



Original: English

No. ICC-01/12-01/18

Date: 4 March 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*
Registry and Defence only**

Decision on Defence request to permit Mr Al Hassan to attend Friday prayers

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

Detention Section

Paddy Craig

**Victims Participation and Reparations
Section**

Other

Judge Kimberly Prost, acting as Single Judge of Trial Chamber X of the International Criminal Court, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, having regard to Article 64(6)(e) of the Rome Statute (the 'Statute'), Rule 132bis(5)(f) of the Rules of Procedure and Evidence (the 'Rules'), Regulation 102 of the Regulations of the Court and Regulation 153 of the Regulations of the Registry issues this 'Decision on Defence request to permit Mr Al Hassan to attend Friday prayers'.

1. On 6 January 2020, the Defence submitted a request before the Registry to allow Mr Al Hassan to attend Friday prayers alongside with Dutch prisoners of Muslim faith.¹
2. On 15 January 2020, the Registry informed the Defence that: (a) Mr Al Hassan is already given the opportunity to practice his religion within detention centre; (b) attendance to Friday prayer would be in conflict with the current restrictions regime applicable to Mr Al Hassan in detention; and (c) even if it were operationally feasible, the Registry would still have to seek the relevant Dutch authorities' views to the extent that it may impact their own operations or detainees. The Registry therefore suggested that the Defence seize the Chamber of the matter.²
3. On 7 February 2020, the Defence filed a request seeking permission for Mr Al Hassan, as a practicing Muslim, to attend Friday Prayers alongside Dutch detainees of Muslim faith held at The Hague Penitentiary Institution in Scheveningen (the 'Dutch Penitentiary' and the 'Request', respectively).³ The Defence submits that Mr Al Hassan's attendance at Friday prayers is possible within the restrictions regime imposed on Mr Al Hassan's communications at the detention centre.⁴ In the alternative, the Defence requests that the current restrictions on Mr Al Hassan's communications be modified to allow his attendance to Friday prayers alongside other

¹ Annex A to the Request for Confirmation, or in the Alternative, for Modification of the Monitoring Regime, ICC-01/12-01/18-583-Conf-Exp-AnxA (confidential *ex parte*, Defence and Registry only) (hereinafter: 'Annex A to the Request'), p. 3.

² Annex A to the Request, ICC-01/12-01/18-583-Conf-Exp-AnxA, p. 2.

³ Request for Confirmation, or in the Alternative, for Modification of the Monitoring Regime, ICC-01/12-01/18-583-Conf-Exp (confidential *ex parte*, Defence and Registry only, with Annex A to the Request).

⁴ Request, ICC-01/12-01/18-583-Conf-Exp, paras 5-8, 13-15.

Dutch detainees.⁵ The Defence avers that since 2017, Mr Al Hassan has been unable to attend Friday prayers, which are considered mandatory for all practising male Muslims and require the congregation of at least three persons in addition to the Imam.⁶ The Defence further submits that 'Mr Al-Hassan's right to attend corporate worship is therefore embedded within his right to practice his religion as provided for within the ICC statutory framework' and that the Registry has 'an obligation to take positive action to facilitate this right'.⁷ The Defence submits that Mr Al Hassan's ability to meet with an Imam is not in line with his religious obligation, which requires more participants.⁸ The Defence notes that logistical arrangements may be necessary between the Dutch authorities and the Registry. However, it submits that these operational matters do not need to be resolved prior to a ruling from the Chamber.⁹

4. On 20 February 2020, upon instruction of the Chamber,¹⁰ the Registry filed its observations on the Request (the 'Registry Observations'),¹¹ stating that the Request is incompatible with the Court's legal framework with the Host State.¹² Specifically, the Registry clarifies that the sought attendance at Friday prayers takes place in a location outside the ICC's detention centre and thus subject to Dutch national legislation and administrative regulations. It further notes that pursuant to Regulation 153 of the Regulations of the Registry, the obligation to provide for spiritual welfare is '*within* the detention centre'.¹³ The Registry further informs that it contacted the Host State authorities, who gave an 'unequivocally negative' answer for various reasons, including safety, Dutch lack of authority over an ICC detained person who would not be at the ICC detention centre, contact and uncontrollable risks of communication with the outside world, and incompatibility between the Dutch

⁵ Request, ICC-01/12-01/18-583-Conf-Exp, paras 16-19.

⁶ Request, ICC-01/12-01/18-583-Conf-Exp, para. 9.

⁷ Request, ICC-01/12-01/18-583-Conf-Exp, para. 12.

⁸ Request, ICC-01/12-01/18-583-Conf-Exp, para. 12.

⁹ Request, ICC-01/12-01/18-583-Conf-Exp, para. 20.

¹⁰ Email from the Chamber to the Registry and the Defence, 10 February 2020, at 13:52.

¹¹ Registry Observations on "Defence Request for Confirmation, or in the Alternative, for Modification of the Monitoring Regime", (ICC-01/12-01/18-583-Conf-Exp), ICC-01/12-01/18-607-Conf-Exp (confidential *ex parte*, only available to the Defence and the Registry; with confidential Annex *ex parte*, only available to the Defence and the Registry, ICC-01/12-01/18-607-Conf-Exp-Anx).

¹² Registry Observations, ICC-01/12-01/18-607-Conf-Exp, para. 7.

¹³ Registry Observations, ICC-01/12-01/18-607-Conf-Exp, para. 8.

detainees (patients with psychological disorders) and the ICC detainees.¹⁴ The Registry further submits that it is already in compliance with the regulations of the ICC and international law.¹⁵ Among other measures put in place, the Registry informs that the same Imam who performs the Friday prayers at the Dutch Penitentiary, visits Mr Al Hassan on a weekly basis for private spiritual services.¹⁶ The Registry further states that the Request conflicts with the restrictions on Mr Al Hassan's contact currently in place.¹⁷ It lastly calls attention to risks that could arise towards Mr Al Hassan should he be allowed to attend the Friday prayers at the Dutch Penitentiary, and which, the Registry states, neither the Registry or the Host State would be able to mitigate, due to the nature of the detained population at the Dutch Penitentiary but also due to lack of resources and logistics.¹⁸

5. At the outset the Single Judge notes that the Defence has outlined its Request in close connection with the current restrictions imposed on Mr Al Hassan's contacts. Nevertheless, the Single Judge considers that in the instant case it is not necessary to analyse the restrictions put in place in order to decide on the merits of the request: *whether Mr Al Hassan should be allowed to attend Friday prayers outside the Court's detention centre and more specifically in the Dutch Penitentiary located contiguous to the ICC detention centre.*

6. In the instant case, the Defence is primarily seeking authorisation for Mr Al Hassan to leave the premises of the detention centre on a weekly basis to attend a gathering with a number of individuals in a location outside the jurisdiction of the ICC. The Single Judge has taken note of the Defence points about the importance of Friday prayers in the Islamic faith,¹⁹ Mr Al Hassan's religious obligation to participate in such prayers,²⁰ and the potential rehabilitative aspect associated with them.²¹ However, from a legal point of view, the Single Judge considers that Regulation 102 of the Regulations of the Court, read together with Regulation 153(2)

¹⁴ Registry Observations, ICC-01/12-01/18-607-Conf-Exp, paras 9-10.

¹⁵ Registry Observations, ICC-01/12-01/18-607-Conf-Exp, paras 11, 15.

¹⁶ Registry Observations, ICC-01/12-01/18-607-Conf-Exp, paras 12-14.

¹⁷ Registry Observations, ICC-01/12-01/18-607-Conf-Exp, para. 16.

¹⁸ Registry Observations, ICC-01/12-01/18-607-Conf-Exp, paras 17-19.

¹⁹ Request, ICC-01/12-01/18-583-Conf-Exp, paras 9, 16.

²⁰ Request, ICC-01/12-01/18-583-Conf-Exp, paras 9, 12, 16.

²¹ Request, ICC-01/12-01/18-583-Conf-Exp, para. 17.

of the Regulations of the Registry, clearly limits the rights of the detained person to practice his or her religion *within the detention centre*. Although other provisions, such as Regulation 103(5) of the Regulations of the Court clearly stipulate the possibility of leaving the ICC detention centre to seek specialised treatment when necessary, the right to spiritual welfare is limited to the confines of the detention centre.²² Moreover, as informed by the Registry, the Request is also contrary to the legal framework agreed upon by the ICC and the Host State. In particular, the Single Judge observes that, if authorised to attend Friday prayers at the Dutch Penitentiary, Mr Al Hassan would be under no authority since the ICC would have no jurisdiction at the Dutch Penitentiary and the Dutch authorities would lack jurisdiction over Mr Al Hassan.²³

7. Moreover, from a security standpoint, the Single Judge notes that neither the Registry nor the Dutch authorities are capable of guaranteeing the safety of Mr Al Hassan should he be allowed to attend the Friday prayers, both in relation to logistics and resources. Even if Mr Al Hassan were to 'waive' any right to his own safety, the Court, pursuant to Article 64(6)(e) of the Statute and Regulation 103(1) of the Regulations of the Court, has the duty to protect the safety of the detained person.

8. Finally, the Single Judge observes that issues such as the current one are clearly within the competence of the Chief Custody Officer and the Registrar. Accordingly, as a matter of principle, matters such as this should be addressed to and resolved by the Registry.²⁴ In general, the Defence and the Registry should hold consultations and continued discussions to reach possible solutions before seizing the Chamber.²⁵

²² See for example Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted version of ICC-01/05-01/08-1099-Conf, Decision on the Defence Request for Mr Jean-Pierre Bemba to attend his Stepmother's Funeral, 12 January 2011, ICC-01/05-01/08-1099-Red, para. 13, where the Trial Chamber *exceptionally* and for humanitarian reasons granted the detained person authorisation to attend a family funeral. It is noted that the detained person had the obligation to reimburse all costs of the entire process to the Host State and to the Kingdom of Belgium.

²³ See Registry Observations, ICC-01/12-01/18-607-Conf-Exp, paras 7, 10.

²⁴ The Single Judge notes that Regulation 153 of the Regulations of the Registry was amended in August 2018. While Regulation 153(4) previously allowed the Defence to file a complaint against a decision of the Registry denying spiritual contact, the provision no longer refers to a complaint procedure before the Presidency or the Chamber.

²⁵ See Transcript of hearing of 18 February 2020, ICC-01/12-01/18-T-011-CONF-ENG, p. 30, lines 15-23.

ACCORDINGLY THE SINGLE JUDGE HEREBY

REJECTS the Request.

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

A handwritten signature in black ink, appearing to read 'K. Prost', is written over a horizontal line.

Judge Kimberly Prost

Single Judge

Dated this 4 March 2020

At The Hague, The Netherlands