

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **11 December 2019**

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***

**Confidential Ex Parte Defence, Prosecution, and Registry only, with Confidential Ex
Parte (Defence, Registry only) Annexes A and B**

Request to access audio files from the detention unit recordings

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

Fatou Bensouda

James Stewart

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

Amicus Curiae

States Representatives

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

Introduction

1. The Defence respectfully requests the Honourable Trial Chamber to order the Registry to provide the Defence, on request, with all audio files of Mr. Al Hassan's detention unit recordings.
2. The Chamber's role in vetting access to such recordings serves to protect Mr. Al Hassan's rights as a defendant, and his right to privacy. This role is inapposite in circumstances where firstly, Mr. Al Hassan is the party seeking access, and secondly, translated transcripts have already been disclosed to the Defence. Since both the defendant and the Defence have already accessed the content of the recordings (through the translated transcripts), granting the Defence access to the audio recordings will not enlarge the circle of recipients, or otherwise impact on the degree of the interference in Mr. Al Hassan's right to privacy. Access is also consistent with Mr. Al Hassan's right to receive and review such recordings in the original language (Tamasheq) as opposed to a language he cannot read (French).
3. The Defence further foreshadows that if access is granted, and if the audios contain information that might be relevant to the Chamber's adjudication of the 'Prosecution's urgent application to maintain restrictions on Mr. Al Hassan's contacts and access to others whilst in detention' ('the Application'),¹ the Defence will submit a request, pursuant to Regulation 35(2) of the Regulations of the Court, to file an addendum to its response to the Application. In order to preserve the ability of the Defence to file such a

¹ Confidential redacted version of the "Prosecution's urgent application to maintain restrictions on Mr. Al Hassan's contacts and access to others whilst in detention", 21 November 2019, ICC-01/12-01/18-505-Conf-Exp, 26 November 2019.

request, the Defence further requests the Trial Chamber to defer the issuance of its decision on the Application, until after the current request is resolved.

Classification

4. This request is filed on a confidential *ex parte* (Defence, Prosecution, Registry) basis due to the fact that it refers to a Prosecution filing classified the same. The contents of this filing are not confidential, and the Defence would not oppose the reclassification of the entirety of the filing as public.

Submissions

Access to audio-recordings

5. On 26 November 2019, the Prosecution filed a lengthy Application to maintain monitoring measures, and further restrictions on Mr. Al Hassan's detention unit communications.² The Application relied upon a particular interpretation of certain detention unit communications, which were transmitted to the Victims and Witnesses Unit (VWU) and the Prosecution.
6. In order to obtain instructions from Mr. Al Hassan's as concerns the particular interpretations advanced by the Prosecution, the Defence requested the Detention Unit to grant it access to the audio recordings, which correspond to the specific transcripts cited in the Application.
7. The Defence request was submitted initially on 29 November 2019.³ The Defence then submitted follow-up inquiries on 2 and 9 December.⁴ On 10 December, the Defence received the following response:⁵

² ICC-01/12-01/18-505-Conf-Exp

³ Annex A, p. 3.

⁴ Annex A, p. 2-3.

⁵ Annex A, p. 2.

The Registry note that these conversations were disclosed as part of the Registry's implementation of the 7 June 2019 (ICC-01/12-01/18-367-Conf-Exp-Red2) decision. DS considers that the matter is one before the Chamber, and further, DS considers that a Chamber's order must be obtained prior to disclosing the audio files of phone calls in Detention.

8. This position contradicts the stance adopted by the Registry at an earlier junction of the case, whereby the Registry provided such audio files to the Defence directly, notwithstanding the absence of prior judicial authorisation.⁶
9. The Single Judge's decision of 7 June 2019 also did not turn on the question as to whether the Defence *could* access Mr. Al Hassan's detention unit recordings, but whether the Defence should be afforded an opportunity to be heard, and to propose redactions to such transcripts, prior to their transmission to the Prosecution. As the affected data subject and owner of any privilege or confidentiality which attaches to the recordings, Mr. Al Hassan's right to access such transcripts and recordings existed independently of this decision.⁷
10. Even if some form of judicial authorisation is necessary, requiring the Defence to seek a judicial order, each time that access to specific recordings is needed, will engender significant delays in the proceedings, and exhaust Defence time and resources unnecessarily. There is also no need to redact or vett the recordings, as the defendant and the Defence receive the unredacted versions of the transcripts. The most efficient and effective approach would therefore

⁶ Annex B.

⁷ See for example, ICC-01/05-01/13-1397, para. 2; ICC-01/05-01/13-893-Red, para. 12; ICC-01/05-01/13-947, paras 40-41.

be to direct the Registry to grant the Defence access to audio-recordings on an ongoing basis, such that the Defence is entitled to receive the audio recordings, which correspond to any transcripts of Mr. Al Hassan 's detention unit recordings.⁸

11. Given that the purpose of this request is to ensure Mr. Al Hassan's right to review the Tamasheq content of the recordings, the Defence does not object to such access being given directly to Mr. Al Hassan, rather than *via* the Defence.

Request to delay the issuance of the decision on the Application

12. At the time that the Defence submitted its response to the Application, it was unaware as to firstly, if and when the Registry would provide the Defence access to the recordings, and secondly, if the content of the recordings would be relevant to the response. The Defence is still unable to formulate a position on these matters. Nonetheless, in order to ensure that the Chamber has all relevant information at its disposal when it renders a decision on the Application, the Defence respectfully requests the Chamber to defer issuing a decision on the Application until three days after Mr. Al Hassan receives access to the recordings. In this manner, the Defence will have a brief window within which to seize the Chamber for relief should any relevant issues arise from Mr. Al Hassan's review of the Tamasheq audio recordings.

⁸ This would be consistent with the practice adopted in the Bemba et al case, where the Trial Chamber found that: "Mr Bemba and his defence team in the Main Case were privy to the requested communications. In the present circumstances, the Chamber regards it as overly burdensome to require Mr Bemba to consent to each and every separate document, particularly as Mr Bemba does not have access to each communication and where the disclosure is to his other defence team, who owe Mr Bemba professional duties of confidentiality." ICC-01/05-01/13-1095, para. 6.

Relief sought

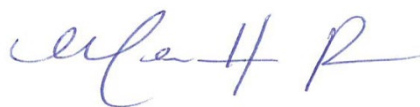
13. For the reasons set out above, the Defence for Mr. Al Hassan respectfully requests the Honourable Trial Chamber to:

- i. Direct the Registry to provide Mr. Al Hassan with access to any audio-recordings of Mr. Al Hassan's detention unit communications; and
- ii. Defer its decision on the 'Prosecution's urgent application to maintain restrictions on Mr. Al Hassan's contacts and access to others whilst in detention', until three days after Mr. Al Hassan has received access to the requested audio-recordings.



Melinda Taylor

Lead Counsel for Mr Al Hassan



Marie-Hélène Proulx

Associate Counsel for Mr Al Hassan

Dated this 11th Day of December 2019
At The Hague, The Netherlands