

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 30 October 2019

PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, 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 Registry and Defence
With Confidential *Ex parte* to the Registry and Defence Annex 1**

**Response to "Registry Request for Guidance on Video-Based Communication at
the Detention Centre"**

**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

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Melinda Taylor

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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

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Mr Paddy Craig

**Victims Participation and
Reparations Section**

Other

I. Introduction

1. The Defence for Mr. Al Hassan objects to the “Registry Request for Guidance on Video-Based Communication at the Detention Centre”,¹ in which the Registry seeks guidance from the Single Judge as to whether video based communications between Mr. Al Hassan and his family, as requested by the Defence,² would be compatible with the current monitoring regime imposed on Mr. Al Hassan during his detention.
2. First, the Request ignores the limited competence of the Pre-Trial Chamber to remain seized of matters following the issuance of the Confirmation Decision³ and in the absence of any compelling circumstances to adjudicate matters which fall within the Trial Chamber’s future jurisdiction. Second, the Request fails to substantiate why additional guidance is necessary following both the Single Judge’s Fourth Decision,⁴ and Decision on Variation of Family Visit.⁵ Third, and in the alternative, even where additional guidance was warranted, the Request as presented is entirely premature in the absence of any firm conclusions as to whether the envisaged systems are logistically and technically feasible.
3. Notwithstanding that the Registry had previously indicated that it would seize the Pre-Trial Chamber of the very same issue three months ago on 26 July 2019,⁶ the Request should not be used to delay the commencement of trial proceedings and should be dismissed *in limine*.

II. Classification

4. In accordance with Regulation 23*bis* (2) of the Regulations of the Court, this response is classified as confidential *ex parte* only available to the Registry and the Defence as

¹ ICC-01/12-01/18-474-Conf-Exp, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Registry Request for Guidance on Video-Based Communication at the Detention Centre, 18 October 2019 (“Request”). All references are to the Al Hassan proceedings unless stated otherwise.

² Request, paras. 7-8.

³ ICC-01/12-01/18-461-Conf, *Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, 30 September 2019 (“Confirmation Decision”).

⁴ ICC-01/12-01/18-340-Conf-Exp-Red, *Quatrième décision sur les mesures de restriction des contacts non privilégiés de M. Al Hassan*, 9 May 2019 (“Fourth Decision”).

⁵ ICC-01/12-01/18-368-Conf-Exp-Red4, *Décision suite au dépôt par la défense d’une requête urgente sollicitant l’autorisation de recevoir des visites conjugales et la variation des modalités de la visite familiale de M. Al Hassan*, 7 June 2019 (“Decision on Variation of Family Visits”).

⁶ Request, para. 11.

the Request it relates to bears the same classification and refers to confidential *ex parte* complaint procedures regarding Mr. Al Hassan's detention.

III. Submissions

5. In the Request, the Registry seeks guidance from the Single Judge as whether video recordings by Mr. Al Hassan sent to his family ("Pre-Recorded Video Request") as well as video-conferences between Mr. Al Hassan and his family ("Video Conference Request") (collectively "Video Request"), would be in compliance with the current monitoring regime as set out by the Chamber.⁷
6. At the outset, the Defence notes that the Request was submitted before the Single Judge three weeks after the Pre-Trial Chamber issued its Confirmation Decision. The Defence recalls that the Pre-Trial Chamber, in response to a Prosecution request for it to remain seized of the communications restrictions regime until a Trial Chamber is constituted, has previously set out its limited competence following the issuance of the Confirmation Decision.⁸ This is consistent with prior findings of Pre-Trial Chamber II in the *Bemba et al.*, case, whereby it was held that once the charges are confirmed, the powers of the Pre-Trial Chamber are transferred to the Trial Chamber, and that absent compelling circumstances, it would not be appropriate for the Pre-Trial Chamber to adjudicate issues that fall within the Trial Chamber's future jurisdiction, pending transfer of the case to the Trial Chamber.⁹ These findings are directly relevant to the present Request and the applicable monitoring regime, if any, to be applied during the trial phase.
7. The Request ignores this jurisprudence and fails to provide any compelling reason as to why the Single Judge should adjudicate on matters concerning the monitoring regime pending the imminent transfer of the case to a Trial Chamber. In this regard, the Defence also objects to the delay with which the Registry has sought guidance from the Single Judge. In its Second Decision, the Registry set out the very same envisaged system to the Defence and proposed that further guidance was necessary

⁷ Request, para. 14.

⁸ Email correspondence from PTC Senior Legal Officer to Prosecution and Defence Counsel dated 1 October 2019 (Annex 1).

⁹ ICC-01/05-01/13-799, *Prosecutor v. Bemba et al.*, Joint Decision on the "Corrected version of 'Prosecution's Request to obtain Records from the Victims and Witnesses Unit', 18 December 2014, ICC-01/05-01/13-784" and the "Prosecution's Motion for the Preservation of Evidence", 23 January 2015, pp. 4-5.

from the Chamber.¹⁰ It then took the Registry three months to actually seize the Single Judge of this matter. In the absence of any reasoning for this delay, the Request should not prevent or stall the commencement of trial proceedings in accordance with Mr. Al Hassan's right to expeditious proceedings. The Registrar should facilitate the Video Request on an expedited basis pending any further decision as to the applicable monitoring regime, if any, to be applied during the trial phase.

8. Relatedly, even where the Single Judge remained competent to adjudicate on the Request following the issuance of the Confirmation Decision, the Request does not provide any further detail as to how or why the Video Requests would fall foul of the monitoring regime particularly in light of prior decisions of the Single Judge.
9. With regard to the Pre-Recorded Video Requests, the Single Judge has already authorised Mr. Al Hassan to enjoy video communications with his family and permitted him to receive pre-recorded videos of family members provided it complies with the communication restrictions in force.¹¹ Furthermore, the Single Judge instructed the Registry to put a system in place to verify that videos received by Mr. Al Hassan were in compliance with the monitoring regime prior to Mr. Al Hassan's viewing.¹² The Single Judge did not order the Registry to provide any further submissions as to how the Fourth Decision was to be implemented which remained exclusively within the domain of the Registry. The Pre-Recorded Video Request does not differ from that already adjudicated by the Single Judge. Mr. Al Hassan has the right to communicate with his family as preserved by Regulation 179(1) of the Regulations of the Registry. Such communications, including by video, have been found to be compliant with the communication restrictions and as such, no further guidance is required. It remains for the Registry to put the requisite systems in place to ensure that Mr. Al Hassan can communicate with his family by receiving videos of his family in a manner which is consistent with the monitoring regime.
10. Similarly, albeit in relation to a request for the variance of the monitoring regime to allow for extended family visits, the Single Judge considered that the modalities as concerns Mr. Al Hassan's family communications were more appropriately

¹⁰ Request, para. 11.

¹¹ Fourth Decision, para. 62.

¹² *Ibid.*

determined by the Registry which has first-hand knowledge of the applicable resources and constraints in facilitating such communications at the Detention Centre.¹³ Furthermore, the Single Judge held that in principle, it was not for the Pre-Trial Chamber to intervene and manage the specific details as concerns family visits.¹⁴ The underlying reasons for the Single Judge's findings are applicable here. On the Registry's own suggestion, it intends for video-calls between Mr. Al Hassan and his family to "cover for in-person family visits when the Trust Fund for Family Visits is depleted".¹⁵ Whilst the Defence objects to the complete substitution of funded family visits in accordance with the established directions of the Presidency,¹⁶ taking the Registry's position to its own logical conclusion would mean that it falls within the purview of the Registry to determine the logistics of the video-calls as part of Mr. Al Hassan's family visits and it is not for the Single Judge to intervene on the organisation and minute detail of these communications.

11. Moreover, even in the event that further guidance was required by the Single Judge, it would only be in relation as to whether the specific systems envisaged by the Registrar were potentially in breach of the monitoring regime. However, the Request does not provide any specific or concrete detail as how the Video Requests would be implemented and lacks any detail as to, *inter alia*, the specific locations, processes, modalities and units or actors which would be involved in facilitating the Video Requests. Such information would have allowed the Single Judge to determine whether or not the envisaged systems were compliant with the monitoring regime or whether additional guidance was necessary in this regard. By its own account the Registry is yet to complete its feasibility study and as such, there is no reasonable basis to conclude that any further intervention by the Single Judge is necessary or warranted.

IV. Conclusion

12. For the abovementioned reasons, the Defence for Mr. Al Hassan respectfully requests the Single Judge to issue an expedited decision dismissing the Request *in limine*.

¹³ Decision on Variation of Family Visits, para. 61.

¹⁴ *Ibid.*

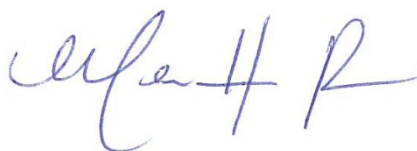
¹⁵ Request, para. 9.

¹⁶ See e.g. Decision on "Mr Mathieu Ngudjolo's Complaint Under Regulation 221(1) of the Regulations of the Registry Against the Registrar's Decision of 18 November 2008", ICC-RoR217-02/08-8, 10 March 2009, para. 36. The Defence will address this matter at the appropriate juncture before the Presidency.



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Dated this 30th Day of October 2019
At The Hague, The Netherlands