

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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15 January 2021

TRIAL CHAMBER X

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
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 the “Prosecution’s response to Defence’s
“Urgent Request for Custodial Visit on Compassionate Grounds”,
18 December 2020, ICC-01/12-01/18-1224-Conf-Exp**

Source: Office of the Prosecutor

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

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Introduction

1. Trial Chamber X (“Chamber”) should dismiss the Defence’s urgent request to allow Mr. AL HASSAN (or “Accused”) a custodial visit to either Bamako or Timbuktu on compassionate grounds (“Defence request”).¹ The Defence request, which effectively amounts to a request for conditional release of the Accused, does not meet the requirements under article 60(2) of the Statute.
2. The Prosecution is sincerely sympathetic to the Accused’s wish to meet his family in person to mourn the recent death of his daughter. However, in light of the recent developments in Mali, in particular, the prisoners-hostages exchange, the conditions proposed by the Defence cannot adequately mitigate the risks under article 58(1)(b) of the Statute that he might abscond, disrupt the Court’s proceedings, or continue the commission of crimes within the jurisdiction of the Court.
3. Moreover, the Defence fails to substantiate the willingness and ability of the Malian authorities to receive the Accused on its territory, maintain him in detention and impose any additional conditions which may be attached to his release.
4. The Prosecution suggests that instead of a conditional release of the Accused to Mali, other measures may be explored, such as communications via video link and a family visit to the seat of the Court organised by the Registry as soon as practicable.
5. In fact, in the context of the ongoing trial and upcoming testimony of Prosecution witnesses from Mali, it is vital that the Accused remains in detention, [REDACTED]
[REDACTED] and ensure the preservation of the evidence, the integrity of the proceedings and the manifestation of the truth.

¹ ICC-01/12-01/18-680 [REDACTED]-Red.

Confidentiality

6. This Request is classified as confidential, pursuant to regulation 23bis(1) and (2) of the Regulations to maintain the confidentiality of the Defence request. It is also *ex parte* since refers to a decision classified as such and to [REDACTED]. [REDACTED] The Prosecution will file confidential and public redacted versions of the Response shortly.

Procedural history

7. On 5 May 2020, the Chamber dismissed the Defence request for interim release of the Accused for the duration of the COVID 19 pandemic, finding, among others, that: (i) the Accused's continued detention appears necessary to ensure his appearance at trial and to prevent him from continuing to commit crimes under the Court's jurisdiction pursuant to article 58(1)(b)(i) and (iii) of the Statute;² (ii) the security risks could not be adequately mitigated by conditions on a release to Mali,³ or "strong family ties" as submitted by the Defence.⁴
8. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁵
9. On 15 December 2020, the Defence informed the Chamber, the Prosecution and participants via email that the Accused's 6 year old daughter had died from malaria the previous day and requested that the Accused be permitted to speak to his family on a daily basis over the coming days.⁶ The Prosecution immediately expressed its sincere condolences and did not oppose the request, [REDACTED]. On the same day, the Single Judge of the Chamber granted the request and directed the Registry to facilitate

² ICC-01/12-01/18-786-[REDACTED], para. 57-73. In this decision, the Chamber did not consider whether the Accused's continued detention was necessary pursuant to article 58(2)(b)(ii) of the Statute to ensure that he does not obstruct or endanger the investigation or the proceedings because the relevant matters were being litigated by the parties in [REDACTED].

³ ICC-01/12-01/18-786-[REDACTED], para. 75.

⁴ ICC-01/12-01/18-786-[REDACTED], para. 79.

⁵ [REDACTED].

⁶ Email from the Defence on 15 December 2020 at 12:22.

additional communication between the Accused and his immediate family over the coming next two weeks.⁷

10.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁸ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁹

Applicable law

11. According to the Appeals Chamber, conditional release is possible in two situations: “(1) where a Chamber, although satisfied that the conditions under article 58(1)(b) are not met, nevertheless considers it appropriate to release the person subject to conditions; and (2) where risks enumerated in article 58(1)(b) of the Statute exist, but the Chamber considers that these can be mitigated by the imposition of certain conditions of release”.¹⁰
12. The Appeals Chamber judgement in *Bemba* also specified that: “In granting conditional release it is necessary to specify the appropriate conditions that make conditional release feasible, identify the State to which Mr Bemba would be released and whether that State would be able to enforce the conditions imposed by the Court.”¹¹

⁷ Email sent by the Legal Officer on behalf of the Single Judge of Trial Chamber X on 15 December 2020 at 13:20.

⁸ [REDACTED]

⁹ [REDACTED]

¹⁰ ICC-01/05-01/08-1626-Red, para.55.

¹¹ ICC-01/05-01/08-631-Red, para. 2.

Submissions

1. The requirements for granting conditional release are not met

1.1. The conditions justifying detention under article 58(1)(b) of the Statute continue to exist

*Continued detention of the Accused is necessary to ensure
his appearance at trial*

13. With regard to the existence of the risks under article 58(1)(b)(i) of the Statute, the Prosecution incorporates by reference its submissions in paragraph 24-30 of its Response to the Defence request for interim release.¹²
14. The Prosecution further notes that since the commencement of the presentation of its case in September 2020, important evidence against the Accused has already been submitted into the record of the case. If anything the case against the Accused has become even more compelling. Prosecution Witnesses have testified before the Court that the Accused was part of the Islamic Police¹³ and took part in the execution of punishments – [REDACTED]
[REDACTED].¹⁴ In sum, the gravity of the charges against the Accused coupled with the possibility that he faces a long prison sentence, if convicted, also supports the existence of a substantial flight risk of the Accused, if released.¹⁵
15. The requirements relating to COVID-19, in particular, the quarantine upon return to the ICC Detention Centre in The Netherlands, could also affect the trial hearings scheduled to resume on 18 January 2021.

¹² ICC-01/12-01/18-697 [REDACTED]-Red, para. 24-30.

¹³ See, for example, [REDACTED]

¹⁴ See, for example, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

¹⁵ ICC-02/11-01/15-992-Red, para. 69: “if the charges brought against the detained person are serious, they may result in a lengthy prison sentence in case of a conviction; this, in turn, indicates a probability that the detained person has motivation to abscond.”

Continued detention is necessary to ensure that the Accused does not obstruct or endanger the investigation or the court proceedings

16. With regard to the existence of the risks under article 58(1)(b)(ii) of the Statute, the Prosecution incorporates by reference its submissions in paragraph 31-35 of its Response to the Defence request for interim release.¹⁶

17. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Continued detention is necessary to prevent the Accused from continuing with the commission of crimes

18. With regard to the existence of the risks under article 58(1)(b)(iii) of the Statute, the Prosecution incorporates by reference its submissions in paragraph 36-38 of its Response to the Defence request for interim release.¹⁷

1.2. The proposed conditions are insufficient to mitigate the risks under article 58(1)(b) of the Statute

19. The conditions proposed by the Defence that may be attached to the Accused's release in Mali cannot adequately mitigate the risks enumerated under article 58(1)(b) of the Statute.

20. The guarantees proffered by the Accused¹⁸ are wholly insufficient to ensure his continued appearance at trial, particularly given the security situation in the

¹⁶ ICC-01/12-01/18-697-[REDACTED] Red, para. 31-35.

¹⁷ ICC-01/12-01/18-697-[REDACTED] Red, para. 36-38.

¹⁸ Annex B to Defence request.

north of Mali which seriously limits access to the specific area where the Accused's family resides, not only by the Court but also by national law enforcement agencies. [REDACTED]

- [REDACTED]
21. Most importantly, the Defence fails to substantiate the willingness and ability of the Malian authorities to receive the Accused on its territory, maintain him in detention and enforce any additional conditions which may be imposed pursuant to rule 119(1) of the Rules in order to address all the risks under article 58(2)(b) of the Statute. It merely refers to the existence of flights it alleges still operating between The Netherlands and Mali, and between Bamako and Timbuktu, without giving any details on the said flights, their ability and willingness to transport a detainee such as the Accused, or the escort that would be necessary for such a trip.¹⁹ In fact, it appears that the Malian authorities and MINUSMA have not been consulted on this important matter.
 22. Should the Accused be permitted to visit his family in Timbuktu, Malian authorities would be unable to effectively enforce any such conditions. [REDACTED]
[REDACTED]²⁰ [REDACTED]
[REDACTED]
 23. Even if the Accused were to be transferred into a custodial facility in Bamako, it is uncertain if the Malian authorities would be able and willing to maintain him in detention and enforce any conditions that may be attached to the Accused's release to Mali. [REDACTED]
[REDACTED]²¹ Malian authorities recently released approximately 200 alleged members of armed groups, who had previously been detained in Bamako, in exchange for four foreign hostages held by those groups.

¹⁹ Defence request, para. 16.

²⁰ See, for example, [REDACTED].

²¹ [REDACTED].

2. There are measures other than conditional release that may be explored

24. While, in general, detained persons have the right to communicate with their family, these rights are not absolute. They can be subject to legitimate restrictions.²²
25. Pursuant to the Single Judge's decisions, the Accused has already been granted the possibility to communicate with his family on a daily basis for the next two weeks. There may also be other measures that could be explored, such as communications via video link and a family visit to the seat of the Court, rather than allowing the Accused's conditional release to Mali.

3. The alleged "humanitarian circumstances" do not justify release

26. At the ICC, there have been only two instances, both in the *Bemba* case, in which a Chamber authorised conditional release of a suspect or an accused on the basis of "exceptional humanitarian circumstances".²³
27. The circumstances and the type of conditional release granted in those instances are markedly different from the present case. Mr. Bemba was allowed to travel to Belgium – at all times escorted by the Dutch or Belgian police and often in handcuffs – to attend the funerals of his father and his stepmother for no more than 24 hours. In contrast, the Defence seeks conditional release of the Accused for an unspecified period of time without having consulted the Malian authorities and MINUSMA and proposes no real means of ensuring that the Accused will return to the seat of the Court.

²² See, for example, article 8 of the European Convention on Human Rights, which allows for interference in the exercise of the right to respect for one's private and family life, their home and their correspondence if it is "in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." See also principle 19 of the [UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#): "A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations."

²³ ICC-01/05-01/08-437-Red, para.9; ICC-01/05-01/08-1099-Red, para.13, 15.

28. It should also be noted that the Appeals Chamber has not confirmed whether a Chamber has the power to order release for “humanitarian reasons” outside the framework of article 60(3) of the Statute.²⁴
29. In light of the risks that would be posed by releasing the Accused and the likely impact on the ongoing trial proceedings, he cannot be granted conditional release based on “exceptional humanitarian grounds” claimed by the Defence.

Conclusion

30. For the foregoing reasons, the Chamber should dismiss the Defence request, and order that the Accused should remain detained.
31. Should the Chamber nevertheless be minded to favourably consider the Defence request, it should seek the views of the Malian authorities pursuant to rule 119(3) of the Rules. [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]



Fatou Bensouda
Prosecutor

Dated this 18th December 2020

At The Hague, The Netherlands

²⁴ ICC-01/05-01/08-1626-Red, para.85.