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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***

Public

**Public Redacted Version of “Defence observations to the Registry report on an
incident that occurred during the active monitoring of Mr Al Hassan’s
telephone communications”**

**Source: Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag
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Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. Introduction

1. On 24 October 2018, the Chief Custody Officer (CCO) notified Mr Al Hassan of a warning entitled ‘non-respect des mesures restrictives relatives à vos communications téléphoniques non couvertes par le secret professionnel’.¹
2. On 25 October 2018, the Registry submitted report on an incident that occurred during Mr Al Hassan’s communications.²
3. The Defence hereby submits its response to the Registry report.

II. Classification

4. In accordance with regulation 23bis(2) of the Regulations of the Court, these observations are classified as confidential *ex parte*, available only to the Registry and the Defence, as the filing to which it relates is classified the same.
5. The Defence considers that, due to the limited nature of the breach, the Registry’s report and its related filings should retain their current level of confidentiality.

III. Submissions

(A) *Mr Al Hassan’s declaration regarding the incident*

6. Mr Al Hassan wishes to express his sincere remorse for speaking in Arabic and briefly discussing his case during a non-privileged telephone call. Mr Al Hassan stresses that he had no intention to violate the Single Judge’s orders or attempt to interfere with the proceedings or the security of witnesses in any way.
7. Mr Al Hassan advises the Single Judge that the breach, which occurred during a sincere attempt to reassure his family, was a small and honest error arising from his confusion of the Arabic influence on the Tamasheq language and he had no intention of violating the Single Judge’s orders.

¹ *Al Hassan*, Annex III of the Registry Report on an incident that occurred during the active monitoring of Mr Al Hassan’s telephone communications, 25 October 2018, ICC-01/12-01/18-162-Conf-Exp-AnxIII. All cases referred to in this document are related to *Al Hassan* case unless stated otherwise.

² Registry Report on an incident that occurred during the active monitoring of Mr Al Hassan’s telephone communications, 25 October 2018, ICC-01/12-01/18-162-Conf-Exp (the Registry’s **report**).

8. In fact, Arabic have had a strong historic cultural and linguistic influence on the Berber culture.

Tamashek likewise is deeply impregnated with Arabic vocabulary, but much of it seems to reflect more ancient Arab-Tuareg contacts, probably much farther north [...]. Arabic has had by far the grates influence on Tamashek, but the influence seems to be largely confined to lexical borrowing. Of course loanwords in areas related to Islam and sharia law (prayer, holy days, days of the week, lunar months, divorce) are very common, but there are also some loans in other domains, sometimes from vernacular rather than classical Arabic...³

9. The Arabic language's influence on Tamasheq is particularly significant when using legal terms. The mistaken switch to Arabic was certainly not intended to send a coded message.
10. Mr Al Hassan is aware that the telephone conversation reported by the Registry was supposed to be conducted entirely in Tamasheq. However, his confusion also stemmed from the fact that, as per the Single Judge's orders, he is allowed to speak in Arabic or French, if the necessary resources are available.⁴
11. In relation to the passing mention of the case during the telephone call on 7 September 2018, Mr Al Hassan misunderstood the extent of the restrictions on his communication. He mistakenly believed that he could inform his family, in general terms and without reference to confidential matters, as to his current circumstances so as to reassure them, and that he would not be in violation of the Single Judge's orders. Mr Al Hassan acknowledges his mistake in this regard and reassures the Single Judge that his act was in no way meant to disrespect the Single Judge's orders and that he will observe a strict understanding of them in the future.

(B) *The Registry's suggestions defeat the purpose of the CCO's warning*

12. On 24 October 2018, the CCO warned Mr Al Hassan about three incidents where he used Arabic and discussed matters relating to the present case in three telephone conversations. The following day, the Registrar reported to the Single Judge one of the three telephone conversations mentioned in the CCO's memo, and suggested that [REDACTED], be removed from the list of Mr Al Hassan's non-privileged contacts

³ Jeffrey Heath, 'A Grammar of Tamashek (Tuareg of Mali)', Mouton de Gruyter, 2005, pp 8-9.

⁴ Decision on the Prosecution's Application under Regulation 101 of the Regulations of the Court, 5 April 2018, ICC-01/12-01/18-16-Conf-Exp-tENG, para 7(4).

for a period of six months. The report did not explain how the warning given to Mr Al Hassan was insufficient to remedy the violation in this case or the purpose of imposing an additional sanction by way of removing a contact from Mr Al Hassan's contact list.

13. Pursuant to regulation 211 of the Regulations of the Registry, the CCO may issue an oral or written warning in case of breach of discipline by a detainee. This measure, when read in conjunction with rule 38(1) of the Mandela Rules, encourages prison authorities not to use sanctions as a first resort.
14. The purpose of a warning is to impose a heavier sanction only if the warned person commits further breaches within a reasonable period of time following the initial offence.⁵ Imposing further restrictions after issuing a written warning would defeat the purpose of taking measures under regulation 211 of the Regulations of the Registry.
15. Further, as highlighted by the Single Judge and the CCO,⁶ breaches of the Single Judge's order, should be encountered by a disconnection of the telephone call by the CCO. This would have been a reasonable and sufficient reaction to Mr Al Hassan's unintentional mistake.

(C) *Further action in response to the incident would be disproportionate*

16. A disciplinary sanction should not exceed the purpose of 'safe custody, the secure operation of the prison and a well ordered community life',⁷ in addition to ensuring the good conduct of proceedings and protection of witnesses. Accordingly, the proportionality of a sanction to the offence must be established.⁸
17. Restrictive measures imposed on a prisoner 'must be linked to the actual or potential harm the prisoner has caused or will cause by his or her actions (or the potential harm to which he/she is exposed) in the prison setting'.⁹ Therefore, proportionality and non-

⁵ See for example, Regulation 211(d) of the Regulations of the Registry.

⁶ Decision on the Prosecutor's Application under Regulation 101 of the Regulations of the Court, 5 April 2018, ICC-01/12-01/18-16-Conf-Exp-tENG, para 18.

⁷ United Nations General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) [A/RES/70/175](#), 17 December 2015, Rule 36.

⁸ Ibid, Rule 39 (2).

⁹ Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 21st General Report of the CPT, 10 November 2011, [CPT/Inf \(2011\) 28](#), para 55(a).

use of harsh sanctions as a first response entail that breaches must be addressed with a preventive rather than punitive approach.

18. The Defence is mindful of the Single Judge's order that prohibits 'any discussion related to the present case' with any individual not falling under regulation 97 of the Regulations of the Court.¹⁰ However, the purpose of regulation 101(2) of the Court, pursuant to which the current restrictive measures on Mr Al Hassan's communication have been imposed, is to prevent the disclosure of information that could 'prejudice or otherwise affect the outcome of the proceedings' or 'could be harmful to the detained person or any other person'.
19. Neither the incident as reported by the Registry nor Mr Al Hassan's intentions lead to the conclusion that there has been any attempt to contact individuals affiliated with armed groups or threat actors in Mali, or to affect the outcome of the proceedings, or endanger potential witnesses and victims in this case. The discussion in question was, as stated by the CCO and in the Registry report,¹¹ brief and superficial. It lasted approximately one minute and, even though the call was not interrupted, did not proceed any further. The gravity of the incident must also be weighed against Mr Al Hassan's compliance rate of 99.93%.¹²
20. The Single Judge provided that, as remedy for a breach of orders during non-privileged telephone conversations, the CCO is to disconnect the call.¹³ It was for that purpose and through this mechanism that a measure as intrusive as active monitoring was imposed. Further restrictions, such as removing [REDACTED] from his list of contacts would be disproportionate and would not reflect the low gravity of the incident.
21. The Detention Centre, as stated by the CCO,¹⁴ was indeed in breach of the Single Judge's order by not disconnecting the telephone call. Nonetheless, Mr Al Hassan

¹⁰ Decision on the Prosecution's Application under Regulation 101 of the Regulations of the Court, 5 April 2018, ICC-01/12-01/18-16-Conf-Exp-tENG, para 17; Second Decision on the Restriction on Contact with Other Persons during Pre-Trial Proceedings, 20 July 2018, ICC-01/12-01/18-93-Conf- Exp, para 74.

¹¹ The Registry's report, para 8-9; the Registry's report, Annex II.

¹² The Registry's report, Annex II.

¹³ Decision on the Prosecution's Application under Regulation 101 of the Regulations of the Court, 5 April 2018, ICC-01/12-01/18-16-Conf-Exp-tENG para 18.

¹⁴ The Registry's report, Annex II.

should not be subjected to further sanctions, in addition to the formal warning, as a way to compensate for the non-termination of the call by the CCO.

22. Several important factors must also be taken into consideration when determining whether further restrictions on Mr Al Hassan's detention conditions are warranted. Communication with family and friends plays a crucial role in Mr Al Hassan's integration to prison life in The Hague, especially in light of cultural and linguistic barriers to adaption and the extreme difficulty in arranging family visits. Communication with the outside world is also 'of particular importance in alleviating the impact of isolation in prison in a foreign country.'¹⁵
23. As a suspect in proceedings before the Court, Mr Al Hassan is already subject to severe restrictions on his communication with the outside world. Active monitoring of private telephone calls with family members is itself a highly intrusive sanction, even more so when the call is disconnected. These measures have a significant emotional and psychological impact on Mr Al Hassan, as they would for any individual. Tightening these restrictions following a brief and honest mistake that was not driven by any malicious intent and did not cause harm to any individual or to the proceedings would be unfair and disproportionate.

(D) *Correction of the record regarding DS/208/050/PC/em*

24. The CCO, in reminding Mr Al Hassan of the Single Judge's orders, stated:

Veuillez noter une fois de plus qu'il vous est interdit: d'abord, pendant vos conversations, des questions liées aux témoins, à une quelconque affaire de la Cour et à toute information confidentielle.¹⁶

25. The CCO's prohibition to 'aborder [...] des questions liées [...] à quelque affaire de la Cour' exceeds the scope of the Single Judge's decision. The decision imposed a restriction of telephone calls to a limited list of individuals 'with whom any discussion related to the present case will be prohibited'.¹⁷ It is also within this scope that the notion of 'questions liées aux témoins' and 'toute information confidentielle' should be interpreted.

¹⁵ UNODC Handbook on Prisoners with special needs, New York, 2009, section 4.3.5, p 93.

¹⁶ The Registry's report, Annex III, ICC-01/12-01/18-162-Conf-Exp-AnxIII, DS/2018/05/PC/em.

¹⁷ Decision on the Prosecution's Application under Regulation 101 of the Regulations of the Court, 5 April 2018, ICC-01/12-01/18-16-Conf-Exp-tENG, para 17 (emphasis added).

26. Accordingly, the Defence requests, for the correctness of the record, a rectification of the warning issued to Mr Al Hassan on 24 October 2018, to ensure that the CCO's reminder is strictly limited to the findings of the Single Judge.

IV. Conclusion

27. In light of the above, any action in addition to the warning issued against Mr Al Hassan on 24 October 2018 would be disproportionate and would not reflect the low impact and gravity of the incident. The Registry's suggestion to remove [REDACTED] from his list of contacts should therefore be dismissed.
28. The Defence respectfully requests the Single Judge to order a rectification of the CCO's warning dated 24 October 2018, in order to reflect the exact scope of the Single Judge's decision.



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Dated this 5th day of November 2018
At The Hague, The Netherlands