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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 “Request for Confirmation, or in the Alternative, for
Modification of the Monitoring Regime”**

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:

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I. Introduction

1. The Defence for Mr. Al-Hassan (the ‘Defence’) files this request for confirmation that the current monitoring regime permits Mr. Al-Hassan, as a practising Muslim, to attend Friday Prayers (also referred to as Jum’ah Prayers) alongside Dutch detainees of Muslim faith held at the Hague Penitentiary Institution in Scheveningen. In the alternative, the Defence requests modification of the monitoring regime to allow for such attendance.
2. This Request is submitted pursuant to Article 64(2) and 64(6)(f) of the Statute and in accordance with Mr. Al-Hassan’s right to practice his faith as provided for under Regulation 102 of the Regulations of the Court, which includes his right to attend corporate worship.

II. Classification

3. In accordance with Regulation 23bis (2) of the Regulations of the Court, this request is classified as confidential *ex parte* only available to the Defence and Registry Only as it concerns Mr. Al-Hassan’s religious practice and private life.¹

III. Procedural history

4. Mr. Al-Hassan was arrested and detained in Mali on 18 April 2017; he was subsequently transferred to the custody of the Detention of the International Criminal Court (“Detention Centre”) on 31 March 2018.
5. As of his transfer to the Detention Centre, Mr. Al-Hassan has been the subject of restrictive measures on his communications as ordered by the Pre-Trial Chamber.² These include:

[REDACTED]

¹ [ICC-01/04-01/07-2187-tENG-Red](#), para. 58.

² As listed in ICC-01/12-01/18-557-[Redacted].

6. In accordance with Mr. Al-Hassan's right to freely practise his religion, the Defence sent a request to the Detention Centre on 6 January 2020, in order to allow for Mr. Al-Hassan to attend Friday Prayers alongside Dutch prisoners of Muslim faith also held at the same facility located in Scheveningen.³
7. On 15 January 2020, the Registry, in accordance with Rule 90 of the Regulations of the Court, provided its response in which it recognised Mr. Al-Hassan's right to practice his religion in accordance with Regulation 102 of the Regulations of the Court.⁴ However, notwithstanding logistical considerations, the Registry stated that it considered Mr. Al-Hassan's attendance at Friday prayers alongside Dutch prisoners of Muslim faith to be in conflict with the operative monitoring regime and that it was not therefore in a position to facilitate the request. However, the Registry advised the Defence to seize the Chamber of the matter in the event that it sought a modification of the monitoring regime.
8. On 21 January 2020, the Trial Chamber maintained the Restrictive Measures on an interim basis upon the request of the Prosecution.⁵

IV. Submissions

a. Mr. Al Hassan has a right to attend corporate worship

9. Friday Prayers are a salient feature of Islam which take place every Friday, which is a virtuous day for Muslims, during the Noon (-or Zuhr) prayers. They involve specific rules to which worshippers must adhere, and they must be offered in a congregation of at least three persons with the exception of the Imam. Notably, Friday prayers are considered mandatory for all practising male Muslims.⁶ Since his detention in 2017, Mr. Al-Hassan has regrettably not been able to attend Friday Prayers in nearly three years.
10. As recognised by the Registry, Mr. Al Hassan has a right to practice his religion or belief in accordance with Regulation 102 of the Regulations of the Court. This provision is in line with

³ Email correspondence from Al-Hassan Defence to Detention Centre dated 6 January 2020 attached at Annex A.

⁴ *Ibid.*

⁵ ICC-01/12-01/18-557-Conf-Exp-Red. See also ICC-01/12-01/18-505-Conf-Exp-Red.

⁶ Further information on Friday Prayers is available at The Global Islamic Seminary, The Rulings Related to Friday Prayer, 22 August 2011.

various international covenants,⁷ and applicable rules governing the treatment of prisoners.⁸ However, the right of a detainee to practice their religion is not a passive one. In addition to the fact that detaining authorities are required to respect prisoners' freedom of religion by refraining from any unjustified interference with the exercise of this right, the European Court of Human Rights has further held that they are required to take "positive action to facilitate the free exercise of those rights, having regard to the particular requirements of the prison environment [emphasis added]".⁹ This further accords with the application of the principle of non-discrimination within a detention context, and the Special Rapporteur of the Commission on Human Rights on Freedom of Religion or Belief support for the finding that the "equality of treatment involves more than ensuring that there is no discrimination. It also means taking positive action to make sure that the special needs of minority groups are met".¹⁰

11. Accordingly, a number of states permit and facilitate prisoners to exercise their right to attend all forms of corporate worship. For example, in the Netherlands, prisoners are provided with the right to practice their religion either individually or in association with others.¹¹ Similarly, in the United Kingdom, prisoners are entitled to attend corporate worship for one hour a week.¹²

⁷ E.g. Articles 2 and 5 Universal Declaration of Human Rights; Article 18 International Covenant on Civil and Political Rights, Article 9 European Convention on Human Rights.

⁸ Rules 41 and 42 Standard Minimum Rules for the Treatment of Prisoners; Human Rights Committee General Comment No. 22, para. 8.

⁹ ECtHR, Guide on Article 9 of the European Convention on Human Rights, 31 August 2019 (last updated 31 August 2019) at paragraph 251 *et seq*

¹⁰ A/60/399, Report of the Special Rapporteur of the Commission on Human Rights on Freedom of Religion or Belief, Asma Jahangir, 30 September 2005, fn. 7.

¹¹ The Netherlands - Penitentiary Principles Act (NLD-1998-L-71628), Article 41:

1. The prisoner shall have a right to freely profess and practice his religion or ideology individually or in association with others.
2. The governor shall provide that sufficient spiritual care, as much as possible in accordance with the prisoner's religion or ideology, is available in the institution.
3. The governor shall give the prisoner the opportunity at the times and places laid down in the prison rules to: a. have personal contact with the spiritual counsellor of the religion or ideology of his choice connected with the institution; b. have contact with persons other than the spiritual counsellors referred to in 3a pursuant to Article 38; c. attend the religious or ideological meetings of his choice held in the institution. Article 23 shall apply *mutatis mutandis*.
4. Further rules shall be established by order in council concerning the availability of spiritual care. These rules shall refer to the provision of spiritual care by or on behalf of the different religious or ideological movements, to the organisation and the cost of spiritual care and to the appointment of spiritual counsellors in an institution.

¹² National Offender Management Service, [Service Specification for Faith and Pastoral Care for Prisoners](#), 2015. See also the United Nations Office on Drugs and Crime, [The Religious Rights and Duties of Muslim Inmates in Prisons](#), p.5:

12. 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. In turn, the Registry, being responsible for the management of the Detention Centre, is under an obligation to take positive action to facilitate this right. For the purposes of Mr. Al-Hassan's current circumstances, the only available opportunity for the exercise of this right is for Mr. Al-Hassan to be able to attend Friday Prayers which the Defence understands are already organised for Dutch prisoners of Muslim faith at the same detention facility in Scheveningen. In this regard, the Defence notes that Mr. Al-Hassan's ability to request to meet with an Imam (as the minister or spiritual adviser), pursuant to Regulation 102(2) of the Regulations of the Court and Regulation 153 of the Regulations of the Registry, does not fulfil Mr. Al-Hassan's religious obligation to participate in Friday Prayers which, as set out above, requires a congregation of at *least three* Muslims excluding the Imam. At present, Mr. Al-Hassan is the only practising Muslim detained at the Detention Centre.

b. The exercise of this right is consistent with the current monitoring regime

13. Mr. Al-Hassan is subject to a robust monitoring regime established on the (contested) basis that there were reasonable grounds to believe that possible contact between Mr. Al-Hassan and persons affiliated with the armed groups Ansar Dine and AQIM could prejudice or otherwise affect the outcome of these proceedings, or could be a threat to the protection of potential witnesses and victims, within the meaning of Regulation 101(2) of the Regulations of the Court.¹³
14. The present Request does not impinge on the Restrictive Measures as currently imposed on an interim basis or give rise to any further grounds as listed in Regulation 102(2) of the Regulations of the Court.
15. First, the Friday Prayers are conducted at the same detention facility located in Scheveningen and would form part of an established arrangement made available to Dutch detainees of Muslim faith. Mr. Al-Hassan will therefore remain on-site and within the confines of the detention facility at all times and therefore subject to the usual security measures which that

"Each Friday, at noon prayer, Muslim prisoners should be allowed to listen to a Muslim religious preacher's speech and have a group prayer"

¹³ ICC-01/12-01/18-16-Conf-Exp, para.16.

entails. Second, Friday prayers are conducted on a weekly basis for no more than 30 to 60 minutes and in silence on the worshipper's part. As such, Mr. Al-Hassan's attendance at the Friday Prayers would form part of the weekly assigned activities, including for example, exercise sessions or language classes, which are currently organised for all detainees at the Detention Centre. Third, given the location of the Hague Penitentiary Institution, it is reasonable to assume that the Dutch detainees attending the Friday Prayers are entirely unconnected to these proceedings and unknown to Mr. Al-Hassan. Notwithstanding the fact that Mr. Al Hassan does not speak Dutch, any interaction with other detainees will be of a minimal nature and conducted in the presence of guards. Ultimately, this is no different to daily interactions held between detainees at the Detention Centre.

c. In the alternative, the modification of the monitoring regime is justified

16. Mr. Al-Hassan has been denied the ability to attend Friday Prayers for nearly three years and counting. This period is considered of significant consequence to practising Muslims, not least because of the obligation to attend such prayers, but also in light of the comfort and refuge sought by worshippers in the practice of their religion. In particular, Friday Prayers include a sermon conducted by the Imam which is intended to assist a worshipper in the development of their daily practice and faith. Notwithstanding special occasions, this component is unique to Friday Prayers.

17. The rehabilitative aspect associated with the practice of religion is only further heightened in Mr. Al-Hassan's situation on account of the fact that he is a torture victim and has been relocated far from his home, relatives and familiar surroundings. The Council of Europe has recognised, albeit in the context of a domestic setting, the difficulties faced by prisoners detained in a foreign country on account of the different language, culture, customs and religion.¹⁴ With this in mind, it specifically addressed the need to: (i) respect the religious precepts and customs of foreign prisoners; (ii) take into account their special needs; and (iii) ensure that they are provided with opportunities equal to those accorded to other prisoners.¹⁵

¹⁴ Council of Europe of the Committee of Ministers to Member States concerning Foreign Prisoners, Recommendation No. R (84)12.

¹⁵ *Ibid.*

18. In this regard, the fact that Dutch prisoners detained only metres away from Mr. Al-Hassan are afforded the right to attend corporate worship cannot be overstated. Whilst the Dutch detention regime is separate from that of the ICC Detention Centre, there remains a distinct possibility whereby the Netherlands, as party to the European Convention of Human Rights, may bear some residual responsibility for violations of human rights law before the ICC.¹⁶ It is in part for this reason that, within the context of the ICTY, judges “took care to ensure that the regime it prepared for the Detention Unit was consistent with the Dutch prison system in all relevant aspects”.¹⁷
19. Therefore, in the absence of any necessary or proportionate justification for the continued restriction of Mr. Al-Hassan’s right to practice his religion, the Defence considers that it is permissible to modify the monitoring regime in a manner which will assuage any security concerns on the part of the Chamber. Mr. Al-Hassan has already proposed that a guard is designated to him throughout his attendance during the Friday Prayers and he remains open to any further proposal which may facilitate this request.
20. Finally, the Defence appreciates the need for logistical arrangements to take place and for discussions to be held between the Registry and its Dutch counterparts. However, in line with the Registry’s prior position,¹⁸ the Defence does not consider that the operational aspects of this Request need to be concretely resolved prior to a ruling on its conformity with the current monitoring regime or in the alternative, the modification of the monitoring regime.

V. Conclusion

21. For the foregoing reasons, the Defence for Mr. Al-Hassan respectfully requests the Trial Chamber to:

¹⁶ See Abels, D., *Prisoners of the International Community: The Legal Position of Persons Detained at International Criminal Tribunals*, T.M.C. Asser Press/Springer, 2014 at p. 154: “During the aforementioned deliberations [in Dutch Parliament on the Implementation of the Rome Statute], the Dutch Minister of Justice recognised that the Netherlands had transferred jurisdiction to the ICC as a supranational institution. In doing so, he acknowledged that such transfer did not imply that the Netherlands, as a party to ECHR, bears no responsibility at all for what happens at the ICC”.

¹⁷ A/49/342 S/1994/1007, Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 29 August 1994, p. 30.

¹⁸ ICC-01/12-01/18-474-Conf-Exp. See also ICC-01/12-01/18-481-Conf-Exp.

CONFIRM that Mr. Al-Hassan's attendance at Friday Prayers is consistent with the applicable monitoring regime; or in the alternative

MODIFY the conditions and modalities of monitoring in order to enable Mr. Al-Hassan to attend Friday Prayers; and

ORDER the Registry to liaise with the relevant Dutch authorities and facilitate Mr. Al-Hassan's attendance at Friday Prayers.



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Dated this 7th Day of February 2020

At The Hague, The Netherlands