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Pénale
Internationale**



**International
Criminal
Court**

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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

**With Confidential, EX PARTE, Annex A,
available only to the Prosecution, Defence and the Victims and Witnesses Unit and
Detention Section**

**Public redacted version of "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", 10 December 2021, ICC-01/12-01/18-2066-Conf-Exp**

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I. Introduction

1. Pursuant to the Trial Chamber X (“Chamber”)’s “Order setting timetable in relation to the restrictions on Mr Al Hassan’s contacts in detention”,¹ the Prosecution reiterates its prior requests² that the Chamber maintain all existing restrictions on the Accused’s non-privileged communications and contacts in detention (“Restrictions”) until the end of the proceedings.³

2. Fundamentally, there is an exceptional set of circumstances: witnesses are still living in northern Mali, where the security situation remains dire, and even UN peacekeepers and the national army [REDACTED]

[REDACTED] These groups are ruthless, violent, extremely organised, and largely unchecked. Mitigating risks by maintaining the Restrictions is the most effective and least intrusive measures possible in this context to prevent, *inter alia*, retaliation against those witnesses who have testified in this case. If there is a leak of information of witness’s identity, and these groups consequently target any of those witnesses, the reality remains that the [REDACTED] [REDACTED] to respond.

3. In fact, even after the end of the Prosecution’s case, there will be no change in circumstances that warrant lifting of the existing Restrictions, under article 60(3) or article 64 of the Rome Statute (“Statute”) or regulation 101(2) of the Regulations of the Court (“Regulations”).⁴

¹ ICC-01/12-01/18-1827, 20 October 2021.

² See ICC-01/12-01/18-505-Conf-Exp-Red (‘Prosecution First Request’); [REDACTED]

³ See ICC-01/12-01/18-871-Conf-Exp-Red2 (‘Decision’), para.18 and Prosecution First Request, para. 39 (see also para. 12-38). The Prosecution considers it appropriate that all Restrictions continue until after the final appeal Judgment is delivered.

⁴ See Prosecution First Request, para. 4, 41 (citing ICC-01/12-01/18-16-Conf-Exp, para.16, finding 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, within the meaning of regulation 101(2) of the Regulations).

4. Indeed, even at that stage, grave, objectively justifiable risks⁵ to witnesses including the remaining witnesses testifying in this case (such as the victims to be called by the Legal Representatives of Victims or any rebuttal witnesses),⁶ will continue to exist. If the Accused's contacts are not actively monitored - and he reveals, inadvertently or intentionally, information identifying witnesses to third parties,⁷ in particular, to the armed groups - there will be a real risk that members of those armed groups (including but not limited to supporters of the Accused), may target witnesses and other persons on account of their cooperation with the Court.⁸

5. Although the Prosecution is limiting its request to continue the Restrictions until the end of the proceedings, the risks depicted above are likely to continue beyond the termination of the case, in particular the risk of retaliatory attacks against witness by members of the armed groups, that have targeted any individuals cooperating with foreign entities.

6. The Accused's conduct while in detention and that of his interlocutors is relevant to assessing the objectively justifiable risk to witnesses (including remaining witnesses) - but not determinative.⁹ Nevertheless, the Accused's prior violations of the Restrictions indicate that there is a risk he would use the opportunity of a lifting of Restrictions to reveal confidential information concerning witnesses to non-privileged third parties, with consequential risks to their security.

⁵ See Prosecution First Request, para. 6.

⁶ The Prosecution also observes that Defence witnesses might also be perceived as cooperating in Court proceedings, and in that way subject to some risk. Because of this precarious security situation, Defence witnesses would be more vulnerable to any attempt by supporters of the Accused, both within and outside of the armed groups, to influence, pressure, intimidate, or otherwise interfere with them, to testify in his favour.

⁷ See Prosecution First Request, para. 5, 42.

⁸ See Prosecution First Request, para. 6, 44, 46-47, 63-72. See, in particular, para. 72 of the Prosecution *Ex Parte* Request, stating that "There is evidence that the Groups are willing to seek revenge on behalf of the Accused. The Prosecution recalls that [REDACTED]"

⁹ See Prosecution First Request, para. 6, 44, 48-62.

7. [REDACTED]

[REDACTED]

[REDACTED]¹⁰ [REDACTED]

[REDACTED]

The security situation in northern Mali in 2021 has deteriorated significantly – including within Timbuktu - with a sharp increase in attacks on civilians. Once French forces withdraw from most of Mali (including Timbuktu), the security situation may worsen. [REDACTED]

[REDACTED]

8. The risk of the identity of a witness becoming known to the armed groups can be mitigated, in part, through the Restrictions, and the current protection regime is predicated on the Restrictions being maintained.

9. In accordance with the relevant criteria¹¹ - which were also addressed in the Prosecution's prior requests¹² - the Restrictions are proportionate and remain the least restrictive possible to the rights of the Accused as a detained person.¹³ [REDACTED]

[REDACTED]

[REDACTED].¹⁴ No further reduction or lifting of Restrictions should be granted at this stage. At a minimum, there must be a continuation of active monitoring of all non-privileged contacts and [REDACTED]

[REDACTED]¹⁵

II. Confidentiality

10. Under regulation 23*bis*(2) of the Regulations, the Prosecution files this response

¹⁰ See Prosecution First Request, para. 6, 44, 73.

¹¹ See Decision, para. 15 (providing that restrictions imposed on the contact of the accused person must be justified and proportionate, in accordance with internationally recognised human rights, that the restrictions imposed must be the least restrictive possible to the rights of the detained person, and that such restrictions must be based on the existence of an objectively justifiable risk).

¹² See Prosecution First Request, para. 78-91; [REDACTED]

¹³ See Decision, para. 15 and citation therein.

¹⁴ [REDACTED]

¹⁵ Prosecution First Request, para. 40.

and its Annex as confidential and *ex parte* available only to the Prosecution, the Defence, the VWU and Detention Section, since it makes reference to confidential information regarding Prosecution witnesses or other persons and [REDACTED]

[REDACTED].¹⁶

III. Submissions

11. In addition to the general threats to witnesses, as detailed further below, there is a *particularised* risk to witnesses because of:

- [REDACTED].¹⁷
- the Accused's profile, his belonging to and association with armed groups operating in northern Mali;
- and, his conduct while in detention and that of his interlocutors and their profile.¹⁸

A. There remains an objectively justifiable risk of physical harm and killing of witnesses and to the integrity of the proceedings¹⁹

12. There continues to be an objectively justifiable risk of physical harm and killing of witnesses, even after the end of the Prosecution's case.

13. Protection measures that have been arranged for Prosecution witnesses so far are predicated on the Restrictions being maintained. [REDACTED]

[REDACTED]. Thus, even after the end of the Prosecution case, there will be no change in the circumstances warranting any lifting or further reduction of the Restrictions.²⁰

¹⁶ [REDACTED]

¹⁷ Detailed in Prosecution Second Request, *Ex Parte* Annex A.

¹⁸ See also Prosecution First Request, para. 6, 44, 46-47, 48-64, 72, 75.

¹⁹ See Prosecution First Request, para. 83.

²⁰ See Prosecution First Request, para. 4, 41 ([REDACTED])

Indeed, as the identities of all Prosecution witnesses for the Prosecution case have been disclosed - other than one delayed disclosure witness²¹ - maintaining the Restrictions remains fully justified. It is vital that, at a minimum, the Restrictions continue to be in place for the duration of the proceedings.

14. Also, in addition to Prosecution witnesses who testified during the Prosecution case, the Prosecution may call further witnesses in any Prosecution rejoinder or rebuttal after the Defence case, whose security would be at risk if no Restrictions are maintained.

15. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]²² [REDACTED]
[REDACTED]
[REDACTED]²³ Witnesses in northern Mali remain in easy reach of the armed groups, and thus highly vulnerable to any targeting.

16. Harm to and/or intimidation of witnesses, regardless of whether they have been called by the Prosecution, Legal Representatives for the Victims, the Defence or the Trial Chamber itself, would in turn prejudice the integrity of the proceedings as it would be extremely detrimental to the ability and willingness of other witnesses to cooperate with the Prosecution during any Prosecution rebuttal or rejoinder following the Defence case.²⁴

(i) Risks to witnesses from the armed groups

17. The Prosecution refers to the factors highlighted in its prior requests,

[REDACTED]
[REDACTED]).

²¹

²²

²³

²⁴ ICC-01/12-01/18-741-Conf-Red, para. 30.

underscoring the existence of an objectively justifiable risk of physical harm and killing of witnesses, and to the integrity of the proceedings.²⁵ The Prosecution further refers to the Chamber's own conclusions concerning the security situation in Mali, in its decision on the Prosecution request for delayed disclosure,²⁶ and its last decision on the measures restricting the Accused's contacts while in detention.²⁷

18. Additionally, as shown in the latest Witness Security Update in *ex parte* Annex A, the security situation in northern Mali in 2021 has significantly deteriorated, with the number of attacks on civilians almost doubling, including kidnappings. It is safe to assume that the situation will only worsen once French forces fully withdraw from Timbuktu. Prosecution witnesses remain in northern Mali.

19. Most notably, and as already advanced, although the Prosecution's Request only extends to the completion of the proceedings, in reality, if the identities of Prosecution witnesses are exposed to the armed groups, the objectively justifiable risk to them goes beyond such completion, as the objective of members of the armed groups is not simply to prevent someone from testifying, or to influence their testimony, but to target those perceived as cooperating with international entities like the Court. As the Chamber observed in its last Decision:

"[...] (ii) the Malian government, the UN and international forces are themselves regularly targeted by extremist groups;

(iii) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED];

(iv) JNIM has a well-established history of taking ruthless action [REDACTED]

²⁵ See Prosecution First Request, para. 6, 44, 46-47, 63-73; [REDACTED].

²⁶ ICC-01/12-01/18-741-Conf-Red, para. 28, citing First Registry Report on the Security Situation in Mali, 31 January 2020, ICC-01/12-01/18-571-Conf.

²⁷ ICC-01/12-01/18-871-Conf-Exp-Red2 ('Decision').

[REDACTED]
[REDACTED]
[REDACTED]; [...]."²⁸

20. Moreover, the following points made by the Chamber serve to emphasise the importance of maintaining the Restrictions, even after the completion of the Prosecution's case:

"(vi) the security situation in Mali has a significant impact [REDACTED]
[REDACTED]; and
(vii) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]."²⁹

21. The Prosecution further recalls that the Malian authorities have no effective control in certain areas, and even the United Nations Multidimensional Integrated Stabilization Mission in Mali ("MINUSMA") is subject to frequent and deadly attacks by the armed groups.³⁰ Furthermore, the most recent developments as detailed in [REDACTED] underscore the continued precarious security situation and the armed groups' ability to target and harm persons associated with Malian state authorities and foreign entities.

22. While the general security situation in northern Mali and the fact that there is a

²⁸ [REDACTED]

²⁹ [REDACTED]

³⁰ See, for example, the latest Report of the Secretary General on the Situation in Mali, 20 March 2020, [S/2020/223](#), para 41, reporting that there were 22 attacks against MINUSMA, including 7 in Mopti Region, 6 in Kidal, 2 in Ménaka, 3 in Timbuktu and 4 in Gao, resulting in the injury of 43 peacekeepers, during the period of three months since the previous report was submitted on 30 December 2019.

general threat to witnesses cannot be the *sole* basis to justify the Restrictions,³¹ it is a relevant factor.³²

(iii) Risks to witnesses from the Accused and/or his supporters

23. The Chamber may grant restrictions on contacts in detention to pre-empt risks to Court witnesses without the need to prove that there has been an attempt to commit an offence. This is particularly important where there is a risk that witnesses could be harmed, and it is too late to put in place measures at a later stage.³³

24. Nevertheless, as evident from the conclusions of the Single Judge of Pre-Trial Chamber I, the Accused has previously violated various Restrictions, in addition to having contact with individuals who pose a potential threat to witnesses and remaining witnesses.³⁴

25. The Prosecution further recalls that the VWU concluded, [REDACTED]

[REDACTED] that the Accused [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

³¹ [REDACTED], para. 10.

³² See e.g. ICC-01/12-01/18-741-Conf-Red, para. 32, 35, 38, 42, 51.

³³ See Prosecution First Request, para. 48, citing ICC-01/12-01/18-93-Conf-Exp, para. 55-63.

³⁴ See Prosecution First Request, para. 49. See also para. 50-58. See further para. 75-76. See further below in connection with a decision by the Single Judge of Pre-Trial Chamber I.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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26. There is a risk that if the Accused's contacts with third parties are not actively monitored, he may reveal information to family members and other supporters. In this respect, the Prosecution notes that such witnesses could be placed at risk irrespective of the intention of the Accused and interlocutors to cause such result.³⁶

27. In fact, [REDACTED]

[REDACTED]³⁷ In this connection, the Prosecution recalls the risk if the Accused passes on confidential information identifying any witness to members of Ansar Dine, AQIM, or supporters from amongst Tuareg nationalist armed groups.³⁸ At the time of his arrest by the French forces, the Accused was still working under instructions of Iyad Ag GHALY (the founder and leader of Ansar Dine and the main leader of the umbrella organisation JNIM).³⁹ The Accused was also the base commander of the *Congrès pour la justice dans l'Azawad* ("CJA") in the region of Timbuktu.⁴⁰

28. As regards the armed groups' willingness to act in support of the Accused, the

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³⁶ See e.g.: ICC-01/12-01/18-741-Conf-Red, para. 29 (disclosure of names of Prosecution witnesses, even to a limited number of people—in this instance to the Defence—inevitably entails the risk that the information will be disseminated more widely. Having regard to the security situation outlined above, the Chamber considers that the nature and extent of the risks, were identities of such individuals to be disclosed, are such that relying on the confidentiality obligations of the Defence alone may not always be sufficient.) See also ICC-01/12-01/18-684-Conf-Red, para. 40 (emphasising that emphasises the risk arising from disclosure to Mr Al Hassan does not arise from any supposition about possible impugned conduct on his part but rather from the greater potential for inadvertent error). See further ICC-01/12-01/18-758-Conf-Red, para. 43.

³⁷ See Prosecution First Request, para. 75.

³⁸ See Prosecution First Request, para. 90.

³⁹ Prosecution First Request, para. 44, 46.

⁴⁰ See ICC-01/12-01/18-697-Conf-Red, para. 25, citing Statement of P-0398, MLI-OTP-0051-1067, p.1078-1080, 1.352-432; [REDACTED]

Prosecution recalls [REDACTED] report that [REDACTED]

[REDACTED]⁴¹

29. The [REDACTED]

[REDACTED] For instance:⁴²

(i) [REDACTED]

[REDACTED];

(ii) [REDACTED]

[REDACTED]⁴³

(iii) as detailed further at paragraph 25, and below, the Accused's [REDACTED] and he reportedly had a conversation that the VWU described as highlighting the importance of the Restrictions, including active monitoring and [REDACTED]. He reportedly tasked [REDACTED] to contact a person and tell that man that the Accused was monitored and could not speak freely as yet.

30. [REDACTED] and the retaliatory attacks

⁴¹ [REDACTED]

⁴² [REDACTED]

⁴³ See also [REDACTED]

referred to in paragraph , demonstrate the potential risks to witnesses, including of retaliation, if there are no Restrictions remaining in place.

(iv) Mitigating the risks by maintaining the Restrictions

31. The risks from witnesses' identities being made known to the armed groups are mitigated, in part, through the Restrictions - in particular the active monitoring of the Accused's non-privileged contacts and [REDACTED] - which reduce the risk of intentional or inadvertent disclosure.⁴⁴

32. As explained in confidential *ex parte* Annex A, attached to the Prosecution Second Request, the protection arrangements for certain Prosecution witnesses are of such reactive nature and [REDACTED] that it is of vital importance, particularly in light of the disclosure of the identity of all but one Prosecution witness and once Defence witnesses are identified, that at a minimum, the Restrictions remain in place for the entirety of the proceedings.

33. The Prosecution recalls that as pointed out by the VWU in [REDACTED] [REDACTED] there is a "preventative aspect of the monitoring" (in addition to [REDACTED] [REDACTED]).⁴⁵ In [REDACTED] the VWU used as an illustration a telephone conversation by the Accused with [REDACTED], which in the VWU's submission clearly shows [REDACTED]

[REDACTED].⁴⁶ The VWU submitted that [REDACTED]

⁴⁴ See e.g. [REDACTED]

⁴⁵ [REDACTED]

⁴⁶ [REDACTED]

[REDACTED]

[REDACTED]⁴⁷ Although the VWU's submissions were made just prior to trial, when it would be expected there would be an elevated risk to Prosecution witnesses, the Prosecution submits that for all the reasons described above, objectively justifiably risks remain even beyond the completion of the Prosecution's case.

34. The VWU's submissions⁴⁸ also support that [REDACTED] should continue after the end of the Prosecution's case, (namely [REDACTED])

[REDACTED]

[REDACTED]

[REDACTED]⁴⁹ [REDACTED]

[REDACTED]

[REDACTED]⁵⁰

35. In [REDACTED], VWU emphasised that [REDACTED] has proven useful in a number of aspects:

- [REDACTED]
- [REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED] [REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

⁴⁷ [REDACTED]

⁴⁸ [REDACTED]

[REDACTED]

⁴⁹ [REDACTED]

⁵⁰ [REDACTED]

⁵¹ [REDACTED]

⁵² Emphasis added.

38. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 55 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 56

53	[REDACTED]
54	[REDACTED]
55	[REDACTED]
56	[REDACTED]
57	[REDACTED]
	[REDACTED]
	[REDACTED]
	[REDACTED]

remains unable to make more meaningful submissions on these breaches other than to indicate that they further underscore the need for at a minimum the Restrictions to remain in place.

B. The Restrictions are the least restrictive possible

40. Even after the end of the Prosecution's case, maintaining the Restrictions is the least restrictive possible means of ensuring the protection of witnesses (including remaining witnesses) and the integrity of the proceedings.

41. All of the Restrictions should be maintained, including active monitoring of all non-privileged contacts.⁵⁸ The various monitoring mechanisms to ensure the implementation of the Restrictions,⁵⁹ and in particular [REDACTED] [REDACTED] should also be maintained.

42. The Prosecution recalls, as previously submitted, that only active monitoring is effective to address the risks identified in a timely manner.

43. The Prosecution repeats its submissions on this point, from the Prosecution Second Request.

44. As to the type of monitoring: passive monitoring is not a feasible alternative for addressing the risks identified above. The Prosecution opposes passive monitoring of telephone calls— [REDACTED]

[REDACTED]

[REDACTED]⁶⁰—for the reason that, [REDACTED]

[REDACTED]

[REDACTED]

⁵⁸ *But see in particular* Prosecution First Request, para. 8 (the Prosecution agrees that the Accused should be able to have contact with his immediate family (i.e. his parents, wives and children), including those known to have contacts with the armed groups (namely his father, and possibly one of his wives) provided active monitoring is retained).

⁵⁹ Prosecution First Request, para. 40.

⁶⁰ [REDACTED]

the list of non-privileged contacts.⁶⁷ This is the least restrictive measure, because, [REDACTED]

[REDACTED]

[REDACTED]⁶⁸

48. Limiting active monitoring only to certain individuals is not a practical and satisfactory solution:

- This is because, [REDACTED]

[REDACTED]

[REDACTED]⁶⁹ It would be difficult to determine the individuals from his list of non-privileged contacts who would need a heightened level of monitoring, particularly in the case of family members, like [REDACTED]. Furthermore, even if, according to the Registry, [REDACTED]

[REDACTED]⁷⁰

[REDACTED]

[REDACTED]⁷¹ and [REDACTED]

[REDACTED]⁷² At minimum therefore, active monitoring of *all individuals* in the list of non-privileged contacts is essential.

⁶⁷ But see in particular Prosecution First Request, para. 8 (the Prosecution agrees that the Accused should be able to have contact with his immediate family [REDACTED] provided active monitoring is retained).

⁶⁸ [REDACTED]

⁶⁹ [REDACTED].

⁷⁰ [REDACTED]

⁷¹ See Prosecution First Request, para. 57-62.

⁷² See Prosecution First Request, para. 8.

- Also, [REDACTED]

[REDACTED]⁷³

49. As to the scope of monitoring: the Prosecution submits that active monitoring should extend to all of the Accused's (non-privileged) communications, which should be monitored in full and not at "random". [REDACTED]

[REDACTED]⁷⁴ while [REDACTED][REDACTED]⁷⁵ [REDACTED][REDACTED]⁷⁶

50. As to [REDACTED] [REDACTED]

[REDACTED]⁷⁷

51. [REDACTED]

[REDACTED]⁷⁸ [REDACTED]

73 [REDACTED]

74 [REDACTED]

75 [REDACTED]

76 [REDACTED]

77 [REDACTED]

78 [REDACTED]

52. The need to maintain [REDACTED] also illustrates more broadly the need to maintain the Restrictions, insofar as [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].⁷⁹

IV. Requested Relief

53. For the foregoing reasons, the Prosecution requests that the Chamber grant the requested relief namely that the Chamber maintain, until the end of the proceedings (including any final appeal judgment), the existing Restrictions and existing mechanisms to ensure compliance with those Restrictions, including [REDACTED]

[REDACTED].⁸⁰



Karim Khan QC, Prosecutor

Dated this 10 December 2021

At The Hague, The Netherlands

⁷⁹ [REDACTED]

⁸⁰ *But see in particular* Prosecution First Request, para. 8 (the Prosecution agrees that the Accused should be able to have contact with his immediate family (i.e. his parents, wives and children), [REDACTED] provided active monitoring is retained).