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APPEALS CHAMBER

Before: Judge Luz del Carmen Ibáñez Carranza, Presiding
Judge Chile Eboe-Osuji
Judge Howard Morrison
Judge Piotr Hofmański
Judge Solomy Balungi Bossa

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 ‘Corrigendum to ‘Defence Appeal of the Trial Chamber’s
“Decision on the urgent Defence request for a custodial visit on compassionate
grounds” (ICC-01/12-01/18-1227-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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I. Introduction ¹

1. The Defence hereby files its appeal against the ‘Decision on the urgent Defence request for a custodial visit on compassionate grounds’² (‘Decision’).³

II. Submissions

2.1 Preliminary Questions Raised by the Appeals Chamber

2.1.1 The Timeliness of the Appeal

2. The Trial Chamber has the power to suspend the date of effective notification of its decisions, for the purpose of calculating deadlines arising from the issuance of such decisions. The caveat, unless “*ordered by the Chamber*”, in Regulation 31(2) of the RoC makes clear that Chambers may vary the dates of notification. In line with this power, there are various examples where Trial Chambers have effectively suspended the notification date for decisions that trigger either an automatic right of appeal before the Appeals Chamber, or a deadline set out in the Rules of Procedure and Evidence (‘RPE’), which cannot be varied pursuant to Regulation 35 of the RoC. The Appeals Chamber has considered appeals, submitted pursuant to such delayed notifications, to be receivable. For example, although the deadline for filing a notice of appeal is established by Rule 150(1) of the RPE would, ordinarily, fall within the competence of the Appeals Chamber, in *Lubanga*, the Trial Chamber accepted the arguments of the Defence that pursuant to Regulation 31(2) “it was within the authority of the Chamber to determine the precise moment when the parties are formally notified for the purposes of sentencing and any appellate proceedings (in the event of a conviction) or immediate release (...)”⁴ After considering judicial precedents,⁵ the Trial Chamber determined that in order to preserve the rights of the Defence, in the event of a conviction, the judgment would not be deemed notified until the defendant had received a French translation of the judgment, whereas if the Chamber issued an acquittal, the time period would commence running. Similarly, in *Gbagbo & Blé Goudé*, the Trial Chamber determined that the Article 74 judgement would not be deemed ‘notified’ until the Chamber issued its written reasons.⁶ In *Katanga & Ngudjolo*, the Defence filed its notice of appeal against the Trial Chamber’s admissibility

¹ Pursuant to Regulation 23bis(2) of the Regulations of Court (‘RoC’), this response has been filed confidentially as it refers to filings and decisions of the same classification.

² ICC-01/12-01/18-1227-Conf.

³ ICC-01/12-01/18-1212-Conf.

⁴ [ICC-01/04-01/06-2834](#), paras. 6 and 23.

⁵ [ICC-01/04-01/06-2834](#), para. 24, citing [ICC-01/05-01/08-424](#), p.185, and [ICC-01/05-01/08-424](#), p. 185.

⁶ [ICC-02/11-01/15-T-232-ENG](#), pp.3-4.

decision within five days of the issuance of the written reasons issued four days after the oral ruling.⁷ The Appeals Chamber accepted and adjudicated the appeal,⁸ notwithstanding the fact that the Chamber considered the impugned decision to be the oral ruling,⁹ and there is no right to receive a written decision or reasons, following the issuance of an oral ruling.¹⁰ There are also multiple judicial precedents, affirming the discretionary power of a Chamber to specify that deadlines will not start to run, during particular periods of the judicial recess.¹¹

3. In the present case, the parties jointly requested the Trial Chamber to suspend all time limits, apart from a specific deadline concerning redactions.¹² On 4 December 2020, the Trial Chamber confirmed “that time limits falling between 11 December 2020 and 10 January 2021 are suspended”, subject to three enumerated exceptions, and the residual ability of the Trial Chamber to “assess on a case-by-case basis whether earlier submissions are indispensable”.¹³ This decision thus resulted in a presumption of suspension for all time limits, unless expressly provided otherwise. In the Decision, the Trial Chamber did not vary the terms of the suspension as concerns the start of the time period for filing a notice of appeal. In the absence of an explicit variation, the Defence was entitled to rely on the general suspension of time limits. In filing the notice on 4 January 2021 (the 4th working day after the Impugned Decision was issued), rather than after 11 January 2021, the Defence also acted in accordance with its residual duty to act with due diligence.

2.1.2 Whether the Decision was a decision on detention or release for the purposes of Article 82(1)(c)

4. Article 82(1)(c) applies to decisions “granting or denying release of the person being investigated or prosecuted”. This article should be interpreted through the lens of Statutory provisions, which distinguish between detention at the seat of the Court, as compared to detention in the territory and custody of national authorities. The Statute sets out two distinct systems for addressing interim release, depending on whether the defendant has been surrendered to the custody of the ICC. Before surrender, Article 59(3) invests

⁷ [ICC-01/04-01/07-1234](#), paras. 6, 8, 10. Oral ruling from the Chamber: [ICC-01/04-01/07-T-67-ENG](#), p. 3, lines 4-7.

⁸ [ICC-01/04-01/07-1497](#).

⁹ [ICC-01/04-01/07-1497](#), para. 8.

¹⁰ [ICC-02/05-01/20-236](#), para. 21.

¹¹ [ICC-01/04-01/06-T-203-Red2-ENG](#), p. 64; [ICC-01/05-01/08-T-43-Red-ENG](#), p. 31, lns. 21-24; [ICC-01/04-01/07-T-173-Red-ENG](#), p. 77, lns. 9-13; [ICC-01/05-01/08-2919](#) paras. 1-2.

¹² ICC-01/12-01/18-1236-Conf-Anx, pgs. 1-2.

¹³ ICC-01/12-01/18-1236-Conf-Anx, pg. 1.

national authorities with the power to grant interim release pending surrender, but once the defendant is transferred to the seat of the Court, the ICC retains the exclusive authority for adjudicating issues pertaining to the detention and release of the defendant, pursuant to Article 60. Conversely, this provision cannot be triggered before the defendant has surrendered and appeared at the seat of the Court.¹⁴ In line with the fact that the objective of an Article 58 arrest warrant is to “ensure the person’s appearance at trial”, the presence of the person at the seat of the Court is an essential element of detention for the purpose of Article 60. Pursuant to Article 3(3) of the Statute, the seat of the Court is The Hague, unless the Court decides to sit elsewhere. It follows that transferring Mr. Al Hassan to a physical location outside the seat of the Court would effectively ‘release’ him from the Court’s custody, even if the arrest warrant otherwise remains operative, and, unlike the pre-surrender scenario governed by Article 59(3), the Court continues to exercise exclusive authority for determining the terms and conditions of his release.

5. The Trial Chamber also adjudicated the Defence Request by reference to the criteria applying to interim release under Article 60(3), and ultimately concluded that the grounds justifying ongoing detention at the seat of the Court remained fulfilled.¹⁵ The Trial Chamber’s assessment of risk further turned on its conclusion that:¹⁶

The Chamber does not consider there to be a significant difference between the present proposal that Mr Al Hassan be detained in a lawful custodial facility by the Malian authorities or MINUSMA as compared to the proposal under consideration in the First Interim Release Request, which was that Mr Al Hassan remain in supervised confinement or house arrest [REDACTED].

6. The Chamber thus resolved the matter before it on the basis of the assumption that there was no “significant difference” between a request for a custodial visit to Mali, as compared to a request for interim release, requiring the defendant to reside at a particular residence, and abide by additional restrictions. Under human rights law, both scenarios can be equated to a deprivation of liberty.¹⁷ It would therefore be inconsistent with Rule 119(e), which envisages the possibility of house arrest as a form of conditional release, to conclude that the ‘custodial nature’ of the Defence request takes it outside Article 60’s ambit. The Appeals Chamber has further affirmed that a request for modification of

¹⁴ [ICC-01/11-01/11-577](#), para. 27.

¹⁵ Decision, paras. 11-14.

¹⁶ Decision, para. 13.

¹⁷ *Guzzardi v. Italy*, App. No. 7367/76, [Plenary Judgment](#), 6 November 1980, paras. 90-95.

detention conditions to allow for conditional weekend release within the Netherlands, was properly adjudicated under Article 60(3) and appealed pursuant to Article 82(1)(b).¹⁸ The fact that release has been requested for a limited time and for the purpose of exercising a specific right also does not take the matter outside Article 82(1)(b)'s framework: the Appeals Chamber thus considered itself to be properly seized of a decision rejecting a request for a 17 hour supervised visit to the DRC to register to vote.¹⁹

7. This distinction between detention at the seat of the Court as compared to custodial arrangements in third States is also consistent with the approach adopted by the ICTY. In *Pandurevic*, the Appeals Chamber determined that a request for a custodial visit to an embassy in The Hague was not covered by Rule 65 of the ICTY RPE, because the defendant would remain on the territory of The Netherlands, and under the responsibility of the Dutch authorities, as opposed to being transferred to the custody of other national authorities.²⁰ In contrast, in *Borovcanin*, the Appeals Chamber treated a request for a custodial visit for humanitarian reasons as a request for provisional release, which, for an unconvicted person, would be adjudicated pursuant to Rule 65(1) of the RPE.²¹ Although Borovcanin had been convicted at this point, the Appeals Chamber applied Rule 65(1) by analogy, in order to ensure that the defendant was not prejudiced through the procedural oversight of the Defence.

Ground One: The Trial Chamber relied on evidence and previous evidential findings that fall under the exclusionary rule set out in Article 15 of UNCAT

8. In the Request, the Defence argued that the humanitarian circumstances arising from the sudden death of Mr. Al Hassan's daughter constituted a changed circumstance, which justified the Chamber departing from the outcome of the Decision on the Defence request for interim release ('Interim Release Decision').²² The Trial Chamber accepted that these reasons "constitute an exceptional humanitarian circumstance",²³ but, on the basis of the

¹⁸ [ICC-01/05-01/08-1019](#), para. 92.

¹⁹ [ICC-01/05-01/08-1626-Red](#), para. 85.

²⁰ *Prosecutor v. Popovic*, '[Public Redacted Version of 22 July 2011 Decision on Vinko Pandurević's Motion for Temporary Alteration of the Conditions of his Detention](#)', 9 November 2011, p.3

²¹ *Prosecutor v. Borovcanin*, [Decision On Appeal From Decision On Ljubomir Borovcanin's Request For Provisional Release](#), 1 March 2011, para. 9.

²² [ICC-01/12-01/18-1212-Red](#), para. 4.

²³ Decision, para. 8.

risks set out in the Interim Release Decision,²⁴ concluded that the imposition of conditions could not sufficiently mitigate these risks.²⁵

9. In line with appellate jurisprudence in order to maintain the outcome of the Interim Release Decision, the Chamber needed to be:²⁶

satisfied, at the time of the review decision, that grounds remain to detain. In this regard, a Chamber cannot simply refer to findings in prior decisions without being satisfied that the evidence or information underpinning those decisions still supports the findings made at the time of the review.

10. The Trial Chamber cannot restrict itself to the arguments raised by the Defence, but must “consider any other information which has a bearing on the subject”.²⁷
11. The Trial Chamber’s endorsement of the risks set out in the Interim Release Decision thus presupposes that the Trial Chamber satisfied itself that the evidence cited in support of these risks in the Interim Release Decision could be relied upon at the time the Decision was issued. Conversely, the Chamber made no reference to the fact that, at the time the Decision was issued, the Chamber had received a substantial body of evidence and argumentation concerning the existence of a real risk that this evidence was obtained in circumstances that amount to torture or cruel, inhumane and degrading treatment (‘CIDT’). By relying on evidence that falls under the exclusionary rule set out in Article 15 of the United Nations Convention against Torture (‘UNCAT’), the Trial Chamber erred in law and acted in a manner which was inconsistent with its obligation to adjudicate the request in a fair and impartial manner.

2.1.3 Article 15 of UNCAT applies to decisions on release and detention

12. As an inter-State treaty, the Statute must be interpreted and applied in a manner consistent with Article 53 of the Vienna Convention on the Law of Treaties (‘VCLT’),²⁸ which stipulates that “[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law”. The prohibition on torture is—and by

²⁴ Decision, para. 12.

²⁵ Decision, para. 12.

²⁶ [ICC-02/11-01/15-992-Red](#), para. 39. See also [ICC-01/05-01/08-1019](#), paras. 50-52.

²⁷ [ICC-01/05-01/08-1019](#), para. 52.

²⁸ [ICC-01/04-01/07-573](#), para. 5; [ICC-01/04-168](#), para. 33; [ICC-02/05-01/09-392](#), para. 6.

extension the use of torture-tainted evidence—a peremptory norm of international law.²⁹ Article 15 of UNCAT obliges State Parties to ensure that any statement established to have been made as a result of torture shall not be invoked as evidence in proceedings. The legal status of the ICC as an organisation or court does not exempt it from the duty to ensure compliance with this obligation.³⁰

13. The Article 15 prohibition is absolute and non-derogable:³¹ the legal imperative of prosecuting alleged acts of torture does not exempt States from complying with the obligation to ensure ‘fair treatment’ to the defendant, through full compliance with Article 15.³² Rather, this provision is to be interpreted deontologically: the end can never justify the means. The exclusionary principle similarly applies to evidence obtained through CIDT.³³ The reasons for this strict prohibition are two-fold: the inherent unreliability of torture/CIDT-tainted evidence and the aim to eradicate torture from law enforcement and investigative processes.

14. The exclusionary rule set out in Article 15 applies to decisions on detention and release. This derives from *first*, that the right to a fair trial “embrac[es] the judicial process

²⁹ International Court of Justice, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, [Judgment](#), para. 99; ECCC, *Co-Prosecutors v. Khieu Samphan & Nuon Chea*, Case 002, [Decision on Objections to Document Lists Full Reasons](#), 31 December 2015, F26/12, para. 34.

³⁰ See ECJ Grand Chamber judgment in [Case C-239/12 P](#), para. 26, concerning the fact that the Commission of the EU “must comply with the mandatory rules of international law and is not entitled to adopt a decision based on information obtained through torture”.

³¹ ECCC, *Co-Prosecutors v. Khieu Samphan & Nuon Chea*, Case 002, [Decision on Objections to Document Lists Full Reasons](#), 31 December 2015, F26/12, para. 43; ECtHR, *Khan v The United Kingdom*, [Chamber Judgment](#), App. No. 35394/97, 12 May 2000, para. 34 and *Gäfgen v Germany*, [Grand Chamber Judgment](#), App. No. 22978/05, 1 June 2010, paras 165-166; see also *Desde v Turkey*, [Chamber Judgment](#), App. No. 23909/03, 1 February 2011, paras 125-126, 132; *Othman (Abu Qatada) v United Kingdom*, [Chamber Judgment](#), App. No. 8139/09, 17 January 2012, paras 263-267, 88; *Jalloh v Germany*, para. 105, citing to the US Supreme Court judgment in *Rochin v California*, 342 US 165 (1952), paras 10-12; *Harutyunyan v Armenia*, [Chamber Judgment](#), App. No. 36549/03, 28 June 2007, para. 63.

³² Article 7(3): “Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.” The commentary states: “The obligation of Article 7(3) continues through all stages of the criminal investigation up to the extradition proceedings and/or the criminal trial. During interrogation, the alleged torturer, of course, should not be subjected to any torture or [CIDT]. During custody, he or she must enjoy the right to habeas corpus and other minimum rights of persons deprived of liberty (...)”. See M. Nowak, M. Birk and G. Monina (eds.), *The United Nations Convention Against Torture and Its Optional Protocol: A Commentary* (2nd edn, OUP 2019).

³³ [UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment](#) Article 12; See further: UN General Assembly, Report on torture and other cruel, inhuman or degrading treatment or punishment, submitted by Sir Nigel Rodley, Special Rapporteur, 1 October 1999, [A/54/426](#), para 12(e); CCPR General Comment No. 20, para 12; HCR, General Comment No. 32, para 60; CAT, General Comment No. 2, para 6. The ECtHR took this position in a succession of cases, including *Söylemez v Turkey*, para 23; *Jalloh v Germany*, para 99; *Haci Özen v Turkey*, App no. 46286/99, 12 April 2007, paras 101-105; *Levinta v Moldova*, App no. 17332/03, 16 December 2008, paras 97-100; *Gäfgen v Germany*, para 166; *Stanimirovic v Serbia*, App no. 26088/06, 18 October 2011, paras 51-52.

in its entirety”,³⁴ and *second*, that the use of improperly collected evidence in the context of investigations and pre-trial proceedings taints the process as a whole.³⁵ The Appeals Chamber’s previous indication that it did “not consider that substantive considerations around admissibility of evidence can be appropriately addressed in the context of a decision taken on interim release, in the absence of obvious *male fides*”³⁶ must be construed consistently with the peremptory norms embodied by Article 15. Apart from the fact that torture tainted evidence is a particular category of ‘*male fides*’ evidence,³⁷ the ambit of Article 15 extends beyond issues of admissibility at trial, as it forbids such evidence being invoked in “any proceedings”. The IACHR has thus affirmed that the exclusionary rule applies to investigations and all decisions issued by domestic courts.³⁸ The right of *habeas corpus* is an essential protection against torture, and protection against forced confessions, is, in turn, an effective element of the right of *habeas corpus*. For this reason, the UN WGAD found that “the fact that the detention was ordered on the basis of evidence obtained from a confession extracted under torture confers on it an arbitrary character”.³⁹

15. The peremptory norms arising from UNCAT also inform the proper construction of Article 55(1)(b) of the Statute, which specifies that, in respect of an investigation under this Statute, a person “shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of [CIDT]”. The teleological objective of this provision would be undermined if any organs of the Court were permitted to either collect evidence from a person, who is being subjected to ongoing forms of psychological torture and CIDT, or to then use that evidence to motivate the person’s detention at the Court. The word ‘subjected’ is passive: Article 55(1)(b) thus targets the legal obligations of the person/entity conducting the investigation, even if it is independent from the entity responsible for committing the various forms of coercion and mistreatment. The

³⁴ [ICC-01/04-01/06-772](#), para. 38.

³⁵ [ICC-01/04-01/06-772](#), para. 39. See also [Ibrahims & ors v. United Kingdom](#), paras. 253-254.

³⁶ [ICC-01/05-01/13-560 OA4](#), para. 73.

³⁷ [Othman v. United Kingdom](#), para. 264.

³⁸ [Cabrera García v. Mexico](#), Application, para. 166: To accord “probative value to extrajudicial statements or statements made during the investigative stage of criminal proceedings merely encourages the practice of torture, insofar as the police prefer to expend less effort in the investigation and to seek instead the confession of the accused person”. [Judgment](#), para. 177: “the Court concludes that the domestic courts, which heard the case at all stages of the proceeding, should have completely excluded the statements (...), given that the existence [CIDT] disqualified the use of such evidence, according to the international standards previously mentioned”.

³⁹ Opinion 34/1994, [E/CN.4/1996/40/Add.1](#), p. 15. See also WGAD Guideline 12, [A/HRC/30/37](#), pp. 17-18.

proscription against conducting investigative actions under the Statute would still apply, even if a third party is responsible for committing the acts of coercion or mistreatment.⁴⁰

2.1.4 The Trial Chamber's reliance on DGSE evidence was contrary to Article 15 of UNCAT, and its duty to adjudicate the request in a fair and impartial manner

16. The Defence has established the existence of a *prima facie* case, or, at the very least, 'real risk', that evidence and statements obtained from Mr. Al Hassan [REDACTED], while held at the DGSE ('the DGSE evidence'), was contaminated by torture or CIDT. The burden fell on the Prosecution to demonstrate that the conditions for detaining Mr. Al Hassan remained satisfied.⁴¹ At the time the Decision was issued, the Prosecution had failed to establish that the Trial Chamber could safely rely on the DGSE evidence, for the purpose of rejecting the Request, or that it possessed sufficient "cogency" for the purpose of establishing the ongoing existence of risks.⁴²
17. Article 15 is triggered if there is a "real risk" that the evidence was obtained through torture or CIDT.⁴³ Once an individual raises a founded complaint that evidence was obtained directly or indirectly through torture or that torture occurred in State-controlled premises, the burden shifts to the public authority to demonstrate the contrary.⁴⁴ The evidence cannot then be admitted or used in criminal proceedings unless the Court has first examined the complaint, and satisfied itself that the risk does not arise.⁴⁵ This burden is consistent with the defendant's right to an effective remedy, and the obligation of public authorities to ensure that allegations of torture investigated fully.⁴⁶
18. In the present case, after the Interim Release Decision was issued and in connection with a request to terminate the proceedings⁴⁷ ('the Termination Request'), the Defence introduced a significant body of evidence concerning the illegal and arbitrary nature of

⁴⁰ See ECtHR, *El Haski v. Belgium*, App. No. 649/08, para. 87: "such treatment may be imputed to the authorities of the forum State or to those of a third State and the victim may be the actual defendant or a third party."

⁴¹ [ICC-01/05-01/08-1019](#), paras. 50-52; [ICC-01/04-01/07-330](#), pp. 5-7; [ICC-02/11-01/15-1156-Red](#), para. 38.

⁴² Cf [ICC-01/05-01/08-323](#), para. 36.

⁴³ ECtHR, *El Haski v. Belgium*, App. No. 649/08, paras 86-88.

⁴⁴ "once a victim raises doubt as to whether particular evidence has been procured by torture or other ill-treatment, the evidence in question should not be admissible, unless the State is able to show that there is no risk of torture or other ill-treatment": African Commission: *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*, [Communication 334/06](#), para 218. See also paras. 169, 216-219. See also K. Ambos, *The Transnational Use of Torture Evidence* 2009. ISR. L. REV. Vol. 42(2), pp. 362-397, 394.

⁴⁵ ECtHR, *El Haski v. Belgium*, App. No. 649/08, paras 86-88.

⁴⁶ UN General Assembly, Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, [A/HRC/25/60](#), 23 September 2014, paras. 25-26.

⁴⁷ ICC-01/12-01/18-885-Conf-Red-Corr.

Mr. Al Hassan's detention at the DGSE,⁴⁸ and the continuous forms of psychological and physical torture that he was subjected to, while detained there.⁴⁹ This mistreatment was comprised of physical assaults [REDACTED], verbal threats,⁵⁰ continuous forms of psychological torture arising from his enforced disappearance and prolonged arbitrary and incommunicado detention,⁵¹ and conditions of detention, which amounted, at the very least, to CIDT.⁵² In support of these allegations, the Defence had submitted: reports from eminent medical specialists, who found that their respective psychological and physical examinations were consistent with his accounts of having been subjected to physical and psychological torture;⁵³ Prosecution evidence which corroborated Mr. Al Hassan's account of being tortured,⁵⁴ the systemic use of physical and psychological torture at the DGSE,⁵⁵ and detention conditions amounting to torture/CIDT;⁵⁶ Defence witness statements and reports,⁵⁷ which corroborated the illegal nature of detention at the DGSE, Mr. Al Hassan's account of being arbitrarily arrested and tortured, the systemic use of physical and psychological torture at the DGSE, and detention conditions amounting to

⁴⁸ ICC-01/12-01/18-885-Conf-Red-Corr, paras. 29-30.

⁴⁹ ICC-01/12-01/18-885-Conf-Red-Corr, paras. 15-26.

⁵⁰ **Threats to family amounting to psychological torture:** See [A/HRC/43/49](#), 20 March 2020, para. 46.

⁵¹ For the position that prolonged incommunicado detention and enforced disappearance, arising from prolonged incommunicado detention, satisfy the threshold for psychological torture, see: Committee Against Torture, [Communication No. 456/2011](#), Decision adopted by the Committee at its fifty-fourth session (20 April to 15 May 2015); [El-Masri v. Former Yugoslav Republic of Macedonia](#), paras. 202, 211; [Velasquez Rodriguez v. Honduras](#), paras. 156, 187; [Celis Laureano v. Peru](#), 4 July 1994, Communication No. 540/1993 (1996); [Katombe L. Tshishimbi c/ Zaïre](#), Communication No. 542/1993, 25 mars 1996, para. 5; A/HRC/13/42, [Joint Study on Global Practices in Relation to Secret Detention](#), 9 February 2010, pp. 2-3. For their characterization as violations of a continuous nature, see: [Zitha v. Mozambique](#), Decision, Comm. No. 361/2008 (ACmHPR, Mar. 2011), para. 77.

⁵² **Hooding:** ECHR: [El Haski v. Belgium](#), 649/08, para. 98; [Lenev v. Bulgaria](#), 41452/07, para 116. See also [Istanbul Protocol Statement on Hooding: Equality and Human Rights Commission v Prime Minister & Ors](#) [2011] EWHC 2401 (Admin) (03 October 2011), paras. 92-95 (re complicity arising from questioning a person abroad hooded in transit by state authorities). **Medical treatment:** [Keenan v. the United Kingdom](#), 27229/95, para. 111: "lack of appropriate medical care may amount to treatment contrary to Article 3". When combined with incommunicado detention, it can amount to CIDT: [Kudla v. Poland](#), 30210/96, paras. 92-94, 158; [Cenbauer v. Croatia](#), 73786/01, para. 44. **Prolonged hand-cuffing:** HRW, 'Mali: Detainee Restraints Causing Grievous Injuries Military Should Adopt International Standards for Treating Prisoners'.

⁵³ [MLI-D28-0002-0500](#); [MLI-D28-0002-0535](#); [MLI-D28-0003-0031](#); [MLI-D28-0003-0315](#); [MLI-D28-0003-1801](#); [MLI-D28-0003-1806](#); [MLI-D28-0003-1809](#); [MLI-D28-0003-1811](#).

⁵⁴ [MLI-OTP-0078-4107](#) and [MLI-OTP-0078-4302](#).

⁵⁵ [MLI-OTP-0020-0564](#); [MLI-OTP-0033-1110](#); [MLI-OTP-0033-2155](#); [MLI-OTP-0033-4336](#); [MLI-OTP-0033-4375](#); [MLI-OTP-0037-1082](#); [MLI-OTP-0051-0281](#); [MLI-OTP-0061-0186](#); [MLI-OTP-0064-1119](#); [MLI-OTP-0066-0709](#); [MLI-OTP-0066-0840](#); [MLI-OTP-0067-1903](#); [MLI-OTP-0071-0041](#); [MLI-OTP-0073-1218](#); [MLI-OTP-0078-3684](#); [MLI-OTP-0078-4155](#); [MLI-OTP-0078-4189](#); See also ICC-01/12-01/18-885-Conf-Exp-Corr, para. 79.

⁵⁶ [MLI-D28-0003-0031](#); [MLI-OTP-0078-4155](#); [MLI-OTP-0078-4155](#); [MLI-OTP-0071-0041](#); [MLI-OTP-0064-1119](#).

⁵⁷ [MLI-D28-0003-0417-R01](#); [MLI-D28-0003-0661-R01](#); [MLI-D28-0003-0668-R01](#); [MLI-D28-0003-0673](#); [MLI-D28-0003-0675](#); [MLI-D28-0003-1203-R01](#) at 1211-1244; [MLI-D28-0003-1245](#); [MLI-D28-0003-1246](#); [MLI-D28-0003-1249](#); [MLI-D28-0003-2049-R01](#).

torture/CIDT; and UN and NGO reports, corroborating the systemic use of physical and psychological torture at the DGSE and detention conditions amounting to torture/CIDT.⁵⁸

19. The Article 15 exclusionary rule thus applied to interview records compiled by DGSE agents, who engaged directly in physical torture,⁵⁹ and interview statements, which the ICC Prosecution took from Mr. Al Hassan, while he was being subjected to continuous forms of psychological torture and CIDT.⁶⁰
20. Although the Defence requested the Trial Chamber to convene an evidentiary hearing and adjudicate these allegations, prior to the commencement of the trial,⁶¹ the Chamber rejected both requests.⁶² There was therefore no *voir dire* hearing before the start of the trial. Rather than making determinations as to whether Mr. Al Hassan had been subjected to torture/CIDT, took “the Defence’s allegations of torture/CIDT at their highest” for the purposes of resolving the Termination Request.⁶³ While the Chamber ultimately found that the Defence had failed to demonstrate that the allegations of torture/CIDT were attributable to the ICC Prosecution, the Chamber added the caveat that the rejection “does not mean, however, that the alleged treatment of Mr Al Hassan [REDACTED] while detained in Mali does not concern the Chamber or preclude that an alternative remedy may be warranted.”⁶⁴ The Chamber foreshadowed that these alternative remedies could “include ruling certain testimony and other materials inadmissible or determining that certain evidence be given little to no weight at the end of the trial”.⁶⁵
21. [REDACTED] evidence collected from Mr. Al Hassan while detained at the DGSE, the Defence challenged its use, and admission through Article 69(7), on grounds related to Article 15 of UNCAT.⁶⁶ [REDACTED],⁶⁷ [REDACTED].⁶⁸ [REDACTED].⁶⁹

⁵⁸ [MLI-OTP-0051-1305](#) at 1319, para. 34 and 1336-1337, paras. 102-106; [MLI-D28-0003-0190](#) at 0193; [MLI-OTP-0046-8902](#) at 8916, paras. 70-77; [MLI-OTP-0051-1305](#) at 1336, paras. 99-100; [MLI-OTP-0033-4336](#) at 4349-4351, paras. 32, 37; [MLI-D28-0003-0277](#) at 0283; [MLI-D28-0003-0074](#) at 0090; [MLI-D28-0003-0304](#); [MLI-D28-0003-0298](#); [MLI-D28-0003-0650](#); [MLI-D28-0003-0238](#); [MLI-D28-0003-0185](#); [MLI-D28-0003-0069](#), [MLI-D28-0003-0618](#) at 0618, 0619, 0621-0623; [MLI-D28-0003-0588](#) at 0588, 0591-0592; [MLI-D28-0003-0154](#) at 0157; [MLI-D28-0003-0185](#) at 0188-0189; [MLI-D28-0003-0571](#); [MLI-D28-0003-0195](#); [MLI-D28-0003-0310](#); [MLI-OTP-0046-8902](#) at 8916, para 71, [MLI-D28-0003-0190](#) at 0193.

⁵⁹ [MLI-OTP-0066-0452](#); [MLI-OTP-0066-0455](#).

⁶⁰ ICC-01/12-01/18-885-Conf-Red-Corr, paras. 27-28.

⁶¹ ICC-01/12-01/18-885-Conf-Red-Corr, para. 8.

⁶² ICC-01/12-01/18-940-Conf, para. 48; ICC-01/12-01/18-1009-Red, para. 123.

⁶³ ICC-01/12-01/18-1009-Red, para. 80.

⁶⁴ ICC-01/12-01/18-1009-Red, para. 119.

⁶⁵ ICC-01/12-01/18-1009-Red, para. 119. See also para. 121.

⁶⁶ [REDACTED].

⁶⁷ [REDACTED].

22. The body of evidence that had been introduced by the Defence prior to the issuance of the Decision more than met the standard for non-reliance/exclusion in criminal proceedings. For example, in *Othman*, the ECHR found that the ‘real risk’ threshold was met through the submission of statements from the persons allegedly tortured, an Amnesty International report on the same point, and evidence concerning the systematic use of torture by the authorities in question: this risk was not rebutted or lessened by avowals from Jordanian authorities that the individuals had not been tortured.⁷⁰ The African Commission affirmed that the submission of victim accounts concerning detention abuse and forensic reports concerning bruising satisfied the threshold, notwithstanding claims of Government experts that due to time lapse, the manner, timing and cause of the injuries could not be established.⁷¹ Like Mr. Al Hassan,⁷² the victims had been held in incommunicado detention at the time of the abuse, and had not been examined for torture indicia by medical professionals before the trial.⁷³ The Special Rapporteur for Human Rights and Counter-Terrorism has further opined that the fact an individual was interviewed, while held in arbitrary, secret or incommunicado detention, will raise a doubt as to the voluntariness of the statements, and justify exclusion, even if there is no direct knowledge or evidence that the individual was subjected to physical abuse.⁷⁴
23. Within the context of its responses to the Termination Request⁷⁵ and subsequent Article 69(7) challenges,⁷⁶ the Prosecution also did not dispute that Mr. Al Hassan had been held in illegal, incommunicado detention at the DGSE,⁷⁷ that he had informed them, on the first days of interviews, that he had been subjected to physical and psychological torture in connection with DGSE interrogations, and was subject to ongoing forms of

⁶⁸ [REDACTED].

⁶⁹ [REDACTED].

⁷⁰ *Othman v. United Kingdom*, para. 272.

⁷¹ *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*, Communication 334/06, paras. 166-169.

⁷² ICC-01/12-01/18-885-Conf-Exp-Corr, paras. 15.c and 29.

⁷³ *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*, para. 169.

⁷⁴ *A/63/223*, paras. 33, 45(d).

⁷⁵ ICC-01/12-01/18-982-Conf-Exp.

⁷⁶ Email from the Prosecution, 16 October 2020, 18:24; Email from the Prosecution, 20 October 2020, at 13:26 [Annex C]; Email from the Prosecution, 21 October 2020, at 14:43 [Annex D]; Email from the Prosecution 22 October 2020, at 15:20 [Annex E].

⁷⁷ According to the Prosecution’s own evidence, Mr. Al Hassan was not brought before a judge, had no access to lawyers or his family, and [REDACTED] was unaware of Mr. Al Hassan’s arrest and detention on 17 June 2017, some 72 days into Mr. Al Hassan’s detention at the DGSE (See ICC-01/12-01/18-885-Conf-Exp-Corr, para. 29 and [MLI-OTP-0078-1919](#) at 1920). The Prosecution arrest warrant application also acknowledged the absence of any judicial proceedings against him, and the absence of any factual or legal basis for his detention at the DGSE: ICC-01/12-01/18-1-Conf-Exp-Red, paras. 300, 311.

mistreatment.⁷⁸ [REDACTED] corroborated Mr. Al Hassan's accounts of detention conditions amounting to torture/CIDT,⁷⁹ and the Prosecution itself conceded that it had not been able to conduct an effective and independent investigation into the allegations of torture and CIDT.⁸⁰ The Prosecution conducted its interviews *within* the context of, and relying upon, Mr Al Hassan's arbitrary detention,⁸¹ and therefore cannot claim merely to be the 'fortuitous recipient' of a previously mistreated individual, nor rely on the maxim *male captus, bene detentus*.⁸² Since prolonged incommunicado detention is a form of psychological torture, the standard for exclusion was met,⁸³ irrespective as to the existence and extent of physical forms of torture.

24. As noted above, the Trial Chamber's subsequent Decision hinged on the risks identified in its Interim Release Decision, which were in turn founded on DGSE evidence.⁸⁴ The Trial Chamber's reliance on the DGSE interrogation records⁸⁵ was particularly problematic and unfair in light of: first, the fact that the Trial Chamber had received mutually corroborating evidence from Mr. Al Hassan, [REDACTED] and Defence medical experts that these interrogations had involved physical and psychological torture;⁸⁶ [REDACTED];⁸⁷ and third, the Prosecution had not cited the DGSE interrogation records in either their response to the Request or the earlier Interim Release Request, and as such, the Chamber's *sua sponte* reliance on them deprived the Defence of a fair right to be heard.

⁷⁸ ICC-01/12-01/18-982-Conf-Exp-Corr, paras. 98, 99.

⁷⁹ Continuous use of handcuffs and chains: [REDACTED]; use of hooding during interrogations, or to bring detainees to interviews: [REDACTED]; threats similar to those described by Mr. Al Hassan: [REDACTED]; the use of DGSE cell 4 as a torture room: [REDACTED]; detainees dying from hunger or thirst: [REDACTED].

⁸⁰ The Prosecution claimed that its ability to investigate any allegations of torture and detention abuses was very limited and dependent on local authorities (ICC-01/12-01/18-982-Conf-Exp-Corr, para. 155)

⁸¹ The Prosecution characterized Mr. Al Hassan's arbitrary detention as a 'unique investigative opportunity' (ICC-01/12-45-Conf-Exp, para. 25), and further relied on the persons responsible for Mr. Al Hassan's physical torture, to secure his presence at interviews: [MLI-D28-0002-0535](#) at 0557, 0563, 0656.

⁸² See *Prosecutor v. Nikolić*, [Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal](#), paras 70-96.

⁸³ Principle 6(d) of the [Principles And Guidelines On The Right To A Fair Trial And Legal Assistance In Africa](#): "[a]ny confession or admission obtained during incommunicado detention shall be considered to have been obtained by coercion"; [Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism](#), 4 February 2009, A/HRC/10/3, para. 54.

⁸⁴ Decision, paras. 11-12, citing Interim Release Decision, paras. 57-68, 71-79. Paragraph 60, which links Mr. Al Hassan to the ongoing activities of armed groups, relies exclusively on DGSE evidence.

⁸⁵ Interim Release Decision, para. 60, fn. 136, citing the contents of [MLI-OTP-0066-0455](#); Decision, para. 11, fn. 28, citing Interim Release Decision, para. 60.

⁸⁶ ICC-01/12-01/18-885-Conf-Exp, para 20; ICC-01/12-01/18-737-Conf para 2, 8, 11.

⁸⁷ [REDACTED].

25. The pre-eminent importance of the presumption of liberty dictates that the defendant must be given a fair and effective opportunity to contest the evidence relied upon to justify detention.⁸⁸ the bar for contesting it cannot be set at such a height that it is impossible to clear. For this reason, an Article 69(7) decision cannot be a pre-requisite for excluding tainted evidence; otherwise, the Defence would have no effective means to contest its use, before the Prosecution first submits it into evidence during the trial process.⁸⁹ The Defence has consistently and persistently argued that the DGSE evidence should not be relied upon in any judicial determinations and, adduced evidence to substantiate this point.⁹⁰ This triggered an obligation on the part of the Chamber to promptly investigate these allegations with a view to either satisfying itself that the allegations of torture were unfounded or, excluding the evidence.⁹¹ Given this obligation of expedition, any delays in reaching such a determination should not operate to the detriment of the Defence. The use of such evidence was thus antithetical to the Trial Chamber's duty to ensure Mr. Al Hassan's right to fair and impartial proceedings. The discretion that is normally afforded to judges to evaluate and exclude evidence does not apply where issues of torture or CIDT come into play:⁹² exclusion is mandatory because:⁹³

no legal system based upon the rule of law can countenance the admission of evidence – however reliable – (...) obtained by such a barbaric practice as torture. (...) Torture evidence is excluded to protect the integrity of the trial process and, ultimately, the rule of law itself.

26. Judicial reliance on information tainted by torture or CIDT:⁹⁴

as evidence to establish the relevant facts in criminal proceedings renders the proceedings as a whole unfair, irrespective of the probative value of the statements and irrespective of whether their use was decisive in securing the defendant's conviction (emphasis added).

⁸⁸ [ICC-01/05-01/08-323](#), paras. 3, 29-33.

⁸⁹ [Amicus brief](#), *Sentsov and Kolchenko v. Russia*, App. No. 29627/16, para. 15: "The aims and effectiveness of the exclusionary rule are undermined if the outcome of a separate criminal or administrative investigation into torture is regarded as necessary to exclude evidence. This is because it creates an unreasonably high evidential burden for the exclusion of evidence and it may also prolong a defendant's detention if the trial is put on hold in order to carry out the investigation".

⁹⁰ ICC-01/12-01/18-791-Conf-Exp para 20-21; ICC-01/12-01/18-737-Conf para 4, 8; ICC-01/12-01/18-885-Conf-Exp-Corr, para 63; ICC-01/12-01/18-915-Conf para 31; ICC-01/12-01/18-991-Conf, para 5; ICC-01/12-01/18-1021-Conf, para 33.

⁹¹ HRC [General Comment no. 20](#), Article 7, para. 14: "Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective."

⁹² [Ibrahim & ors v. United Kingdom](#), [50541/08](#), [50571/08](#), [50573/08](#) and [40351/09](#) para. 254.

See also IACtHR, [Teodoro Cabrera Garcia and Rodolfo Montiel Flores v. Mexico](#), Case No. 12, 449), 26 November 2010, para. 165: "the Court considers that this rule is absolute and irrevocable".

⁹³ [Othman v. United Kingdom](#), para. 264.

⁹⁴ [Ibrahim & ors v. United Kingdom](#) para. 254.

27. Accordingly, irrespective of the weight or probative value given to the DGSE evidence, the Chamber's ongoing reliance on factual findings based on this evidence further ruptured the fairness of the adjudicative process as a whole,⁹⁵ and thereby vitiated the outcome of the Decision.

Ground Two: The Trial Chamber erred in law, and/or abused its discretion by placing significant weight on risks that were not related to the criteria set out in Article 58(1), or which were otherwise inconsistent with its duty to apply Article 58(1) in a manner which is consistent with internationally recognized human rights law.

28. Decisions on release or detention must be tailored to the personal circumstances of the defendant and the case at hand. Even if the risk is not linked to the conduct of the defendant, it is necessary to demonstrate that it will impact on the likelihood that the defendant will constitute a flight risk, engage in witness intimidation, or engage in continuing criminal activity. For this reason, in *Gbagbo*, while the Appeals Chamber found that it was permissible to rely on the conduct of third persons, the persons in question were supporters *of the defendant*, and the risk related to conduct in which they were likely to engage *for the defendant*.⁹⁶ There was therefore a nexus between the defendant and the risk. Similarly, in *Bemba et al.*, the Chamber's reliance on the network of Mr. Bemba, to ascertain the risk of flight concerning Mr. Kilolo, was permissible, due to indicia that Mr. Kilolo was part of this network and could benefit from its assistance and resources to evade arrest.⁹⁷ The assessment of risks cannot be based on speculation,⁹⁸ and in accordance with internationally recognized human rights law, the reasons justifying detention cannot be based on 'stereo-typed formulae' or 'general and abstract' grounds that have no connection to the concrete circumstances of the case at hand.⁹⁹ "[S]tandardized justifications", based on "generalized security concerns" form a "problematic" and "insufficient" foundation for an alleged risk of witness intimidation.¹⁰⁰ Given the importance of the right to liberty, these findings necessarily inform the appropriate approach to Article 58(1)(b)(ii).

⁹⁵ *Ibrahims & ors v. United Kingdom* para. 254; *Gafgen v. Germany*, para. 166.

⁹⁶ [ICC-02/11-01/11-278-Red](#), para. 59.

⁹⁷ [ICC-01/05-01/13-558](#), paras. 103-105.

⁹⁸ [ICC-01/05-01/13-1151](#), para. 19.

⁹⁹ Zeegers, K. J. (2015). *International criminal tribunals and human rights law: Adherence and contextualization*, p. 197, citing, *inter alia*, *Idalov v. Russia*, App. No. 5826/03, [Judgment](#), 22 May 2012, para. 147; *Smirnova v. Russia*, App. Nos. 46133/99 and 48183/99, [Judgment](#), 24 July 2003, para. 63; ECtHR, *Clooth v. Belgium*, App. No. 12718/87, [Judgment](#), 12 December 1991, para. 44.

¹⁰⁰ [ICC-01/09-01/11-743-Red](#), para. 26.

29. The risks enumerated at paragraphs 11 and 12 of the Decision reveal no such nexus to Mr. Al Hassan, or the proposed modalities of release. The Defence had sought Mr. Al Hassan's release to a custodial facility in Bamako, if the ICRC were available to facilitate the transfer of Mr. Al Hassan's family to Bamako.¹⁰¹ The ICRC duly confirmed their availability to do so.¹⁰² The Government of Mali's lack of authority in the North was thus irrelevant to the risks presented through his release in Bamako.¹⁰³ The Chamber cites activities of armed groups in the North,¹⁰⁴ but fails to identify these groups, or to articulate their link to Mr. Al Hassan. If this link is to be inferred from the Interim Release Decision's findings concerning Mr. Al Hassan's alleged link to JNIM, then the finding is vitiated by virtue of its reliance on tainted DGSE evidence. The Chamber's heavy reliance on such risks also fails to place sufficient weight on the humanitarian purpose of the Request, which was to have a family reunion during their mourning process, and its temporally limited nature.
30. Paragraph 12 of the Decision represents the Chamber's assessment of the ongoing validity of these risks in light of current developments, but the Chamber fails to enunciate the nexus between these developments and Mr. Al Hassan. The Chamber cites general threats concerning [REDACTED],¹⁰⁵ without enumerating the groups involved, the link to this case, or the specific Article 58(1)(b) criterion concerned. The potential impact of such factors on the Malian authorities' willingness and ability to secure Mr. Al Hassan's arrest is unexplained and contradicted by the continuing cooperation provided by Malian authorities throughout the trial [REDACTED].¹⁰⁶ Similarly, the relevance of released detainees,¹⁰⁷ none of whom were detained pursuant to requests from the ICC, is unexplained and unclear, particularly in the absence of any elucidation as to the identity of the 'threat actors', whom some allegedly rejoined. The Registry Observations, relied upon by the Chamber for this point,¹⁰⁸ provide no further clarity, as no evidence or information is cited in support of the point.¹⁰⁹

¹⁰¹ Decision, para. 9.

¹⁰² Annex B.

¹⁰³ Cf Decision, para. 11.

¹⁰⁴ Decision, para. 11.

¹⁰⁵ Decision, para. 12.

¹⁰⁶ [REDACTED].

¹⁰⁷ Decision, para. 12.

¹⁰⁸ Decision, para. 12, fn. 39.

¹⁰⁹ ICC-01/12-01/18-1225-Conf, para. 34.

31. The Chamber's failure to identify evidence relied upon to establish such factors, or to articulate the nexus between them and the Article 58(1)(b) criteria, constitutes a reversible error of law.¹¹⁰ The Chamber's reliance on such generic factors, [REDACTED],¹¹¹ also raises the spectre that Mr. Al Hassan's rights to liberty and to return to his own country have been subjected to the whims of public opinion, and extraneous risks. His status as a detainee does not justify the restriction of these rights, nor, does public opinion,¹¹² general security considerations, or risks arising from COVID-19.¹¹³ This factor is also based on a generic avowal by the Registry, not supported by any evidence, information, or explanation as to the nexus between the alleged risk, and the criteria under Article 58(1)(b).¹¹⁴ In terms of the latter, the Court's implementation of key fair trial rights, such as interim release, can only serve to increase the public perception of the legitimacy of the Court,¹¹⁵ and thus lessen security risks. The notion that release could be denied due to the risk that it might increase public interest in the Court is also antithetical to the presumption of liberty. The Statute and Rules set out this presumption, and cases and public outreach must therefore proceed on the assumption that defendants could be granted interim release. Defence rights are part and parcel of the judicial process, and a ban on interim release, caused by judicial reliance on such extraneous factors, is unlawful.
32. It was, moreover, unfair for the Trial Chamber to have based its determination on speculation concerning [REDACTED],¹¹⁶ without hearing from Mali, or affording the Defence a right to respond. Mali, a State Party, referred the situation to the Court, executed the ICC arrest warrant against Mr. Al Hassan, and is subject to a continuing obligation to enforce this warrant. As a Malian national, Mr. Al Hassan is entitled to enter and reside in his own country.¹¹⁷ The situation is not analogous to an unsecured request for release to a third country since Mr. Al Hassan has a right to enter Mali, and Mali has an existing obligation to secure his custody as soon as he does so. If a general agreement to

¹¹⁰ ICC-02/11-01/11-278-Red, para. 47. See also *Prosecutor v. Milutinovic*, [Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojsa Pavkovic's Provisional Release](#), para. 11; *Prosecutor v. Haradinaj*, [Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying His Provisional Release](#), para. 10.

¹¹¹ Decision, para. 13.

¹¹² *Dickson v. United Kingdom*, 44362/04, para. 68.

¹¹³ CCPR/C/128/2, para. 2(2).

¹¹⁴ Decision, para. 12, citing ICC-01/12-01/18-1225-Conf, para. 37.

¹¹⁵ *Prosecutor v. Blagoje Simic*, [Decision on Motion of Blagoje Simic Pursuant to Rule 65\(I\) for Provisional Release for a Fixed Period to Attend Memorial Services for his Father](#), para. 22.

¹¹⁶ Decision, para. 13.

¹¹⁷ Article 12(4), ICCPR.

implement interim release triggers an obligation on the part of the Chamber to hear from the State before rejecting release,¹¹⁸ it follows that a legal obligation to receive the defendant and enforce custodial conditions must do the same. The Chamber's cursory reliance on assumed and hypothetical practical issues that Mali might face if it were to receive Mr. Al Hassan was incompatible with its duty to judge the Request by reference to the critical point that "a person's personal liberty is at stake".¹¹⁹

33. As a result of these errors, the Trial Chamber erroneously concluded that the custodial nature of the proposed release had no impact on the risks identified in the Interim Release Decision. No reasonable Chamber could conclude that the risk of flight, intimidating witnesses, and engaging in continuing crimes is not impacted by the defendant's custody.¹²⁰ The above errors therefore vitiated the outcome of the Decision, by causing the Chamber to place too much weight on the risks of release, and insufficient weight on the extent to which the humanitarian nature and proposed modalities of the Request outweighed these risks.

Ground Three: The Trial Chamber erred in law and procedure by failing to take into consideration the reasonableness of the length of time between family visits, and abused its discretion by failing to afford sufficient weight to the humanitarian importance of ensuring the compatibility of detention with Mr. Al Hassan's right to family life

34. The necessity of detention, circumstances of the defendant, and 'reasonableness' of the length of detention, must be assessed in a manner which is consistent with internationally recognized human rights.¹²¹ The Chamber accepted that Mr. Al Hassan has not been able to see the mother of his deceased daughter, or several of his children, for almost four years, and the Trial Chamber accepted that they would not be able to travel to The Netherlands in the coming months, due to the entry restrictions imposed at the ICC detention unit.¹²² The Trial Chamber nonetheless failed to consider the consequences of rejecting the Request, on the overall reasonableness of detention.

¹¹⁸ [ICC-01/05-01/08-1626-Red](#), paras. 50-55.

¹¹⁹ [ICC-01/05-01/08-1626-Red](#), para. 55.

¹²⁰ Cf. *Prosecutor v. Popovic et al.*, [Decision on Consolidated Appeals Against Borovcanin's Motion for Provisional Release](#), para. 16, rejecting OTP arguments that custodial visit conditions should be considered on par with previous interim release requests. See also [Decision on Nikolic's Motion for Provisional Release](#), paras. 19-21, finding that the humanitarian objective and stringent conditions of release, including spending every night at a detention facility, outweighed the risks identified in previous release decisions.

¹²¹ [ICC-01/05-01/13-969](#), para. 45; [ICC-02/11-01/15-992-Red](#), para. 77.

¹²² Decision, para. 10.

35. The Trial Chamber thus erred in law by failing to consider whether rejecting the Request, and thereby further prolonging the length of time between family visits would undermine the reasonableness of the length of detention and trigger mental suffering that was incompatible with the legitimate purposes of pre-conviction detention. The Chamber also abused its discretion by failing to appropriately weigh the heightened right to family life during bereavement, when balancing the risks of release, in particular, through the lens of Mr. Al Hassan's family, who are "rights holders with specific needs that must be known and considered" by the Court.¹²³
36. As recognized by the ICC Presidency, the right to family life entails a right to regular, in person contacts;¹²⁴ telephone or video contacts are not an adequate substitute,¹²⁵ particularly as "conversations via video calls may not be appropriate for very young children—the artificial nature of such interactions may make it difficult for younger children to bond or interact with adults virtually".¹²⁶ The application of the monitoring regime in this case to video-conferencing also raises specific issues concerning the right to privacy and the right to religious practice.¹²⁷ Mr. Al Hassan has also expressed concern that video-conferencing might cause traumatic memories to resurface, and thereby impair his relations with his family.¹²⁸
37. In order for this right to family visits to be effective, and given the unique circumstances of indigent defendants detained abroad, the Court also has a corollary duty to take steps to ensure that this right can be respected and implemented.¹²⁹ The right to family life is of increased importance during times of bereavement. While there is no absolute right to release for this reason, the grounds for rejecting release must be construed more narrowly.¹³⁰ There is also a heightened obligation to consider whether the modalities of release could mitigate these risks.¹³¹ Although the Trial Chamber acknowledged that

¹²³ "State agencies who care for persons deprived of their liberty should be reminded that families and children of those persons are right holders with specific needs that must be known and considered. Families, especially women and children, are both protected and impacted by necessary prevention measures": [COVID-19: FOCUS ON PERSONS DEPRIVED OF THEIR LIBERTY](#), March 2020 OHCHR and WHO, p. 5.

¹²⁴ [ICC-RoR217-02/08-8](#), paras. 31-36; [ICC-RoR220-01/19-2-Red](#), paras. 19-21.

¹²⁵ [ICC-RoR217-02/08-8](#), para. 36.

¹²⁶ [‘The effects of digital contact on children’s well-being: evidence from public and private law contexts’](#), Nuffield Family Justice Observatory, p. 2.

¹²⁷ ICC-01/12-01/18-791-Conf-Red, paras 51-56.

¹²⁸ ICC-01/12-01/18-870-Conf-Red, paras. 33, 37, 44, 45 and 49.

¹²⁹ [ICC-RoR217-02/08-8](#), paras. 31-36; [ICC-RoR220-01/19-2-Red](#), paras. 19-21, 26-27. See also [Khoroshenko v. Russia](#), App. No. 41418/04, Grand Chamber Judgment, 30 June 2015, paras. 110, 134-135, 148.

¹³⁰ [Lind v. Russia](#), App. No. 25664/05, Judgment, 6 December 2007, para. 92.

¹³¹ [Lind v. Russia](#), App. No. 25664/05, Judgment, 6 December 2007, para. 98.

the death of Mr. Al Hassan's daughter constituted an "exceptional humanitarian circumstance",¹³² there is no indication that the Chamber weighed, or sufficiently weighed the exceptional nature of this circumstance in its assessment of the right to liberty *versus* the identified risks. Nor is there any indication that the Chamber sufficiently weighed the overall length of family separation, when balancing the related risks of release. Indeed, it is telling that the Chamber found its assessment of the level of risk to be unchanged from the First Interim Release Decision,¹³³ where no humanitarian circumstances were identified.¹³⁴ This stands at odds with the fact that in accordance with human rights law, humanitarian circumstances should be considered to *lessen* the risks of release.¹³⁵ The Chamber therefore erred by conducting a naked comparison of the right to release with the risks of release, rather than considering, in addition, whether the humanitarian circumstances identified in the Decision lessened their relevance or importance.

38. Finally, the Decision is marred by the Chamber's omission to consider whether, this exceptional humanitarian circumstance, when considered in connection with Mr. Al Hassan's circumstances as a whole, including his mental health, had given rise to a degree of suffering that was incompatible with the legitimate object and purposes of pre-trial detention.¹³⁶ The Interim Release Decision had noted the existence of issues affecting Mr. Al Hassan's mental health, and expert evidence that his mental health would benefit from meaningful family contacts.¹³⁷ [REDACTED].¹³⁸ [REDACTED].¹³⁹ The Chamber had also placed weight on submissions from the Registry that a family visit would be [REDACTED].¹⁴⁰ [REDACTED]. The Decision makes no reference to this change in circumstances underpinning the outcome of the Interim Release Decision, nor does it reference the Chamber's special obligation to evaluate and weigh the humanitarian circumstances, by reference to the particular health vulnerability acknowledged in the

¹³² Decision, para. 8.

¹³³ Decision, paras. 12-13.

¹³⁴ ICC-01/12-01/18-786-Conf, para. 91.

¹³⁵ [ICC-02/11-01/15-992-Red](#), para. 1

¹³⁶ [General Comment No. 21: Article 10 \(Human treatment of persons deprived of their liberty\)](#), paras. 3-4; *Shadurdy Uchetov v. Turkmenistan*, [CCPR/C/117/D/2226/2012](#), para. 7.4; *Kayum Ortikov v. Uzbekistan*, [CCPR/C/118/D/2317/2013](#), para. 10.4; *Kudla v. Poland*, App. No. 30210/96, [Judgment](#), 26 October 2000, para. 94.

¹³⁷ ICC-01/12-01/18-786-Conf, para. 82.

¹³⁸ [REDACTED].

¹³⁹ [REDACTED].

¹⁴⁰ ICC-01/12-01/18-786-Conf, para. 40.

Interim Release Decision.¹⁴¹ The Chamber therefore erred in law, and abused its discretion by failing to consider the ongoing compatibility of Mr. Al Hassan's detention, in light of the cumulative effect of the circumstances he is experiencing.¹⁴²

III. Relief sought

39. The Defence respectfully requests that the Appeals Chamber **ALLOW** the appeal, and reverse the Decision.



Melinda Taylor
Counsel for Mr. Al Hassan

Dated this 14th Day of January 2021
At The Hague, The Netherlands

¹⁴¹ ICC-01/12-01/18-786-Conf, para. 25.

¹⁴² *Ramírez Sanchez v. France*, App. No. 59450/00, [Judgment](#), 4 July 2006, para. 119.