



Original: **English**

No.: **ICC-01/12-01/18**
Date: **9 December 2019**
Date of submission: **11
February 2020**

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

**Public redacted version of Defence response to Prosecution urgent application to maintain
restrictions on Mr. Al Hassan's contacts and access to others while in detention**

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
Sarah Bafadhel

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
Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

I. Introduction

1. The Defence for Mr. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (the “Defence”) respectfully submits the present response to the “Prosecution’s urgent application to maintain restrictions on Mr. Al Hassan’s contacts and access to others whilst in detention”, filed in confidential, redacted and *ex parte* version on 26 November 2019 (“Prosecution Motion” or “Motion”).¹
2. The Motion should be rejected: the Prosecution’s allegations are unfounded, irrelevant, and/or based on spurious inflections of harmless conversations. The Prosecution’s unwillingness (or inability) to disclose a shred of independent evidence in support of such accusations speaks volumes as to their probative value.² But, in case there is any doubt on this point or the burden of restricting liberty is somehow reversed, then an evidentiary hearing should be convened, to enable the Defence to demonstrate that Mr. Al Hassan was not associated or working with Ansar Dine/Iyad Ag Ghaly in 2017. The Prosecution’s attempt to claim otherwise represents an unconscionable reliance on the fruits of torture, which should be deprecated rather than condoned by the Chamber.
3. Apart from the fact that the Prosecution’s application is evidentially unfounded, the current level of restrictions is disproportionate, and unsustainable. The Prosecution is aware of Mr. Al Hassan’s psychological situation, and the impact of such depredations on his mental well-being.³ The suggestion that the intensity of restrictive measures should be increased is tantamount to a deliberate attempt to subject Mr. Al Hassan to further psychological distress. The Trial Chamber should reject the Motion, and relax the restriction regime imposed by the Pre-Trial Chamber.

II. Classification

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.

² See Annex A, pp. 3-4, Email sent by the Defence to OTP on 29 November 2019, 17:05.

³ ICC-01/12-01/18-345-Conf-Exp-AnxB, paras. 7-11, 38.

4. The present Response is filed confidentially and *ex parte* as it relates to a Motion classified the same. However, in line with the principle of publicity of the proceedings, the Defence requests the Trial Chamber's permission to file a public redacted version of its Response.

III. Submissions

A. Preliminary remarks

5. Both the United Nations and the ECHR have indicated that States have a particular duty to ensure that the fight against terrorism does not cloak bias against specific ethnic groups or religions.⁴ For this reason, the Defence deplores the Prosecution's choice to resort to fear-mongering and scare-tactics in the Motion. This sets an unfortunate tone at the very start of the trial stage of the proceedings. Mr. Al Hassan is presumed innocent and is entitled to a fair and impartial process. The Prosecution's attempt to paint Mr. Al Hassan as a violent and dangerous criminal mastermind, with hordes of dangerous supporters,⁵ flies in the face of the Pre-Trial Chamber's determination, on the available evidence, that he was a low-lying administrator with no decision-making power.⁶ Such an incendiary tone is prejudicial and runs counter to the interests of justice. It is, moreover, particularly disturbing that such a tone was injected into the record through allegations in a filing that was initially *ex parte* to the Defence.
6. The argument that the burden falls on the Defence to justify "a change in circumstances",⁷ which would warrant the cessation of the current restrictive measures is also misplaced and prejudicial.
7. *First*, as a precondition to the imposition of restrictive measures, the Appeals Chamber has underscored the importance of first 'hearing' from the defendant. This 'right to be heard' should be "a genuine opportunity, which entails the Defence being provided with sufficient information to submit an informed view".⁸ *Ex parte* information should not be relied upon to substantiate the Chamber's primary findings concerning the existence of witness

⁴ *A and others v. The United Kingdom*, App. No. [3455/05](#), paras. 108-109. See also Opinion No. 89/2017 concerning Ammar al Baluchi, A/HRC/WGAD/2017/89, paras. 62-65.

⁵ Motion, paras. 6, 44, 47.

⁶ ICC-01/12-01/18-461-Conf, paras. 764, 839.

⁷ Motion, paras. 4, [REDACTED].

⁸ *Ntaganda*, ICC-01/04-02/06-410-Conf-Exp, para. 46. This Decision is referred to in [ICC-01/04-02/06-1817-Red.](#)

interference.⁹ In this case, the evidential foundation for the restrictive measures requested by the Prosecution and imposed by the Single Judge, was never disclosed to the Defence.¹⁰ Since the Defence has never been heard on this point, the burden cannot fall on the Defence to disprove what were, essentially, *ex parte* allegations and findings.

8. *Second*, the restrictions imposed by the Single Judge were time-bound, and subject to ongoing review as concerns their necessity and proportionality.¹¹ The Appeals Chamber has underlined in this regard that the Chamber has an independent obligation to review the necessity and proportionality of such measures, in a regular manner;¹² this duty exists independently of the existence of any ‘change in circumstances’.
9. *Third*, the effluxion of time and length of the proceedings are factors, which impact on the continued proportionality of restrictive measures.¹³ Thus, although Dominic Ongwen was initially denied private visits due to the existence of a “reasonable suspicion that there had been attempts to exercise some form of influence on persons who possess information relevant to the case”,¹⁴ it is apparent from public records that this restriction was lifted at some point of the proceedings.¹⁵ The need for strict temporal limitations derives from the fact that the “[i]nterception and registration of telephonic conversations is a far-reaching intervention into the private life of the prisoner, which seriously hampers communication about personal issues and may lead to emotional isolation of the prisoner.”¹⁶ It should be self-evident that the ‘do no harm’ approach to witness protection should not result in harm for the defendant either. The balancing approach dictated by Article 68(1) of the Statute dictates that neither witnesses *nor* the defendant should be exposed to physical or psychological harm as a result of the Court’s processes.

⁹ Ntaganda, [ICC-01/04-02/06-1817-Red](#), para. 91.

¹⁰ Cf Bamba, [ICC-01/05-01/08-323](#), para. 1, which sets out the principle that the Prosecution is obliged to disclose the evidential foundation of requests that result in a deprivation of liberty.

¹¹ ICC-01/12-01/18-340-Conf-Exp-Red, para. 44.

¹² Ntaganda, [ICC-01/04-02/06-1817-Red](#), para. 71.

¹³ Ntaganda, [ICC-01/04-02/06-1817-Red](#), para. 72.

¹⁴ Ongwen, [ICC-02/04-01/15-503](#), para. 18.

¹⁵ “[LRA commander Ongwen fathers child from ICC custody](#)”, The Observer, (23 September 2018).

¹⁶ Dirk van Zyl Smit and Sonja Snacken, *Principles of European Prison Law and Policy*, Oxford University Press, 2009, p. 213; D. Abels *ibid.*, pp. 675-676; see also, Commission nationale consultative des droits de l’homme: *Sanctionner dans le respect des droit de l’homme. I. Les droit de l’homme dans la prison* (Paris : la documentation Française, 2005), p. 50: « Ce contrôle opéré sur la correspondance aboutit à une auto-censure de la part des détenus et de leurs proches dans leurs échanges. Les uns comme les autres s’abstiennent d’évoquer des sujets trop personnels. Cette autolimitation peut conduire à un appauvrissement des rapports affectifs et en définitive à un isolement sentimental de la personne détenue ».

10. *Fourth*, the three most recent Registry reports have confirmed that there have been no violations of the monitoring regime during the reporting periods.¹⁷ These periods coincided with the disclosure of sensitive data concerning Prosecution witnesses, and the confirmation of the charges proceedings. To give these reports no weight or relevance would turn the burden of proof and evidentiary standards on their head. Namely, if concrete proof that the defendant respects judicial orders and restrictions does not suffice to eliminate the hypothetical risk of future infractions, then the defendant would be placed in the invidious position of having a burden to prove changed circumstances, whilst at the same time, being denied any means to do so.
11. As a separate and final preliminary point, the Defence does not have a record of the transcripts, which were provided to the Prosecution by orders of the Single Judge, since they were transmitted to the Prosecution *ex parte* to the Defence. A concrete consequence of this lack of transparency is that the Defence is not in a position to ascertain which redactions remained in place. The Defence therefore requests the Trial Chamber to order the Registry to transmit to the Defence the specific versions that were transmitted to the Prosecution, so that the Defence can prepare a confidential redacted version of the current Response.

B. The Prosecution has failed to establish the existence of a reasonable suspicion, which justifies the measures in question

i. *Mr. Al Hassan was not affiliated with Ansar Dine and AQIM at the time of his arrest*

12. The evidential foundation of the Prosecution's Motion is either inexistent or based on the poisonous fruits of Mr. Al Hassan's mistreatment in Mali.
13. A key case in point concerns the allegation that on the day of his arrest, Mr. Al Hassan was working with Ansar Dine, under the command of Iyad Ag Ghaly, and was involved in attacks against the MINUSMA.¹⁸ [REDACTED],¹⁹ [REDACTED]. The Prosecution has declined to proffer any other evidential material in support of such prejudicial submissions.²⁰

¹⁷ ICC-01/12-01/18-355-Conf-Exp; ICC-01/12-01/18-457-Conf-Exp; ICC-01/12-01/18-503-Conf-Exp.

¹⁸ Motion, paras. 44, 46.

¹⁹ See Motion, [REDACTED].

²⁰ See Annex A, pp. 3-4, email sent by the Defence to OTP, 29 November 2019 at 17:05; and p. 2, email sent by OTP to the Defence on 3 December 2019 at 14:18.

14. The Prosecution has repeatedly and persistently impeded the ability of the Defence to obtain information and evidence (within the custody of the Prosecution) that concerns [REDACTED]. In any case, given that the “the imposition of restrictions—including increased monitoring –on a detained person’s contacts constitutes the exception and not the rule”,²¹ the evidential burden of substantiating grounds to justify such restrictions falls on the Prosecution; by the same token, the Prosecution must establish that such evidential foundation is reliable, and corroborated by independent evidence.
15. The Prosecution has failed to do so, because it is not possible to do so. At the time of Mr. Al Hassan’s arrest, he was allegedly associated with the “Congrès pour la Justice dans l’Azawad” (“CJA”)²², a Tuareg movement linked to the Kel Ansar tribe, which was created in 2016, and which was part of the Alger peace process.²³ The CJA has never been under the command of Iyad Ag Ghaly. The CJA is not an Islamist group, and does not work alongside JNIM or AQIM.²⁴ The 2018 UN Experts Report describes attacks by AQIM and JNIM against the CJA, due to the perception that CJA was aligned with (not against) international peacekeeping forces.²⁵
16. The CJA is also not alleged to have been implicated in attacks against MINUSMA, Barkhane, G5 or FAMa.²⁶ The United Nations resolutions cited by the Prosecution to demonstrate Mr. Al Hassan’s responsibility in such attacks mention neither Mr. Al Hassan, nor the CJA.²⁷
17. In addition, the insinuation that Mr. Al Hassan is [REDACTED]²⁸ is wholly unsupported and severely prejudicial. The prejudice is even greater considering that the Prosecution declined to give its basis for this allegation, when requested to do so by the Defence.²⁹ The

²¹ ICC-01/04-02/06-2384-Red, para. 57.

²² [Tombouctou : Barkhane arrête trois proches du CJA soupçonnés de complicité avec des terroristes](#), Kibaru (22 April 2017). See Annex A, p. 13, email from OTP to Defence, 24 May 2019 at 12.26, providing this article as the source of the OTP’s knowledge of Mr. Al Hassan’s arrest.

²³ [Le CJA, nouveau mouvement armé dans le nord du Mali](#), RFI Afrique (11 October 2016).

²⁴ *Contra* Motion, para. 47.

²⁵ United Nations Security Council, [S/2018/581](#), *Final Report of the Panel of Experts on Mali in accordance with paragraph 11(c) of resolution 2374 (2017)*, see para. 99, fn. 123.

²⁶ [S/2019/636](#), Final Report of the Panel of Experts on Mali in accordance with paragraph 4 of resolution 2432 (2018) (7 August 2019), which makes no reference to the CJA; [S/2019/137](#), *Midterm report of the Panel of Experts on Mali in accordance with paragraph 4 of resolution 2432 (2018)*, para. 29, which refers to the CJA in the continuation of the process of establishing the Operational Coordination Mechanism, but makes no reference to CJA’s implication in attacks; [S/2018/581](#), *Final Report of the Panel of Experts on Mali in accordance with paragraph 11(c) of resolution 2374 (2017)*, which refers to CJA as one of the armed group in the Timbuktu region (para. 94), and refers to AQIM actions against CJA-CMA, more specifically, to attack on the CJA leaders claimed by the JNIM and AQMI (para. 99, fn. 123).

²⁷ Motion, fn. 88.

²⁸ Motion, paras. 44, 47.

²⁹ See emails in Annex A, p. 2.

[REDACTED], referred to by the Prosecution,³⁰ has not been disclosed to the Defence, and the Prosecution has not demonstrated that [REDACTED] is known to Mr. Al Hassan, or that he ever pledged allegiance to Al Qaeda, or to Ansar Dine.³¹ The argument is also based on a patently false syllogism: [REDACTED] (an assertion, which is not, in any case, accepted by the Defence), Mr. Al Hassan must be [REDACTED]. If this link were to be accepted, it would mean that any person who ever uses [[REDACTED], must be a member of Al Qaeda. This tendentious pleading has no place in this case file.

18. Considering that evidential foundation of the Motion is based on a false premise – namely Mr. Al Hassan’s alleged membership and affiliation with Ansar Dine/AQIM in 2017 and onwards,³² there are compelling reasons for the Chamber to revise decisions imposing intrusive restrictions (beyond passive monitoring).

ii. *The Prosecution fails to show that Mr. Al Hassan violated his detention regime in Mali*

19. This assertion is fundamentally misconceived, and as before, unsubstantiated. Mr. Al Hassan’s detention in the Sécurité d’État fell outside the protection of the law and the rule of law: he was granted no access to lawyers, no contact with the outside world, and was never brought before a judge to assert his basic right to challenge the legality of his detention. Given this injurious context, the claim that he somehow violated a non-existent legal regime³³ is nonsensical.

20. The factual basis of the assertion has also never been disclosed to the Defence.³⁴

iii. *The Prosecution fails to show that Mr. Al Hassan’s conduct influences or contributes to the acts of ‘supporters’ willing to harm or intimidate Prosecution witnesses*

21. The Prosecution alleges, several times and without any foundation, that Mr. Al Hassan has “supporters”, who ‘could’ target Prosecution witnesses.³⁵ The Prosecution does not cite one

³⁰ Motion, fn. 92, referring to [REDACTED] and to *ex parte* Annex A to the Motion.

³¹ ICC-01/12-01/18-394-Conf, paras. 98, 128, 268.

³² Motion, paras. 3, 6, 44, 46, 47, 63-72.

³³ Motion, paras. 44, 58.

³⁴ Motion, fn. 116. This footnote is entirely redacted in the version of the Motion available to the Defence.

³⁵ Motion, paras. 6, 44, 61, 74, 90.

item of evidence to support its assertion that Mr. Al Hassan effectively has “supporters”, nor who these supporters are, what their aims are, or how they could effectively harm or intimidate witnesses. Crucially, no causal link has been asserted or established between Mr. Al Hassan’s detention regime, and the actions of such ‘supporters’. In the absence of such a nexus, there is absolutely no basis in fact or law to deprive or restrict Mr. Al Hassan of his fundamental rights. There is also no logical reason to do so, since the actions of such unidentified persons are not impacted or influenced by the actions of Mr. Al Hassan.

22. It also bears repeating that Mr. Al Hassan was found by the Pre-Trial Chamber to have exercised a very minor role in Timbuktu in 2012. Mr. Al Hassan is neither a statesman, nor a high-profile character in his home country. He has no network or affiliations that have the intention or capacity to frustrate the Court’s protection programme. And of particular importance, the testimony of Prosecution witnesses – in so far as it concerns Mr. Al Hassan – is not incriminating. Put simply, Mr. Al Hassan has neither the capacity nor the motive to influence or impede the testimony of such persons.
23. While the Defence is not contesting that the situation in Mali remains volatile and that armed groups may represent a threat to the civilian population, including Prosecution witnesses, restriction measures cannot be based on a situation over which the detainee has no power or influence. Mr. Al Hassan did not create the current security situation in Mali and should not be punished because of it.

C. Allegations of past violations are unsubstantiated and irrelevant

24. The Prosecution’s reliance on past findings concerning technical infractions³⁶ overstates and misleads the relevance of such actions.

i. *The allegations that Mr. Al Hassan discussed his case [REDACTED]*

25. The Single Judge of the Pre-Trial Chamber found that [REDACTED].³⁷ The reasoning of the Single Judge is fully redacted from the Defence, which renders it impossible to respond to the arguments raised by the Prosecution. The Defence was also never given an opportunity to

³⁶ Motion, paras. 6, 7, 44.

³⁷ [REDACTED]

review the evidence, on the basis of which these findings were made, or to challenge these findings. In line with the fundamental right to be heard on such matters, should the Chamber decide to take into account these findings, the Defence requests to be given the opportunity to access the evidence in question, and to then submit additional observations.

26. In terms of the parameters of this allegation, the Prosecution avers that Mr. Al Hassan discussed ‘Prosecution witnesses’, fails to reconcile this claim with the fact that the identity of more than 60% of Prosecution witnesses has not been disclosed to Mr. Al Hassan or the Defence. The extent of this non-disclosure renders it impossible for Mr. Al Hassan to know if any of his acquaintances, friends or family members could be Prosecution witnesses. There is therefore a significant risk that Mr. Al Hassan could be discussing ‘Prosecution witnesses’ without actually knowing of their status as such. This allegation is not, therefore, probative of any wrongdoing or intentional misconduct on the part of Mr. Al Hassan.
27. The Prosecution’s assertions, that [REDACTED],³⁸ are irrelevant. Such [REDACTED] are not facially apparent from the materials disclosed to the Defence, and are, in any case, irrelevant as concerns the legitimate bases for imposing restrictive measures. Defendants cannot be expected to exist in a vacuum for the entirety of the proceedings before the ICC: they have a right to exist, and to assert their rights through different mechanisms and political processes. The notion that any such initiatives could cause the defendant to forfeit fundamental communication rights is completely at odds with the obligation to apply the Statute and Rules with internationally recognised human rights. In the absence of any demonstrated link between such communications and witness interference, these communications cannot serve as a basis to restrict his right to communicate with his family, or the manner in which he does so.
28. Nor has such a link ever been demonstrated. In the first of these conversations, [REDACTED].³⁹ There is absolutely nothing improper or illicit about giving information to a lawyer: to suggest otherwise would severely hamper the Defence in its ability to prepare its case. This conversational snippet was also initiated [REDACTED].
29. In [REDACTED].⁴⁰ This conversation occurred in the period during which Mr. Al Hassan was deciding whether to change his Counsel⁴¹: it is therefore logical he [REDACTED]. Although the discussions of Mr. Al Hassan’s ‘then’ Counsel constituted a technical violation,

³⁸ Motion, [REDACTED].

³⁹ [REDACTED].

⁴⁰ ICC-01/12-01/18-367-Conf-Exp-Red, para. 44.

⁴¹ See Annex B.

these conversations did not reflect any intention or attempt to interfere or harm Prosecution witnesses.

30. [REDACTED] the presence of armed groups in Northern Mali locations at the time of the conversation (March 2019). Contrary to what the Prosecution alleges,⁴² this does not automatically imply that [REDACTED] has close links to armed groups and poses a danger to Prosecution witnesses. The Prosecution fails to link the content of the conversation with events and groups active in 2012. The information discussed during the conversation was available in local media at the time, and would have been common knowledge among the local population of Northern Mali. Given that Mr. Al Hassan's family remains in these areas, he had a clear and human interest in receiving information on issues that impact their safety. As submitted previously, [REDACTED] but in any case, such a reference would refer to the frontier with Mauritania – given that persons in the North of Mali frequently traverse this border.
31. Of particular importance, these conversations are entirely irrelevant to the issue of future risks. [REDACTED] is not on the list of Mr. Al Hassan's contacts, and Mr. Al Hassan has not requested that he be included on the list in the future.

ii. Mr. Al Hassan allegedly instructed [REDACTED] to contact a person named [REDACTED]

32. The Prosecution alleges, that the fact that Mr. Al Hassan requested [REDACTED] to inform a person named [REDACTED], that this person could not speak to him, shows that he was 'extremely conscious' of the monitoring measures;⁴³ the Prosecution then implies that such awareness constitutes a basis for imposing further restrictions.
33. This allegation is based on information which remains redacted from the Defence.⁴⁴ It is telling that the Prosecution has chosen to rely on a VWU interpretation of transcripts, rather than the transcripts which were later disclosed to the Prosecution. This suggests that there was never an actual foundation for the concerns pre-emptively expressed by the VWU.
34. The Prosecution's claim is, in any case, predicated on Kafka-esque logic and argumentation. It is not illicit or improper to inform acquaintances that Mr. Al Hassan does not possess the capacity to call them, due to restrictions imposed by the Court. The existence of such

⁴² Motion, para. 56.

⁴³ Motion, [REDACTED].

⁴⁴ Motion, fn. 100 citing to [REDACTED] (these paragraphs are redacted from the Defence).

restrictions is a matter of public record,⁴⁵ as was Mr. Al Hassan's transfer to The Hague. Clearly, given that Mr. Al Hassan was incommunicado detention for almost a year before his transfer, his family and friends would have wished to have spoken to him, and, as a matter of kindness and courtesy, Mr. Al Hassan would have wished for them to have known that he could not call them, for reasons beyond his control.

iii. The allegation that Mr. Al Hassan referred to persons who may also be Prosecution witnesses

35. The foundation for this allegation has been entirely redacted from the Defence, which renders it impossible for the Defence to be heard on this claim.
36. It is nonetheless apparent that this claim is built on a false premise: that because the individuals in question *might* be Prosecution witnesses, the mere fact that Mr. Al Hassan has referred to them is evidence of potential witness interference. In the absence of proof that firstly, Mr. Al Hassan had *actual* knowledge that the persons *are* Prosecution witnesses (as opposed to acquaintances that he could be expected to refer to in the normal course of conversations), and secondly, that the context in which the names were mentioned evidenced an intention to interfere with, or influence their testimony *as Prosecution witnesses*, these conversations are irrelevant.

iv. Mr. Al Hassan's alleged instructions for [REDACTED] to contact [REDACTED]

37. Mr. Al Hassan has the right to receive visitors in person. At present, apart from one family visit, the only persons who have visited Mr. Al Hassan in person are from his Defence team. His Defence team do not speak Tamasheq and do not come from his community. He is isolated by virtue of the fact that his friends and family are extremely poor, and do not possess the means to visit him. His situation stands in stark contrast to that of other ICC detainees, who receive significant community support, or who have family and friends in close proximity to the seat of the Court. There is, therefore, absolutely nothing improper as concerns his suggestion that his family reach out to ascertain whether a member of his community ([REDACTED]) would be willing to apply to visit him at the Court. Bearing in

⁴⁵ See Annex A, p. 9 and ICC-01/12-01/18-288-Red, paras. 8, 12.

mind that any such visit would be processed and vetted by the Registry in accordance with Court procedures, and potentially subject to active or passive monitoring, this proposition represents no security risk or breach.

- v. *The Prosecution's assertion that Mr. Al Hassan's [REDACTED] passed the phone to third parties*

38. The Prosecution's arguments on this point are based on a misunderstanding of the ICC detention telephone regime. Both Mr. Al Hassan's [REDACTED] and [REDACTED] are on the list of his pre-approved contacts. Given that firstly, he has a very restricted time allotment for calls with his family (two, one hour allotments each week), and secondly, the different family members live together, it is not required that he call each member separately, as long as he records which member(s) he speaks to. It is, in addition, notable that the Registry – the organ responsible for monitoring compliance with the relevant procedures – has not found Mr. Al Hassan to be in breach.

D. The security situation in Mali alone cannot justify the restriction regime

- 39. Regardless of Mr. Al Hassan's alleged former affiliation with any group operating in Northern Mali in 2012, the activities of these groups today, almost three years after the arrest and detention of Mr. Al Hassan, cannot be held against him and serve to impose the strictest detention regime possible before the ICC.
- 40. There is no nexus between the activities of these groups, and Mr. Al Hassan's communications with his family members. There is no link between the persons on his contact list, and Al Qaida or JNIM. Mr. Al Hassan and his Defence are opposed in every way to the activities of these groups. The Prosecution's attempt to infer any degree of alignment of interests or activities between the Defence/defendant and such groups is offensive and harmful to the Defence – which must conduct its own investigations in this volatile environment.

E. The detention regime requested by the Prosecution is disproportionate, and not in the interests of justice and of fair and impartial proceedings

41. The Prosecution's attempt to carve out a special, highly restrictive detention regime for Mr. Al Hassan is contrary to the Statute, and Mr. Al Hassan's internationally recognized right to family life, and to privacy.
42. The claim that the proposed regime is consistent with human rights law is – quite simply – wrong. The Prosecution's reliance on manuals and directives concerning *prisons* is inapposite, and contrary to the Prosecution's duty to conduct itself in a manner that comports with the presumption of innocence.⁴⁶ And, of particular concern, the Prosecution's claim that the ECHR has endorsed the imposition of such severe restrictions in particular cases concerning high risk defendants, is based on case law that states the opposite. For example, footnote 151 of the Motion refers to:

Messina v. Italy, 25498/94, (Dec.), June 8, 1999, ECHR 1999-V (“*Messina v Italy*”), para. 59-74 (where the ECHR found that “*a special prison regime which involved restrictions on the number of family visits (not more than two per month) and imposed measures for the supervision of such visits (prisoners were separated from visitors by a glass partition)*” did not violate the applicant's right to respect for his family life (article 8, ECHR)).

43. The Court nonetheless found, at paragraph 62 of that decision, that

In the present case the applicant was subject to a special prison regime which involved restrictions on the number of family visits (not more than two per month) and imposed measures for the supervision of such visits (prisoners were separated from visitors by a glass partition).

The Court considers that these restrictions constitute interference with the exercise of the applicant's right to respect for his family life, guaranteed by Article 8 § 1 of the Convention (see *X v. the United Kingdom*, application no. [8065/77](#), Commission decision of 3 May 1978, DR 14, p. 246).

44. The imposition of such restrictions is therefore incompatible with the right to family life. Although the ECHR then went on to find that the imposition of such measures might be justified in the specific circumstances of that case (where the defendant had been sentenced previously for murdering a judge, and was alleged to be part of the mafia, which had a long history of murdering judges and witnesses), the ECHR took into account the fact that the Italian authorities had relaxed the regime to allow the defendant to receive four family visits a

⁴⁶ Motion, para. 85; Articles 57(1)(c) and 66 of the Statute.

month.⁴⁷ This stands in stark contrast to Mr. Al Hassan who is presumed innocent, has no criminal record, and has seen members of his family only once in the last 32 months.

45. Even if the questions of cause and effect of Mr. Al Hassan's psychological conditions are put aside, the fact that Mr. Al Hassan appears to suffer from PTSD also warrants particular consideration, as it means that he is a vulnerable detainee,⁴⁸ and is likely to experience the effects of such restrictions more intensely than persons who do not suffer from PTSD. As a result, the imposition of certain measures causes a level of distress that exceeds the unavoidable level of suffering that is inherent in detention.⁴⁹ The existence of medical treatment for PTSD is also not an adequate substitute for the salutary effects of family contacts.⁵⁰

⁴⁷ *Messina v. Italy*, [25498/94](#), paras. 72, 73:

72. Moreover, the Court notes that the applicant was not subject to the restrictions on family visits laid down by section 41 *bis* for the whole of the period during which the special regime was applied to him. By two decisions of the President of the Trapani Assize Court of 9 and 20 December 1993 (see paragraphs 15 and 19 above) he was authorised for the first time to receive extra visits from his wife and daughters. Later, by a decision of 27 March 1995 (see paragraph 24 above), the Ancona court responsible for the execution of sentences rescinded the restrictions on family visits, authorising the applicant to receive four visits per month. When the restrictions were reintroduced by a decree of 19 November 1996, the Florence court responsible for the execution of sentences rescinded them again by a decision of 11 February 1997. On 4 February 1997 the Minister of Justice gave orders that the monthly visit could be replaced by a telephone call. The restrictions in question were reintroduced by a decree of 21 November 1997 (see paragraph 35 above), but were relaxed by the circular of 6 February 1998 (see paragraph 54 above), which implemented the Constitutional Court's judgment of 26 November 1997.

73. The Court considers that these decisions attest to the Italian authorities' concern to help the applicant maintain contact with his close family, in so far as that was possible, and thus strike a fair balance between the applicant's rights and the aims it was sought to achieve through the special regime.

⁴⁸ *Kudla v Poland*, [30210/96](#), para. 99: "The Court accepts that the very nature of the applicant's psychological condition made him more vulnerable than the average detainee and that his detention may have exacerbated to a certain extent his feelings of distress, anguish and fear."

⁴⁹ *Kudla v Poland*, [30210/96](#), para. 94: "The State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance (see, *mutatis mutandis*, the Aerts v. Belgium judgment of 30 July 1998, *Reports* 1998-V, p. 1966, §§ 64 et seq.)."

⁵⁰ Seamone, Evan R., "Improved Assessment Of Child Custody Cases Involving Combat Veterans With Posttraumatic Stress Disorder", *Family Court Review*, vol. 50, no. 2, April 2012, pp. 310-343, in particular at p. 328: "of all the factors known to increase the chance of recovery from **PTSD**, continued contact with family members is the most pivotal". See also Principle 19 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Resolution adopted by the UN General Assembly on 16 December 2005): "*Restitution* should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, **family life** and citizenship, return to one's place of residence, restoration of employment and return of property." See also Principle 2.1 of the Committee of Ministers Recommendation Rec(2006)8 to member states on assistance to crime victims adopted on 14 June 2006: "States should ensure the effective recognition of, and respect for, the rights of victims with regard to their human rights; they should, in particular, respect the security, dignity, private and family life of victims and recognise the negative effects of crime on victims".

46. The Defence acknowledges and endorses the strong emphasis on witness protection set out in the Statute. The Statute nonetheless requires that such measures be balanced with the rights of the Defence, and those of the defendant; protective measures should not, therefore, be permitted to transform the pre-conviction detention regime into a form of punishment by process. Nor should the defendant's right to receive disclosure of the Prosecution case against him be conditioned on the imposition of additional layers of deprivation.
47. And yet, in its Motion, the Prosecution is effectively putting the Defence in front of an impossible choice: either receive adequate disclosure to allow for the preparation of the Defence and remain under the strictest possible restriction measures indefinitely; or forego full disclosure in a manner which allows adequate preparation for trial, and remain under heavy monitoring anyway.⁵¹
48. Indeed, the Prosecution already announces that it will request even more restriction measures before lifting the redactions on the identities of witnesses,⁵² which is of course, of crucial importance for adequate Defence preparation and investigations. This is simply unacceptable.
49. Mr. Al Hassan must be in a position to know the evidence against him, without having to submit to the strictest of detention regime possible. for an indefinite period. Delayed disclosure is also no antidote to this issue as it simply prolongs the length of the proceedings, and the length of Mr. Al Hassan's detention (and related restrictions).

F. Specific requests

i. *The request to limit the contact list to immediate family*

50. In order to exclude a potential contact or visitor, it is necessary to demonstrate the existence of reasonable grounds that contact between the person and the accused could fulfil the criteria set out in Regulation 180(1) of the Regulations of the Registry. This is not a matter that can be adjudicated on a purely hypothetical basis. A hypothetical embargo would also fetter the Court's duty to assess such matters on a case by case basis, taking into account, any change in circumstances concerning Mr. Al Hassan, the contact in question, and the region in general.

⁵¹ Motion, paras. 5, 9, 42.

⁵² Motion, para. 9.

ii. *The request to impose constant active monitoring*

51. Mr. Al Hassan has done nothing wrong and has nothing to hide. The Defence does not, therefore, oppose the *principle* of active monitoring. The issue lies, rather, with its implementation, and the impact that it has on related issues, such as the timing and frequency of communications, the use of video-conferencing measures, the right to receive private (conjugal visits), and the right to receive visits from medical experts. For all such issues, the Prosecution/Registry have relied on the existence of active monitoring to deny a range of measures which seek to promote Mr. Al Hassan's welfare, his rehabilitation (as a torture victim), and his right to family life throughout what are likely to be lengthy proceedings. It is also likely that the very existence of active monitoring would be relied upon to deny Mr. Al Hassan his basis right to request interim release – thus rendering the right illusory.
52. In order to preserve Mr. Al Hassan's rights in relation to such matters, the Defence requests that the Trial Chamber determine *firstly*, that the imposition of active monitoring is for a restricted period, and subject to review, *secondly*, that the existence of active monitoring does not justify particular restrictions which are based exclusively on issues concerning the availability of resources within the Registry, *thirdly*, that this determination concerning active monitoring is without prejudice to the position of the Chamber as concerns future family visits, or particular forms of communication, and *fourthly*, that in relation to any such future applications, the burden of argumentation as concerns the imposition of specific restrictions remains with the Prosecutor, and is not shifted to the Defence. These caveats are also warranted in light of the fact that the Defence has been prevented from tendering relevant medical evidence, due to issues that are beyond the control of the Defence.

IV. Conclusion

53. Based on the above, the Defence respectfully requests the Trial Chamber to:

DENY the Prosecution Motion;

ORDER the Prosecution to disclose to the Defence all relevant evidence referred to in the Motion;

ORDER the Registry to transmit to the Defence the specific versions of conversation transcripts that were transmitted to the Prosecution;

CONDUCT a *de novo* review of the restriction regime;

REVIEW the restriction regime and reassess the necessity of any restriction imposed on Mr. Al Hassan on a regular basis.



Melinda Taylor
Lead Counsel for Mr. Al Hassan



Marie-Hélène Proulx
Associate Counsel for Mr. Al Hassan



Sarah Bafadhel
Associate Counsel for Mr. Al Hassan

Dated this 9th Day of December 2019
At The Hague, The Netherlands