

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/12-01/18

Date: 15 July 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***

Public

**With *EX PARTE* Confidential Annex only available to the Defence and the
Registry**

**Public redacted version of the Registry's Observations on the Defence Rule 134(1)
Observations (ICC-01/12-01/18-870-Conf-Exp), 22 June 2020, ICC-01/12-01/18-891-
Conf-Exp**

Source: Registry

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. Introduction

1. Pursuant to an email instruction issued by the Single Judge of Trial Chamber X of the International Criminal Court (“Chamber” and “Court”, respectively) on 11 June 2020 (“Instruction”),¹ in the case of *The Prosecutor vs Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (“Mr Al Hassan”), the Registry provides its views on the “Defence [for Mr Al Hassan] Rule 134(1) observations” (“Defence” and “Defence Observations”, respectively).²
2. As per the Instruction, the Registry provides below updates and, to the extent possible, concrete solutions, including timelines, regarding: (i) Mr Al Hassan’s ability to attend trial hearings in person; (ii) Mr Al Hassan’s ability to meet in person with his Defence team; and (iii) issues raised in relation to the Defence ability to conduct *in situ* investigations.

II. Classification

3. In accordance with regulation 23 *bis*(2) of the Regulations of the Court (“RoC”), the present submissions and the annex thereto are classified as confidential *ex parte* only available to the Defence and the Registry, as they refer to the Defence Observations with the same level of classification, and to information pertaining to confidential consultations with the Kingdom of the Netherlands (“host State”) or to internal Registry confidential procedures.

III. Submissions

- (i) *Mr Al Hassan’s ability to attend trial hearings in person*
4. On 20 May 2020, in the “Registry’s Observations on methods of work to minimise the impact of COVID-19 and related measures on the conduct of

¹ Email from the Single Judge of Trial Chamber X to the Registry on 11 June 2020 at 11.30.

² Defence, “Defence Rule 134(1) observations”, 10 June 2020, ICC-01/12-01/18-870-Conf-Exp.

proceedings (ICC-01/12-01/18-776)’’ (“Registry’s Observations’’),³ the Registry recommended that Mr Al Hassan participates in the upcoming status conference on 30 June 2020, *via* video-link from the Court’s Detention Centre (“DC”). For recollection, the rationale behind this recommendation was, *inter alia*, that, once inside a prison facility, infections are difficult to contain. [REDACTED].

5. Since then, the Medical Officer within the Court’s DC (“MO”) has recently relayed medical information on the evolution of the Pandemic in The Netherlands [REDACTED]. With regard to the possible easing of the measures currently in place at the detention centre and within the host State prison, the MO has informed as follows.
6. Following the Pandemic and even when a vaccine will be available, it is unlikely that we will be able to return to the ‘old normal’ experienced before the pandemic until there is a viable and available vaccine. Easing the measures is particularly challenging when considering [REDACTED]. Taking into account the [REDACTED] duty of care, a [REDACTED] decision making with regard to implementing measures concerning COVID-19 prevention and to easing these measures, is recommended. Moreover, [REDACTED] need to be flexible and prepared, in case of subsequent new spikes in viral trends, to reassess the measures in the new normal and accept the possible return to earlier, stricter measures.
7. Any easing of measures must be premised upon risk management. To assess the possibilities within the International Detention Facilities regarding easing the COVID-19 measures, not only the medical requirements need to be taken

³ Registry, “Registry’s Observations on methods of work to minimise the impact of COVID-19 and related measures on the conduct of proceedings (ICC-01/12-01/18-776)’’ (“Registry’s Observations’’, 20 May 2020, ICC-01/12-01/18-824.

into account but also the security and logistical implications. In this context, new protocols are prepared in view of the easing of the measures, such as:

-) a COVID-19 [REDACTED] protocol : Detainees with COVID-19 symptoms and who have tested positive but who do not need hospitalisation will be separated [REDACTED] apart from the rest of the detainees, with specific preventative measures in place;
-) a new/returning detainee protocol: a new/returning detainee will be tested upon arrival and segregated from other detainees for 14 days with specific preventative measures, upon which he will be tested again. If tested positive detainee will be transferred [REDACTED]; and
-) a visitors protocol (under development and similar to the protocol so far developed for entering the Court's premises as explained below): it is strongly recommended to triage all visitors at the International Detention Facilities entrance with a questionnaire and temperature measurement, as well as provide instructions regarding social distancing and the hand washing procedure.

8. As to a given timeline for the easing of the COVID-19 measures, the host State custodial authorities' policy on such a relaxation will be useful guideline. The MO recommends cautiously observe the consequences of national and international easing of the measures, which took effect on 1 June 2020. The MO is of the view that in the coming weeks, it should become apparent what impact this policy of easing the measures will have on the number of people, on average, that one infected person will pass the virus onto. If such a number increases, the eased measures will need to be nationally modified.
9. Therefore, at present and pending the effective easing of the restrictions measures in detention, the situation reported one month ago, in May, remains unchanged for the time being. In these circumstances, the Registry will periodically update the Chamber on the easing of measures as they happen.
10. As a concrete solution in the meantime, even if Mr Al Hassan would remain at the DC and be present at all hearings *via* video-link, the Registry can now accommodate a system by which counsel is able to communicate during a

court session in a privileged and discreet manner with his client through a secured telephone line and with interpretation. This scenario has been tested during the recent first appearance hearing on 15 June 2020 in the case *The Prosecutor v. Ali Muhammad Ali Abd-Al Rahman (Al Kushayb)*.⁴ For the sake of completeness concerning the temporary physical separation between counsel and their clients, albeit in a situation where persons are not detained, the communication system proposed above has also been considered satisfactory for the purpose of the 22-24 June appeals hearings in the case *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*.⁵

11. In any event, when his presence in the courtroom will be rendered possible, Mr Al Hassan will be requested, like any other person present in the courtroom, to follow the protocol designed by the Occupational and Health Unit (“OHU Protocol”) and annexed to the recent Presidential Directive ICC/PRESG/2020/001 (“PD 2020”).⁶
12. In accordance with the OHU Protocol Mr Al Hassan will thus have to be medically cleared sufficiently in advance of the hearing. If both Mr Al Hassan and the Defence are present in the courtroom, they will have to wear masks to communicate in a discreet manner. In addition, the Registry draws the Chamber’s attention to the following: if Mr Al Hassan comes out of [REDACTED] the DC and makes an appearance in Court, he will necessarily

⁴ [REDACTED].

⁵ Appeals Chamber, *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, “Decision rescheduling the hearing before the Appeals Chamber”, ICC-02/11-01/15-1359, 17 June 2020, para. 17; “Should either Mr Gbagbo or Mr Blé Goudé not be physically present in the same room as his counsel or members of his defence team, he will be able to communicate confidentially with them, through other electronic means. The Appeals Chamber considers that confidential communication either by telephone or by way of other online technology, suffices for this purpose in the particular circumstances of this case”.

⁶ Policy concerning the physical reopening of the Court’s Buildings and the related terms of access and use in connection with the COVID-19 Pandemic” with its Annex, ICC/PRESG/2020/001, 5 June 2020. The PD 2020 establishes the policy governing the access to, and use of, the Court’s Buildings, including of the Court’s premises in The Hague. It includes the relevant rules applicable, inter alia, to the medical examinations, the medical clearance process and related medical records. The PD 2020 – which forms an integral part of the Court’s legal framework – provides the protection level afforded to such medical records and establishes the parties that can have access to them.

have been potentially exposed to the COVID 19 virus by a number of people, including the transport team from the DC to the Court's premises, the security guards SSS at Headquarters and his own Defence team. Therefore, he will have to go [REDACTED] on his return to the DC for 14 days pending a negative COVID 19 test. This will be done to safeguard and ensure the safety of the other detained persons in the DC [REDACTED].

(ii) *Mr Al Hassan's ability to meet in person with his Defence team*

13. On 20 May 2020, in its Registry's Observations,⁷ the Registry generally informed the Chamber that "consultations are being held about in-person visits by the Defence at the DC, as any such visit is currently suspended due the Pandemic and, if re-instated, must also abide by the host State measures adopted as a result of COVID-19".⁸

14. More specifically and by way of background, on 19 March 2020, the Chief Custody Office ("CCO") communicated his "URGENT New Detention Centre Temporary Measures Regarding COVID-19" ("Urgent Measures") to all detained persons and their respective counsels.⁹ As part of the Urgent Measures, and based on the host State measures,¹⁰ the CCO informed all detained persons of the temporary suspension of all visits to the DC, including legally privileged visits, which can still be conducted *via* telephone communication. Due to the ongoing nature of the Pandemic, these measures, which are in place at the DC to protect the health and safety of the detained

⁷ Registry, Registry's Observations, 20 May 2020, ICC-01/12-01/18-824.

⁸ Registry, Registry's Observations, 20 May 2020, ICC-01/12-01/18-824, para. 22.

⁹ Email from the CCO to all Defence teams, "Urgent - New DC temporary measures regarding COVID-19", 19 March 2020 at 15:16.

¹⁰ Annex and *see also*, Government of Netherlands, Custodial Institutions Agency (DJI) takes protective measures to prevent spread of coronavirus, 13 March 2020, available at <https://www.government.nl/topics/coronavirus-covid-19/news/2020/03/13/custodial-institutions-agency-dji-takes-protective-measures-to-prevent-spread-of-coronavirus> and https://icpa.org/wp-content/uploads/2020/03/Netherlands_Custodial_Institutions_Agency.pdf.

persons, have been extended until the 29 June 2020 (included) with the approval of the Presidency.¹¹

15. For the sake of completeness, all measures put in place at the DC have been taken with due consideration of regulations 90 and 103 of the RoC to protect the health and the safety of the detained persons by “minimizing the number of contact to detained persons, and thus the risk of contamination”.¹² The Urgent measures are following the recommendation of the Medical Officer ("MO"), pursuant to regulation 155(2) of the Regulations of the Registry. The renewed Presidency's approvals to suspend the application of certain regulations in accordance with regulation 96(2) of the RoC (e.g. regulations related to in-person visits be they privileged or not) are equally based on the MO's advice to maintain restrictions measures to address the Pandemic.

16. Furthermore, the approved measures were undertaken following consultation and agreement [REDACTED], as part of the [REDACTED] duty of care to all detained persons housed together during the Pandemic as stated above.

17. In light of the above, due to the temporary suspension of all in-person visits in detention as approved by Presidency, the Registry, following the host State policy on COVID-19 measures does not facilitate a physical visit of Mr Al Hassan by his defence team since such visit can take place digitally as explained below. Depending on the evolution of the Pandemic, the in-person privileged visits would resume when the host State custodial authorities will ease the restrictions measures in the host State prison.

18. As a concrete solution in the meantime, privileged visits can be conducted digitally using secured video-conferencing technology. The Registry has been working towards developing and rolling out a system of facilitating video

¹¹ [REDACTED].

¹² See in Annex, [REDACTED].

conferencing between the defence teams and detained persons. After having faced and overcome a number of legal, technical and security issues, the Privileged Video Conference (“PVC”) is now established at the DC with final quality assurance testing having taken place. Guidance on its use and the booking of PVC slots by counsel for privileged meetings has been sent to all Lead Counsel. [REDACTED]¹³ [REDACTED]. [REDACTED].

19. Therefore, the PVC has been implemented as a temporary alternative to physical visits in response to the temporary suspension of Defence team visits at the DC during the COVID-19 crisis. Again, this temporary solution will remain in place pending the upcoming easing of measures as explained above.

(iii) Defence ability to conduct in situ investigations

20. Should the Chamber wish to assess the Defence ability to investigate, the Registry notes that consideration may need to be given to both (a) conjectural and (b) structural issues as further detailed below.

21. The Defence has identified four so-called “structural” issues, “yet to be resolved”, namely:

- “a. [REDACTED];
- b. [REDACTED];
- c. [REDACTED]; and
- d. Whether the Defence can be indemnified or provided temporary ICC insurance if they are required to sign UN waivers.”¹⁴

22. The Registry submits that issues (a), (b) and (c) relate to missions requests [REDACTED]. The approval of said missions is depending on conjectural issues (as opposed to structural issues), namely the improvement of the Pandemic situation. The request (d) above may raise more “structural” issues as explained below.

¹³ [REDACTED].

¹⁴ Defence, Defence Observations, para. 19.

a) Updates with regard to missions requests (a), (b) and (c)

Missions request (a) to [REDACTED]

23. [REDACTED].

24. REDACTED:

“[REDACTED]”¹⁵

25. [REDACTED].¹⁶

26. [REDACTED].

27. [REDACTED].

Missions requests to and/or within Mali (issues (b) and (c))

28. [REDACTED]:

“[REDACTED]”

29. With regard to mission requests, the CSS is the first point of contact with external teams. When mission requests are received, the CSS applies a *prima facie* assessment on the availability of funds in the team's budget and checks whether the administrative procedures have been followed (advance notice, signatures,...). In the event that sufficient funds are available to conduct the mission and cover the estimated expenses, the CSS sends the mission request to the Registry specialist sections [REDACTED].

30. In turn, the Registry [REDACTED] will contact, depending on the specific mission request, the relevant state authorities to further facilitate the execution of the mission. The CSS is kept regularly updated as to mission preparations (and progress) so it is able to adequately inform the respective Defence or Victims teams and take appropriate internal actions in case of difficulties.

¹⁵ [REDACTED].

¹⁶ [REDACTED].

31. The Registry clarifies that the “approval” of the mission by the CSS is merely an administrative approval and does not concern the actual provision of services/assistance provided on the ground. As explained above, the final decision to endorse a mission is a decision made on the basis of the feasibility assessment by all stakeholders supporting the mission [REDACTED]. It is communicated by CSS to the respective Defence or Victims teams.

32. In the case at hand, on 20 May 2020, the Registry informed the Chamber on matters regarding, *inter alia*, the current situation and projected situation in terms of the COVID-19 measures over the next six months in Mali and the feasibility of field missions in the next four months.¹⁷ As the present submissions [REDACTED], the Registry provides below updated information on (1) the evolution of the Pandemic in Mali since last 20 May 2020 and (2) the current capacity at the time of Pandemic of key actors possibly supporting the Court’s missions in the field.

1 - COVID-19 measures in Mali

33. The relevant information submitted in the Registry Observations remains valid with the updates provided below.

34. On 17 June 2020, Mali reported 1890 COVID-19 cases, [REDACTED]. Due to the deteriorating Pandemic in Mali, the airports in Mali remain closed for commercial flights until 30 June 2020. It is anticipated that such a closure might be extended. Personnel arriving at Bamako (e.g. from cargo or humanitarian flights still operating) are required to self-quarantine for 14 days. The Government of Mali continues to implement enhanced screening and quarantine measures to reduce the spreading of the COVID-19 virus, which has an impact on the missions in country.

¹⁷ Registry, “Registry’s Observations”, 20 May 2020, ICC-01/12-01/18-824, paras. 4 to 8 and Annex I.

2 - Current capacity at the time of Pandemic of key actors possibly supporting the Court's mission in the field

35. [REDACTED].

36. [REDACTED].

37. In terms of international travel to and from Mali, in light of the closure of borders and the reduced capacity of many commercial service carriers to the situation countries, [REDACTED].

38. In light of the above [REDACTED], the current Pandemic situation renders those missions logistically impossible in a near future.

b) Update on the structural issue (d) – request to be indemnified or provided temporary ICC insurance if defence team members are required to sign UN waivers

39. [REDACTED]. The mission ultimately did not take place because the Defence did not sign the UN waiver required for any person to board a [REDACTED] plane, [REDACTED].

40. For recollection as to the context of the request (d), the Registry understands that the Defence seems to condition the signature of the UN waivers, which is not a Court but a UN requirement, to the compensation by the Court of the Defence team members or their respective family members in case of service-incurred death, injury or illness during mission. According to the Defence, there would be a situation of inequality of arms with regard to the parties' respective abilities to conduct investigation missions. The Defence avers that this is so because members of the Office of the Prosecutor ("Prosecution") or Prosecution's intermediaries benefit from this indemnification and the Defence would not. The Defence is well aware that, by status, staff from the Prosecution cannot be compared to defence team members. The Registry also

recalls that the compensation scheme for service-incurred death, injury or illness (i.e. Appendix D) benefit to Prosecution's intermediaries by virtue of an Assembly of State Parties' resolution, and specifically, by contracting them as individual contractors.¹⁸ Such a resolution does not exist for counsel and their respective team members, who are not considered – due to their independent status - as individual contractors (or consultants) signing a working contract with the Court. There is therefore no legal framework for counsel to be compensated under Appendix D.

41. The Registry further clarifies that, in any event, the benefit of compensation for service-incurred death/injury/illness by Prosecution intermediaries hired as consultants and individual contractors does not exempt them from their obligation to contract their own health insurance. Likewise, even if a service-incurred insurance for counsel and their team members is found – [REDACTED] -, they would still have to have their own health insurance.

42. In light of the above, since request (d) raises systemic issues, - which do not only concerns the Defence but also all teams on mission, including legal representatives of victims - , the Registry and the ICC Bar Association ("ICCBA") will continue to discuss the matter with the aim of achieving an acceptable outcome, as appropriate, including identifying insurance providers, be it through the Court, the ICCBA or defence team members. To this effect, internal consultations continue to take place within the Registry. Involving the insurers is key in order to determine the business requirements, including population of the insured or risk group, demographics of insured individuals, income, benefits of coverage, derogations, and other sets of

¹⁸ Through ICC-ASP/12/53, it was decided to contract Prosecution intermediaries as individual contractors. The conditions of service for individual contractors/consultants attached to that ASP resolution (in Annex 1) include the right to compensation in the event of service-incurred death, injury or illness, as regulated under Appendix D. Pursuant to Section 6.28 of the Court's Administrative Instruction on Consultants and Individual Contractors ("ICC/AI/2016/002/Cor. 1"), consultants and individual contractors, or their dependants as appropriate, shall be entitled to compensation under Appendix D. On this basis, it can be concluded that Appendix D coverage also extends to Prosecution intermediaries as long as they are contracted as individual contractors.

information insurers normally ask. This information, which is in the possession of counsel themselves or possibly the ICCBA, is the basis on which insurers can determine how much it will cost said insurers to cover for the incurred risk.



p.p. Marc Dubuisson
Director Division of Judicial Services
on behalf of Peter Lewis, Registrar

Dated this 15 July 2020

At The Hague, The Netherlands