

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **24 June 2020**

Date of submission:

30 November 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 Confidential *ex parte* Annexes A and B [Registry and Defence only]

Public redacted version of ‘Defence request for leave to reply to “Registry’s Observations on the Defence Rule 134(1) Observations (ICC-01/12- 01/18-870-Conf-Exp)” - ICC-01/12-01/18-891-Conf-Exp’ (ICC-01/12-01/18-899-Conf)

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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**Victims Participation and
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I. Introduction

1. The Defence for Mr. Al Hassan seeks leave to reply to the observations of the Registry¹ ('Registry Observations') in relation to the following discrete issues:
 - a. Legal visits to the Detention Unit;
 - b. Mr. Al Hassan's position as concerns the use of Web-ex/video-conferencing; and
 - c. The status of Registry and ICCBA discussions on issues of mission insurance.
2. For each of these issues, the Registry has raised new or unforeseen information, that the Defence could not have foreseen in its initial observations. Given the *ex parte* nature of these issues, it is also not practical for the Defence to address these matters during the Status Conference, within the framework of the agenda established by the Single Judge.

II. Submissions

Legal Visits to the Detention Unit

3. The Registry Observations does not set out a clear basis for either prohibiting legal visits at the present juncture nor is there any indication as to when visits will be allowed. Instead, it would appear that the MO [REDACTED] has recommended that the ICC "cautiously observe the consequences of national and international easing of the measures, which took effect on 1 June 2020."²
4. The indefinite nature of these restrictions, and related uncertainty as to if and when they might be lifted, are generating a considerable degree of stress for Mr. Al Hassan, particularly as the underlying rationale for the prohibition appears to him, and other detainees, to be illogical. ICC guards come in and out of the facility each day, and interact directly with the detainees. This includes handing them food, and entering their cells. The composition of the guards changes throughout the day. External medical staff also visit the detainees. All of these interactions entail the same degree of risk that would result from a legal visit. And given that the overarching purpose of Mr. Al Hassan's detention is to ensure his presence for

¹ ICC-01/12-01/18-891-Conf-Exp.

² ICC-01/12-01/18-891-Conf-Exp, para. 8.

trial, it is difficult to see why legal visits are not being afforded a similar or sufficient degree of priority.

5. Mr. Al Hassan also has no interactions with the Mechanism detainees, who are limited in number, and have either completed their proceedings, or are at a stage where interactions with their Counsel are of less importance. Since their situation is different, the Defence is concerned by the fact that Mr. Al Hassan's rights are being restricted due to the arbitrary notion that it is somehow necessary to adopt the same policy for the ICC, as is adopted for the Mechanism.
6. Since the Registry mentioned, without attaching or hyperlinking, the Host State Policy, the Defence has endeavoured to locate this policy. In doing, it has identified the following information, which it seeks leave to introduce to the Chamber. According to the policies adopted by the Dutch authorities:
 - a. Essential legal visits were allowed throughout the COVID-19 pandemic;³ and
 - b. As of 1 June 2020, penitentiary centers also allowed non-legal visits from family members (1 visit of 1 hour *per* week).⁴
7. In a public redacted filing in the *Yekatom and Ngaïssona* case, the Counsel for Mr. Ngaïssona indicates that he has been able to visit clients in other facilities in The Netherlands.⁵
8. Given firstly, that Dutch prisoners and detainees are allowed to receive visits from their lawyers, and secondly, the importance of effective legal communication between Counsel and clients in cases involving allegations of war crimes and crimes against humanity, it is difficult for Mr. Al Hassan to understand the basis for deviating from Dutch policies in respect of ICC detainees.
9. Whereas the Registry Observations refers to medical advice provided by [REDACTED], the Defence would like to note that this medical advice has not been provided to either the

³ Fair trials "Short update" 30 March 2020, <https://www.fairtrials.org/news/short-update-prison-visiting-room-hours-cancelled-netherlands>.

⁴ Annex A (translation).

⁵ *Prosecutor v. Yekatom and Ngaïssona*, 'Public redacted version of "Request to allow Defence team in-person visit to Mr Ngaïssona in order to prepare for the Status Conference of 9 July 2020"', 23 June 2020, ICC-01/14-01/18-564-Red, para. 16.

Defence or Mr. Al Hassan. Given the Registry's reliance on this advice, it is pertinent to note that:

- a. In light of the fact that the initial memorandum concerning the imposition of restrictions referred to medical advice from [REDACTED], the Defence requested the Registry to provide the Defence with any medical advice provided by [REDACTED] to the Registry on this point. The Registry responded that:⁶

As to your mention of the CCO measures regarding COVID-19, there are no documents pertaining to Mr Al Hassan to provide you with. Internal Registry discussions do not involve detained persons or their medical records but are rather administrative matters. Specific questions regarding Mr Al Hassan and his medical treatment during COVID-19 can be addressed directly to the Medical Officer by Mr Al Hassan using the appropriate request forms that he has in the Detention Centre.

- b. On 4 May 2020, the Defence wrote to [REDACTED] directly, to request access to "all records and advice concerning Mr. Al Hassan's medical situation, from 12 March 2020 until the present day."⁷ The Defence further noted "that the Registry indicated that your medical opinion was sought in relation to the effects of the lock down measures in relation to the detainees", and therefore asked "that this advice be included insofar as it concerns Mr. Al Hassan". The Defence received no response from [REDACTED]. Instead, on 12 May, the legal officer for the detention unit informed the Defence that in order to obtain access to such records, it would be necessary for Mr. Al Hassan to submit a new written request. The legal officer further noted that⁸:

the MO informed us that he does not have any specific information regarding Mr Al Hassan and the COVID-19 measures. All detained persons are vulnerable to the virus just as all humans are vulnerable to the virus. The Detention Section and the medical team have enacted the measures in the CCO memos to protect the detained persons to the extent possible.

⁶ Email from the Registrar to the Defence, 1 May 2020 at 14:22.

⁷ Email from the Defence to [REDACTED] on 4 May 2020 at 13:31.

⁸ Email from the Legal officer to the Defence on 12 May 2020 at 12:34.

10. The Defence does not have the time and resources to engage in a new wave of litigation on this point, and would be unfair to expect Mr. Al Hassan to personally shoulder the burden of doing so. It is, in any case, apparent from the above correspondence that [REDACTED]'s advice concerning the prolongation of the COVID-19 restrictions might not have been based on a case-by-case assessment of the impact of such measures on the specific circumstances of individual detainees, taking into account, in particular, specific mental health issues, the vulnerable nature of the detainees in question, and the proportionality of such measures in light of the consequences for the detainees' fair trial rights.
11. Given the link between such matters, and the conduct of the proceedings in this case, these issues should not be shielded from any form of judicial scrutiny or oversight: if advice is being relied upon to take decisions that affect core fair trial rights, then this advice should be made available to persons who are directly affected by it, so that the implications can be addressed, in an informed manner, before the Chamber. This advice also should not bind the Registry or the Chamber if there is a conflicting advice, including the advice that informed the policies of the Host State. And, it might also be helpful to solicit the views of the ICRC, as the entity responsible for monitoring detention conditions, as concerns the impact of these restrictions, on an indefinite basis, on the mental health of the detainees.

Mr. Al Hassan's position as concerns the use of [REDACTED] video-conferencing

12. This option was presented to Mr. Al Hassan in the third month of lockdown. During these months, he has reviewed a significant amount of materials that have resurrected painful memories for him, and triggered nightmares. This includes [REDACTED]. The Defence would have wished to review these materials with him, in order to gauge his reactions, and provide in-person support. That was not possible. The Defence has been advised to listen to him, and to make sure he feels heard and that is what the Defence is doing.
13. Mr. Al Hassan has informed the Defence that he does not wish to communicate with the Defence via Webex or to participate via video-conferencing. He has informed the Defence that when he considered these options, it triggered harmful memories for him. At present, he also feels cut-off from the outside world, and does not wish to use any technology that reinforces this sense of distance, and his fear concerning the indefinite nature of his separation from his Defence. This fear is aggravated by the absence of clear and comprehensible reasons for the current measures, and the lack of information as concerns

when they will be lifted. There has been no dialogue with the detainees on these issues to solicit their views and concerns: Mr. Al Hassan was instead merely provided a memorandum in French.⁹

14. In light of the above considerations, Mr. Al Hassan has informed the Defence that he intends to waive his right to participate during the Status Conference. The Defence will endeavor to obtain his views, during the proceedings, by communicating, in real time (through electronic means) with a person in the office, who will speak to Mr. Al Hassan on the privileged phone line. The efficacy of this measure may depend on lockdown times, and the detention unit schedule.

The status of Registry and ICCBA discussions on issues of mission insurance

15. The Registry has indicated, in the Registry Observations, that:¹⁰

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 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.

16. In order to gauge the likely time-frame as concerns the outcome of such discussions, the Defence requested the ICCBA to provide a status update as concerns its discussions with the Registry on this issue. According to the timeline of communications, attached,¹¹ there have been no substantive discussions since 10 March 2020, and whereas the Registry indicated, on 27 March 2020, that it would revert to the ICCBA in due course in relation to the ICCBA proposal (sent on 20 March 2020), no substantive response has been provided.

⁹ Mr. Al Hassan has consistently requested to receive written communications in Arabic.

¹⁰ ICC-01/12-01/18-891-Conf-Exp, para.42.

¹¹ Annex B.

17. Although such matters may fall within the remit of the Registry, the notion of equality of arms, within international trials, must be construed broadly, in order to encompass the *impact* of such structural issues on fair trial rights.¹² This may include judicial consideration as to whether this issue is being addressed, with sufficient diligence and expedition, with a view to identifying solutions that can be implemented as soon as possible.

III. Relief Sought

18. For the reasons set out above, the Defence for Mr. Al Hassan respectfully requests the Trial Chamber **GRANT LEAVE** for the Defence to reply to the Registry Observations, on the issues identified above.



Melinda Taylor
Counsel for Mr. Al Hassan

Dated this 24th Day of June 2020
At The Hague, The Netherlands

¹² See *Prosecutor v. Tadic*, [Appeals Judgment](#), para. 52.