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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 "Urgent request to obtain Mr Al Hassan's medical record"

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
Seydou Doumbia
Mayombo Kassongo
Fidel Luvengika Nsita

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
Nigel Verrill

Detention Section
Paddy Craig

Victims Participation and Reparations Section

Other

Introduction

1. The Defence for Mr. Al Hassan respectfully requests the Honourable Trial Chamber to order the Detention Unit to take the necessary steps to ensure that Mr. Al Hassan is granted full access to all data, information and records in his medical file, as soon as possible.

2. Mr. Al Hassan has, on several occasions, complied fully with the formal requirements for obtaining access to information and data that concerns him directly. And yet, over three months after submitting such requests, he has yet to receive access to the requested information.

3. The delay in resolving this issue has had a fundamental impact on Defence preparation. Without such access, the Defence cannot finalise two pending expert reports. The information in these records are also highly likely to be relevant to pending issues concerning the conditions of detention of Mr. Al Hassan, and a potential application for interim release.

4. This issue therefore engages Mr. Al Hassan's rights under Article 67(1) of the Statute, and the Chamber's overarching power, and under Article 64(1) of the Statute, to issue such orders as are necessary to ensure the fairness of the proceedings, and Mr. Al Hassan's rights as an accused person appearing before the ICC.

Submissions

5. There are there separate routes through which access has been requested:

I. Mr. Al Hassan has submitted requests to directly access his entire medical file;

II. The Defence - with the written consent of Mr. Al Hassan – has requested access to the file; and

III. Defence medical experts have requested access for the purpose of conducting a medical expertise.

6. All three routes have been effectively blocked – even though the Defence has complied with every formality and requirement put to it. The Defence has attempted to resolve the issue through meeting with the Registry and the Detention Unit Medical Officer [REDACTED]. Mr. Al Hassan has also reformulated his requests on several occasions in order to comply with the suggested formula proposed by the Detention Unit. These endeavours have proved fruitless.

7. A brief summary of these interactions is set out below:

- On 5 September 2019, Mr. Al Hassan submitted a written request to access his medical files, information and data.[1]

- On 16 September 2019, the Defence met with the Director of Judicial Services and the CCO of the detention unit to resolve this issue: during the meeting, the Defence stressed that it needed full access for the purpose of its medical experts.

- Later that day, the CCO informed the Defence that the request had to comply with a certain formula.[2] Mr. Al Hassan then submitted a

[1] ICC-01/12-01/18-529-Conf-Exp-AnxB, p. 3.

request, which complied fully with this formula, on the 17th September[3]

- The Defence was then told that Dr. [REDACTED] was away for the next week.

- When he returned on the 25th, the Defence followed up, and on 2nd October, the Defence were told that all relevant files were ready to release to Mr. Al Hassan the next Wednesday.[4]

- But that did not happen. On 7 October, the Detention Unit then forwarded an email advising the Defence that Dr. [REDACTED] could not release any documents to the Defence unless the Defence specified the purpose of its request.[5]

- Given the implications that this request had for legal privilege – the Defence requested to meet Dr. [REDACTED]. Separately - on 8th October - Mr. Al Hassan submitted another written request to have full access to his medical file. He explained that the purpose related to a confidential Defence application that the Defence hoped to file in the near future.[6]

- On 11 October, the CCO confirmed that the purposes of access was now clearer, and they anticipated releasing the requested documents the following Monday.[7]

[2] ICC-01/12-01/18-529-Conf-Exp-AnxB, p. 3.
[3] ICC-01/12-01/18-529-Conf-Exp-AnxB, pp 5 and 9.
[4] ICC-01/12-01/18-529-Conf-Exp-AnxB, p. 11.
[5] ICC-01/12-01/18-529-Conf-Exp-AnxB, p. 17.
[6] ICC-01/12-01/18-529-Conf-Exp-AnxB, p. 25.
[7] ICC-01/12-01/18-529-Conf-Exp-AnxB, p. 27.

- This did not happen: even though Mr. Al Hassan had requested full access to his medical records in an unambiguous manner, he was only given limited extracts, which were redacted. The reasons for the redactions were not apparent given that for some of the records, the Defence had received an unredacted version earlier in the case.

- On 21 October 2019, Mr. Al Hassan submitted a fourth request to access his detention medical file. This request underscored that he was seeking full access, and that he did not want the detention unit or its doctors to impose redactions without his consent.[8]

- On 22 October, Mr. [REDACTED] informed the Defence for the first time that full access was not possible, and that notwithstanding the four signed requests submitted from Mr. Al Hassan to access his full file, he had agreed to receive a more limited version.[9] Of particular concern, Mr. [REDACTED] expressed the view that the Detention Unit was in no way required to comply with Mr. Al Hassan's written request to access his medical file: such a request was the mere starting point for a conversation between the detainee and the Detention Unit doctor as to what documents the doctor thought should be disclosed.

- In order to resolve this issue, the Defence suggested that a meeting should be convened with the Defence, Dr. [REDACTED] and Mr. Al Hassan in order to clarify and confirm what his wishes were. The Defence were told this was not possible.

[8] ICC-01/12-01/18-529-Conf-Exp-AnxB, p. 39.
[9] ICC-01/12-01/18-529-Conf-Exp-AnxB, p. 42.

- On 29 October 2019, Mr. Al Hassan submitted another written request that Dr. [REDACTED] share medical information with Defence experts [REDACTED].[10] On the same date, the Defence also asked Dr. [REDACTED] to contact the Defence experts directly, if further precision was required.

- Dr. [REDACTED] spoke to the experts on 6 November 2019, and on 11 November, the experts sent a detailed request specifying the type of information that was relevant to their respective expert reports.

- On 20 November, in light of the lack of any progress on these different requests, the Defence sent an urgent letter to the Registrar to inquire as to what steps could be taken to break the impasse, and ensure that Mr. Al Hassan, and the Defence medical experts, had timely access to the requested information.[11]

- On 22 November, the Defence were then informed that the Medical Officer intended to transmit documentation directly to the two experts, and not to Mr. Al Hassan or the Defence.[12]

- The Defence were informed that the documentation - in Dutch – was comprised of only 4 pages – of information – in Dutch – extracted from the reports.

- On 2 December, one of the medical experts – [REDACTED] – wrote to the Defence to indicate that the extracts table "provide a very sparse

[10] ICC-01/12-01/18-529-Conf-Exp-AnxB, p. 45.
[11] ICC-01/12-01/18-529-Conf-Exp-AnxB, pp 48-64.
[12] ICC-01/12-01/18-529-Conf-Exp-AnxB, pp. 66.

record of the medical treatment".[13] [REDACTED] further expressed her concern that Dr. [REDACTED] also indicated that the information was restricted to information concerning symptoms that had been attributed to torture in Mali. It therefore appears that it excluded any symptoms or diagnostic information that Mr. Al Hassan had not himself attributed to his detention in Mali.

- Dr. [REDACTED]'s concerns were communicated to the Detention Unit and Dr. [REDACTED] on 3 December 2019. The Defence were informed in response that Dr. [REDACTED] was sick.

8. Time is now of the essence given that one of the experts, [REDACTED], is scheduled to examine Mr. Al Hassan from 2-3 January 2020. [REDACTED] is extremely busy, and it was not easy to identify a window of opportunity for her to perform this evaluation. Further delays may also render it harder for [REDACTED] to evaluate certain physical indicia concerning Mr. Al Hassan's detention in Mali.

9. In terms of the claim that Dutch ethics prevents Dr. [REDACTED] from responding to a request for general access to medical records, this position does not appear to be consistent with either Dutch law, or the obligations of the Netherlands under Article 8 of the European Convention on Human Rights.

10. Specifically, articles 446 to 448 of the Dutch Medical Law Agreement affirm that patients have the right to access and receive all data and files concerning

[13] ICC-01/12-01/18-529-Conf-Exp-AnxB, pp 69-70.

their medical treatment and history.[14] This right may be circumscribed if the information relates exclusively to a third person (for example, if the doctor interviews a child of the patient separately) but that is not the case here: it has never been claimed that the information in the file should not be handed over for that reason.

11. It is also important to emphasise that Mr. Al Hassan is not just a defendant sitting trial. He is person – presumed innocent – who retains a full array of rights, including the right to privacy, which entails a positive right to access private data held by the detention unit, or medical staff.

12. Mr. Al Hassan did not select his current doctors, and although he is very grateful that he can benefit from their services and treatment, it is understandable that he would want to know as much about it as possible.[15]

13. The European Court of Human Rights (ECHR) also underscored, in the case of *KH v. Slovakia*, that the right to privacy entails a positive right to receive medical data or information that relates to an individual's private life.[16] The ECHR further explained that:

[14] ICC-01/12-01/18-529-Conf-Exp-AnxA, p. 11.
[15] As explained by the European Committee for the Prevention of Torture (CPT),

> *Freedom of consent and respect for confidentiality are fundamental rights of the individual. They are also essential to the atmosphere of trust which is a necessary part of the doctor/patient relationship, especially in prisons, where a prisoner cannot freely choose his own doctor. (…) Patients should be provided with all relevant information (if necessary in the form of a medical report) concerning their condition, the course of their treatment and the medication prescribed for them. Preferably, patients should have the right to consult the contents of their prison medical files, unless this is inadvisable from a therapeutic standpoint. They should be able to ask for this information to be communicated to their families and lawyers or to an outside doctor.*

See Health care services in prisons, Extract from the 3rd General Report of the CPT, published in 1993, paras 45, 46.
[16] *K.H. and others v. Slovakia*, 32881/04, paras. 44-48.

- *Firstly*, since this right should be practical and effective, States have a positive obligation to make available to the data subject his or her data files; and
- *Secondly* since this is a right, the data subject should not be compelled to justify his or her request to access files; rather, it would be for the authorities to adduce compelling reasons to deny such requests.[17]

14. This right of access also applies to detainees. Rule 26 of the Mandela Rules provides that:

> *The health-care service shall prepare and maintain accurate, up-to-date and confidential Individual medical files on all prisoners, and all prisoners should be granted access to their files upon request. A prisoner may appoint a third party to access his or her medical file.*

15. An OSCE commentary concerning the implementation of this rule further explains that:[18]

> *Prisoners must be made aware that they have a right to access their medical files upon request, or to appoint a third party to access their file. Authorities should ensure that there are proper, consistent procedures in place on how prisoners or third parties can access the files and how their confidentiality can be protected.*

16. Within the framework of the ICC itself, Regulation 92(2) of the Regulations of the Court affirms detainees' right to access their detention record. Regulation 156(2) of the Regulations of the Registry then clarifies that in relation to medical records, the detainee is the data owner, and that as such, his consent is required in order for persons, other than the treating time to access the medical record. The necessary corollary of this negative right to deny third

[17] Para. 48.
[18] OSCE, Guidance Document on the Nelson Mandela Rules, p. 166, para 130.

persons access to these records is that the detainee also has the positive right to access them.

17. The notion that this right can be defeated by unspecified Dutch medical ethics also flies in the face of the practice and case law of the ICTY, where detainees, who are treated by exactly the same Dutch doctor (Dr. [REDACTED]), have the right to receive full access to their medical records. For example, in the *Mladic* case, the ICTY President ordered the Registry to provide the Mladic Defence with access to all confidential and *ex parte* medical reports and opinions concerning Mr. Mladic. The President affirmed that if the information in question concerned Mr. Mladic, he had a related right to receive it.[19] In an earlier decision issued in the same case, the President underlined firstly, "the crucial importance of a detainee's right to obtain medical information", and secondly, "that such information must be provided in a timely fashion".[20]

18. It would appear, at this juncture, that a judicial order is required to untie the Gordian knot, obstructing any resolution of this issue. The Defence cannot avail itself of the detention unit complaints mechanism because the Registry and the Defence appear to be in agreement as concerns Mr. Al Hassan's right to receive the data in question. The suggestion, that a third expert be appointed to receive the documentation in question, would engender further delays and disputes. It is also illogical that Dr. [REDACTED] would provide the documentation to a third expert, but not Mr. Al Hassan or his medical

[19] *Prosecutor v Mladic*, Decision on Defence Motion for an Order to Provide Access to Confidential and *Ex Parte* Medical Opinions, IT-09-92-R, 17 November 2017, p. 2.
[20] *Prosecutor v Mladic*, Decision on Three Defence Motions, 13 November 2017, IT-09-92-T, para 37.

experts. The Chamber's intervention is therefore required to ensure a fair and expeditious resolution to this impasse.[21]

19. Article 64(2) of the Statute provides that the Chamber shall ensure that the trial is fair and expeditious, and conducted with full respect for the rights of the accused. Article 64(6) then sets out a broad array of powers vested in the Chamber to achieve these objectives. This includes the right to exercise any powers of the Pre-Trial Chamber that might be relevant to the trial process.[22] Article 57(3)(b), in turn, sets out the power to issues such orders as might be necessary to assist the person in the preparation of his or her defence. These powers should be read in conjunction with Regulation 92(3) of the Regulations of the Court, and the fact that Regulation 156(3) and (4) affirm that the Chamber possesses the power to issue orders concerning the disclosure of the medical record.

20. The combined effect of these provisions is that the Chamber has the power to order that the requested medical records and data be provided to Mr. Al Hassan forthwith.

Relief Sought

21. For the reasons set out above, the Defence for Mr. Al Hassan respectfully requests the Honourable Trial Chamber to issue an urgent order that all medical records, information and data concerning Mr. Al Hassan, which is

[21] See ICC-01/05-01/13-1977, para. 7, and fn. 13, which cites to the following case law: "See Trial Chamber III, The Prosecutor v. Jean-Pierre Bemba Gombo, 20 October 2009, ICC-01/05-01/08-568 (ordering that funding be provided to the accused after they had not been paid since March 2009); Pre-Trial Chamber I, The Prosecutor v. Callixte Mbarushimana, Decision on the "Defence Request for the Review of the Scope of Legal Assistance", 15 May 2011, ICC-01/04-01/10-142, para. 16 (granting defence request for retroactive legal assistance to a time before an application for legal assistance was made)."
[22] Article 64(6)(a), and Article 61(11).

held by the Detention Unit, or by any doctors, or medical experts appointed to examine or treat him during his detention at the Detention Unit, be transmitted to him immediately in unredacted form.

Melinda Taylor
Lead Counsel for Mr Al Hassan

Marie-Hélène Proulx
Associate Counsel for Mr Al Hassan

Dated this 13th day of December 2019
At The Hague, The Netherlands