

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: **09 April 2020**

Date of submission: **15
May 2020**

TRIAL CHAMBER X

Before: Judge Antoine Kesia-Mbe Mindua, Presiding
Judge Tomoko Akane
Judge Kimberly Prost

SITUATION IN THE REPUBLIC OF MALI

**IN THE CASE OF
THE PROSECUTOR v. AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG
MAHMOUD**

Public

**Public redacted version of “Defence Reply to Prosecution and Registry Responses to
Interim Release Request”**

Source: Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud

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I. Introduction

1. The Defence and Mr. Al Hassan appreciate efforts being made by various sections of the Court to address the unprecedented effects of the COVID-19 pandemic. However, these best efforts cannot change the fact that Mr. Al Hassan is a torture survivor, and his mental welfare is severely impacted by any diminishment of meaningful social interactions, and any developments that trigger memories of torture in the DGSE. Mr. Al Hassan has seen some members of his immediate family only once in the last three years, and there are others that he has not seen at all. This sense of distance and trauma is further exacerbated by the absence of effective treatment for his PTSD, and the fact that Mr. Al Hassan's family cannot travel to The Hague for the foreseeable future. The COVID-19 travel restrictions have, and will continue to have a severe impact on the Defence's ability to conduct necessary pre-trial preparation. This in turn, will increase the degree of hardship experienced by Mr. Al Hassan, by unreasonably prolonging the length of his detention. The driving force for the request is also not freedom, but family reunification. Mr. Al Hassan needs to be with his children and family at this critical time. He has accepted any conditions, and form of confinement that would allow this to happen. It would, moreover, be unfair, and unduly prejudicial to deprive him of this right, due to unsubstantiated and vague allegations, and those which are based on evidence obtained in violation of the Statute.

II. Submissions

Issue 1: It is improper, and procedurally unfair for the Prosecution to rely on inadmissible categories of evidence, while at the same time, obstructing the Defence from contesting the reliability of this evidence

2. The Trial Chamber's decision concerning an Article 60(2) challenge to detention must be based on the information placed before it, concerning the factual and legal basis for detention, that exist at the time of its determination:¹ "the decision under article 60 (2) of the Statute is a decision de novo ... It is imperative that the Pre-Trial Chamber is deciding de novo because it is hearing the submissions of the defence for the first time."² Since the Trial Chamber is hearing the defendant for the first time, this right must be effective: the defendant must have the possibility to influence the Chamber as

¹ [ICC-01/04-01/07-572](#), para. 10; [ICC-02/11-01/11-278-Red](#), para. 23.

² [ICC-02/11-01/11-278-Red](#), para. 23.

concerns any issues that might affect the Chamber's determination of the issues placed before it.³ The fair and adversarial nature of the current release proceedings has nonetheless been undermined by: *ex parte* submissions adduced by the Prosecution and the Registry;⁴ the Prosecution's reliance on statements obtained from Mr. Al Hassan [REDACTED] held in illegal and arbitrary detention, and subjected to torture and/or cruel treatment;⁵ and the Prosecution's inconsistent, unsubstantiated, and illogical attempt to conflate the CJA with extremist groups or activity.

a) Unfair reliance on ex parte allegations

3. Bearing in mind the advanced stage of the proceedings, and the fundamental liberty rights at stake, there can be no justification for the attempt, by the Prosecution and the Registry, to sway the Chamber's determination, by placing *ex parte* allegations before the Chamber. The right to disclosure is not absolute, but any exceptions must not defeat the accused's right to be heard on the key issues that are relevant to the Chamber's resolution of the matters placed before it. It follows, therefore, that the Trial Chamber should either completely disregard such allegations, or afford the Defence with a fair opportunity to be heard.

b) The Prosecution's reliance on evidence which cannot be fairly tested, and/or the direct and indirect fruits of torture

4. Although the Appeals Chamber has not established a particular evidential threshold as concerns evidence submitted in order to fulfil the criteria under Article 58(1)(b), human rights principles dictate that the Court should not rely on evidence or information if to do so would be contrary to fundamental rights of the Defence, or would otherwise seriously damage the integrity of the proceedings. As has been held within the context of extradition hearings, the very fact that the defendant lacks the ability to cross-

³ *Ntaganda*, [ICC-01/04-02/06-1817-Red](#), para. 91; *Ntaganda*, ICC-01/04-02/06-410-Conf-Exp, para. 46. This Decision is referred to in [ICC-01/04-02/06-1817-Red](#).

⁴ Prosecution Response, para. 11; Registry Response, para. 3. Cf Guideline 11, promulgated by the UN Working Group on Arbitrary Detention ('WGAD') ([A/HRC/30/37](#), p. 17), stating that the procedure for determining the legality of detention must respect the "ability of detainees to challenge any documents relating to their case file, including all the arguments and material elements adduced by the authorities, including the prosecution, the security apparatus and the immigration authorities, to justify the detention, which may be determinative in establishing the arbitrariness and lawfulness of his or her detention."

⁵ See WGAD Guideline 12, [A/HRC/30/37](#), pp. 17-18: "Any statement established to have been made or any other evidence obtained as a result of torture or other cruel, inhuman or degrading treatment shall not be invoked as evidence in any proceedings, except against a person accused of torture ..."

examine or test the evidence that might influence the Court's decision, heightens the Court's obligation to exercise careful scrutiny as concerns the reliability of the evidence placed before it.⁶ Of further import, the prohibition on the use of evidence obtained directly, or indirectly,⁷ from torture applies to all legal proceedings and procedural submissions, including those pertaining to detention and habeas corpus.⁸ This is a non-derogable principle of international law, and extends to evidence obtained from individuals, other than the accused,⁹ and also evidence obtained through ill-treatment, which does not rise to the threshold of torture.¹⁰ In terms of evidence obtained indirectly from torture or cruel treatment:¹¹

The exclusionary rule applies no matter where in the world the torture was perpetrated and even if the State seeking to rely on the information had no previous involvement in or connection to the acts of torture. (...) [It] extends not only to confessions and other statements obtained under torture, but also to all other pieces of evidence subsequently obtained through legal means but which originated in an act of torture. In some jurisdictions, this approach is called the "fruit of the poisonous tree" doctrine. There is no doubt that this includes real evidence obtained as a result of ill-treatment but falling short of torture. (...) if a State is known to systematically torture detainees or specific categories of detainees, no State may actively collect, share or recognize information it receives from the agency as "lawfully obtained", nor may it "passively" accept such information. (...) After-the-fact, acceptance and use of information likely obtained by torture or other ill-treatment constitute implicit recognition of the situation created by the torture or ill-treatment as lawful since it treats the information no differently than legally-obtained information.

5. In the case of *Harutyunyan v. Armenia*, the ECHR also underscored that:¹²

where there is compelling evidence that a person has been subjected to ill-treatment, including physical violence and threats, the fact that this person confessed – or confirmed a coerced confession in his later statements – to an authority other than

⁶ *Saifi v Brixton Prison* [2020] EWHC Admin 437, para. 9: "As in extradition proceedings there is no opportunity to cross examine and accomplice evidence may be sufficient to establish a case to answer, a police officer in the requesting state can disproportionately influence the decision to commit if he produces evidence obtained in bad faith. Therefore, the consequence of admitting improperly obtained evidence is more profound at committal than at trial."

⁷ *Nardone v. United States*, 308 U.S. 338 (1939) at 340: "To forbid the direct use of methods thus characterized, but to put no curb on their full indirect use, would only invite the very methods deemed "inconsistent with ethical standards and destructive of personal liberty.""

⁸ IACHR: *Cabrera García v. Mexico*, case 12,449, paras. 165-166, 177.

⁹ ECHR: *Othman (Abu Qatada) v. United Kingdom*, 8139/09, para. 266; *A/HRC/25/60*, para. 28.

¹⁰ *A/HRC/25/60*, para. 26.

¹¹ *A/HRC/25/60*, paras. 27-29, 54, 56. See also para. 66: "The exclusionary rule covers the exclusion of statements obtained through torture or other ill-treatment of the defendant himself or of a third party as well as evidence obtained in a third state, even if the State seeking to rely on the information had no previous involvement in or connection to the acts of torture or other ill-treatment. Similarly, documentary or other evidence obtained as a result of acts of torture or other ill-treatment must be excluded, irrespective of whether such evidence was corroborated or not the only decisive evidence in the case".

¹² *Harutyunyan v. Armenia*, 36549/03, para. 65.

the one responsible for this ill-treatment should not automatically lead to the conclusion that such confession or later statements were not made as a consequence of the ill-treatment and the fear that a person may experience thereafter.

6. In the case of *Cabrera García v. Mexico*,¹³ the Inter-American Court of Human Rights also endorsed a broad interpretation of the exclusionary rule in relation to evidence that was derived directly or indirectly from torture or cruel treatment:

173. In order to analyze the relationship between the three statements, the Court notes that the European Court on Human Rights, in the case of *Harutyunyan v. Armenia*, indicated that if there is reasonable evidence that a person has been tortured or subjected to cruel and inhuman treatment, the fact that this person ratifies his confession before a different authority other than the one responsible for the first confession, should not automatically lead to the conclusion that such confession is valid. This is so because a subsequent confession may be the consequence of the mistreatment suffered by the person and, more specifically, because of the fear that remains after this type of experience.

174. **The Court shares the aforementioned view and reiterates that the situations of defenselessness and vulnerability felt by an individual when detained and subjected to cruel, inhuman and degrading treatment in order to wear down that individual's psychological resistance and force him to incriminate himself, can produce feelings of fear, anguish and inferiority capable of humiliating and overwhelming an individual and possibly breaking his physical and moral resistance.** (emphasis added)

7. Apart from the prescriptions related to physical or mental torture, the Special Rapporteur on Torture has further extended the exclusionary rule to interrogations conducted with detainees, who are held in illegal, secret or incommunicado places of detention.¹⁴ Temporary transfer to a 'known location' does not address the concern underlying this principle: that is, that detainees in secret/illegal/incommunicado locations are particularly vulnerable to retaliation and abuse.
8. Notwithstanding the above principles, the Prosecution's arguments in support of Mr. Al Hassan's detention rely primarily on highly prejudicial extracts from interviews conducted with Mr. Al Hassan [REDACTED] detained at the DGSE in Bamako.¹⁵ The Prosecution's own evidence gives rise to a reasonable basis for concluding that Mr. Al Hassan [REDACTED] interviewed, while [REDACTED] held in arbitrary and incommunicado detention, in an extremely coercive environment, which involved threats, beatings, and treatment that would trigger the application of the exclusionary

¹³ *Cabrera García v. Mexico*, case 12,449, paras. 166-167, 173-174.

¹⁴ [General Recommendations of the UN Special Rapporteur on Torture](#), E/CN.4/2003/68, para. 26.

¹⁵ Prosecution Response, paras. 3, 24, 34.

rule. Specifically, it does not appear to be disputed, or reasonably capable of dispute, that while detained at the DGSE, [REDACTED]:

- a. Informed the Prosecution that [REDACTED] had been beaten, threatened, and interrogated by Malian authorities;¹⁶
 - b. [REDACTED] not brought before a judge, or otherwise brought within the protection of the law;
 - c. Apart from the limited duration of [REDACTED] interview with the ICC Prosecution, had no access to the outside world (including [REDACTED]), independent legal representation, or independent monitors (such as the UN or the ICRC);¹⁷ and
 - d. At various points, reported that [REDACTED] experienced severe physical and/mental ailments, and [REDACTED] otherwise, extremely vulnerable;¹⁸ and
 - e. The Prosecution threatened to provide the transcripts of [REDACTED] interview to the Malian authorities, if the latter requested them.¹⁹
9. Of further concern, the Prosecution obtained the names and details [REDACTED] from Mr. Al Hassan, while they were completing the security and protection evaluation on the first day of interviews.²⁰ The Appeals Chamber has affirmed that such questioning does not constitute a formal witness interview,²¹ and there is no clear indication that Mr. Al Hassan was aware that the information collected during the security assessment could be used against him to conduct further investigations. The Prosecution has also relied on the transcripts comprising its security assessment, in order to allege that Mr. Al Hassan constitutes a risk of flight.²²
10. [REDACTED] not included on the Prosecution's provisional list of witnesses, and a recent medical report relating [REDACTED] recommended against interviews being conducted due to the ill-health of the witness.²³ Accordingly, unless [REDACTED],²⁴

¹⁶ [REDACTED].

¹⁷ [REDACTED]. See also [A/HRC/34/72](#), para. 71, concerning the fact that UN human rights monitors have no access.

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [ICC-01/04-02/06-1330](#), paras. 33, 38.

²² Prosecution Response, para. 29.

²³ [REDACTED].

²⁴ On 6 April 2020, the Defence inquired as to whether the Prosecution would request specific measures to protect the integrity [REDACTED]. The Prosecution responded that it was aware of its obligations under

there does not appear to be any prospect of the Defence being able to interview [REDACTED] in the foreseeable future, under conditions that would respect [REDACTED] mental and physical integrity, and be consistent with the principles set out in the Istanbul Protocol.²⁵

11. The only information that the Defence has concerning [REDACTED] is contained within sparsely worded notes, prepared by the Prosecution's own investigators. The absence of an objective record of such matters in itself falls foul of the directive that "in order to show that evidence has not been obtained by torture, a court must rely on evidence other than the testimony of the investigating officer".²⁶ The Prosecution only disclosed its [REDACTED],²⁷ on 31 March 2020. Notwithstanding its commitment to prioritise the disclosure of materials related [REDACTED], the Prosecution has also confirmed that it is still in the process of preparing and disclosing additional investigators' notes concerning other [REDACTED].²⁸ Based on the information that has been disclosed so far, these notes are highly likely to corroborate the Defence submissions concerning the torture and cruel treatment of Mr. Al Hassan [REDACTED] and the nature of illegal and arbitrary detention at the DGSE.²⁹
12. The partial and piecemeal nature of this disclosure has prevented the Defence from finalizing certain investigations and expert reports.³⁰ It is also not compatible with the obligation of special diligence that applies as concerns the disclosure of evidence related to the legality of detention,³¹ and the torture and mistreatment of a detainee.³²

[REDACTED], but did not provide any details that would allow the Defence to make an informed decision as to whether it would be possible for the Defence to [REDACTED].

²⁵ [Istanbul Protocol](#), p. 26 (visits to detention facilities).

²⁶ A/HRC/25/60, para. 25.

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ During the February Status Conference, the Defence explicitly emphasized that [REDACTED].

³¹ The obligation to disclose such information as expeditiously as possible is intrinsically tied to the defendant's right to challenge detention promptly: [ICC-01/05-01/08-323](#), paras. 28-33, see para. 33, in particular: "the Pre-Trial Chamber should ensure that in the disclosure process priority is given to those documents that are essential for the person to receive in order effectively to challenge the lawfulness of detention."

See also [Garcia Alva v. Germany](#), para. 39; WGAD Guideline 13, [A/HRC/30/37](#), p. 18: "The detaining authority shall provide all relevant information to the judge, the detainee and/or his or her lawyer. Disclosure is to include exculpatory information, which includes not only information that establishes an accused person's innocence but also other information that could assist the detainee, for example, in arguing that his or her detention is not lawful or that the reasons for his or her detention no longer apply." See also al Baluchi, [A/HRC/WGAD/2017/89](#), para. 56: "The Working Group is particularly concerned that information regarding the alleged torture of Mr. al Baluchi under the Agency programme has not been provided to his lawyers. This is potentially exculpatory material in the capital charges against Mr. al Baluchi if it indicates that statements made

Given the importance of these principles, human rights Courts have found it appropriate to assume the existence of torture, or adopt adverse inferences of facts vis-à-vis the entity that has custody of the relevant information.³³ Within the context of the ICC, exclusion of evidence is an appropriate remedy for tardy disclosure, or delays that have impeded Defence preparation.³⁴ It follows, therefore, that even if the Chamber is not in a position to make a positive determination that the statements of Mr. Al Hassan [REDACTED] are tainted by torture, cruel treatment, or arbitrary detention, the Chamber should still exclude them, due to the fact that the Defence has been prevented from substantiating such matters, for reasons that are attributable to the Prosecution, and not the Defence.

c) The Prosecution's inconsistent, unsubstantiated, and illogical attempt to conflate the CJA with extremist groups or activity

13. Throughout the pre-confirmation phase, the Prosecution asserted that Mr. Al Hassan was actively working with Ansar Dine at the time of his arrest in 2017.³⁵ They have now performed a *volte face*, and acknowledged that he was affiliated with the CJA (“Congrès pour la Justice dans l’Azawad”) at the time of his arrest.³⁶ The Prosecution has nonetheless failed to clarify or acknowledge the clear distinction between the different groups (CJA *versus* Ansar Dine), and the incompatibility between their different strands of argumentation. As explained by the Defence in its December 2019 submissions:³⁷

the CJA is a Tuareg movement linked to the Kel Ansar tribe, which was created in 2016, and which was part of the Alger peace process.³⁸ The CJA has never been under the command of Iyad Ag Ghaly. The CJA is not an Islamist group, and does not work alongside JNIM or AQIM. The 2018 UN Experts Report describes attacks by AQIM and JNIM against the CJA, due to the perception that CJA was aligned with (not against) international peacekeeping forces.³⁹

by him were not voluntary. This information is also necessary for the investigation of alleged acts of torture upon Mr. al Baluchi and for the provision of physical and psychological rehabilitation to him for those acts.”

³² Prompt disclosure of evidence of torture is directly related to the “right to the truth” (and the right to an effective investigation): [Djamila Bendib v. Algeria](#), Communication No. 376/2009 (CAT), paras. 6.6, 8; *El Masri v. Macedonia*, [39630/09](#), paras. 175, 191. See also al Baluchi, [A/HRC/WGAD/2017/89](#), para. 56.

³³ *El Haski v. Belgium*, [649/08](#), para. 88; see also *Othman (Abu Qatada) v. United Kingdom*, [8139/09](#).

³⁴ [ICC-01/09-02/11-728](#), para.90; [ICC-01/04-01/06-2690-Red2](#), para. 212.

³⁵ [REDACTED].

³⁶ Prosecution Response, para. 25.

³⁷ [ICC-01/12-01/18-520-Red2](#), para. 15.

³⁸ [Le CJA, nouveau mouvement armé dans le nord du Mali](#), RFI Afrique (11 October 2016).

³⁹ United Nations Security Council, [S/2018/581](#), *Final Report of the Panel of Experts on Mali in accordance with paragraph 11(c) of resolution 2374 (2017)*, see para. 99, fn. 123.

14. In terms of the latter aspect, a range of open source materials confirm that CJA is in favour of the implementation of the peace agreement and dialogue, and opposed to Al Qaeda and other extremist groups.⁴⁰ Specifically, in mid 2017, CJA was involved in coordinating humanitarian assistance to the local populations of the North, including meetings with OCHA,⁴¹ and the Chief of MINUSMA.⁴² Since its creation, its leaders have emphasised that taking arms against the government is out of question,⁴³ the CJA has worked with Malian authorities, against Al Qaeda, in order to ensure security and safety in remote Northern areas.⁴⁴ The CJA has been a victim of several attacks by AQMI and JNIM.⁴⁵
15. Mr. Al Hassan was also most closely affiliated with the wing led by Hama Ag Mahmoud, who has evinced a clear opposition to extremists and Al Qaeda, and support for the peace process.⁴⁶ The fact that Mr. Al Hassan has no interests which are linked to, or aligned with extremists groups is further underscored by the Registry's observation that, [REDACTED].⁴⁷ There is, of course, a factual dissonance between these reports, and the Prosecution's allegations but this dissonance speaks to the fact that a Touareg, who was apprehended in a violent manner, detained, threatened, beaten, and interrogated by security forces (who are only accountable to the executive), will say exactly what they are expected by such security forces to say.⁴⁸

Issue 2: The COVID-19 pandemic impacts directly on the Chamber's appreciation of the criteria under Article 58(1)

⁴⁰ <https://www.journaldumali.com/2017/05/11/colonel-abass-paix-larme-poing/>.

⁴¹ [Tombouctou : le chef militaire du CJA reçoit une équipe d'humanitaires](#), 25 March 2017.

⁴² [Bamako : Le patron de la MINUSMA reçoit le chef de la tribu Kel Antassar accompagné d'un bureau du CJA](#), 2 February 2017.

⁴³ [Le CJA, nouveau mouvement armé dans le nord du Mali](#), 11 October 2016.

⁴⁴ “[La solution est d'occuper le terrain](#)” pour contrer le terrorisme au Mali selon la CJA”; Audio interview with Kassim Traoré: “Le Congrès pour la Justice dans l’Azawad (CJA) travaille avec les autorités maliennes pour la sécurisation des personnes de leurs biens dans les localités de Tombouctou où se trouvent leurs bases militaires.”

See also, [Accord pour la paix au Mali: le MPSA et le CJA s'accordent les violons pour une mise en œuvre diligente, 22 April 2017](#).

⁴⁵ [Mali: le quartier général du CJA attaqué à Gargando, cinq morts](#), 08 April 2017; MENASTREAM ([here](#)), “Mali: JNIM leaflet distributed in Zouera (...)”; MENASTREAM ([here](#)): Mali: “JNIM claims the attack against a vehicle on December 10 in the area of Douekiré(...)”; [Mali : Six morts et trois blessés dans une embuscade](#), 11 December 2017. [Tombouctou : Nouvelles menaces de mort proférées contre le Colonel Abass par le JNIM](#), 28 July 2018.

⁴⁶ VOA, [Six morts dans l'attaque d'un groupe touareg par des jihadistes présumés au Mali](#), 11 décembre 2017.

⁴⁷ [REDACTED].

⁴⁸ [Cabrera García v. Mexico](#), case 12,449, para 167: “this Court considers that statements obtained under duress are seldom truthful, because the person tries to say whatever is necessary to make the cruel treatment or torture stop.”

16. The Defence has not brought its request for release lightly. Throughout these proceedings, the Defence has attempted to address Mr. Al Hassan's detention conditions through dialogue with the Registry (and the submission of complaints where necessary), and discrete applications before the Chamber. These approaches are patently inadequate in the face of the COVID-19 pandemic, and the severe consequences that it has generated. The Defence is highly appreciative of the efforts undertaken by detention centre personnel thus far, but the Registry cannot make the COVID-19 pandemic and its related risks, disappear. The Defence cannot expect detention centre guards or medical personnel to expose themselves to risk in order to alleviate Mr. Al Hassan's psychological suffering and virtual isolation. There is a perfect storm of circumstances that can only be effectively remedied through Mr. Al Hassan's temporary release. Under human rights law, the right to challenge an unnecessary, or disproportionate deprivation of liberty also extends beyond the formal scenario of detention: it encompasses the cumulative impact of various forms of restrictions, that reduce his liberty in a severe and meaningful manner.⁴⁹ The Prosecution has nonetheless attempted to address the implications of the COVID-19 pandemic in a hermetically sealed manner, treating it as either an isolated and independent basis for release.⁵⁰ This approach cannot be reconciled either with the approach of the ICC Appeals Chamber, or emerging legal statements and case law concerning relevance of COVID-19 to judicial determinations as concerns the necessity and proportionality of detention during the pandemic.⁵¹
17. The Statute does not establish an exhaustive list of factors as concerns the Chamber's proper consideration as to whether the defendant constitutes a flight risk, or if release presents a risk of obstruction and intimidation of witnesses. For this reason, the

⁴⁹ *Guzzardi v. Italy*, [7367/76](#), para. 95; See also [A/HRC/30/37](#), para. 2: "The right to challenge the lawfulness of detention before a court (...) is also a means of determining the whereabouts and state of health of detainees and of identifying the authority ordering or carrying out the deprivation of liberty."

⁵⁰ Prosecution Response, paras. 59-61.

⁵¹ **Canada:** *R v. Rajan*, [2020 ONSC 2118](#), paras. 53-71, especially para. 56: "In all of this upheaval, to be in a jail as an inmate or a staff member must count as one of the most dangerous places imaginable."; *R v. CJ*, [2020 ONSC 1933](#), para. 9; *Canada (Public Safety and Emergency Preparedness) v. Taino*, [2020 FC 427](#), paras. 98-99; *R v. Nelson*, [2020 ONSC 1728](#), paras. 35-42; *R v. JS*, [2020 ONSC 1710](#), paras. 18-20; **Australia:** *Rakielbakhour v DPP* [\[2020\] NSWSC 323](#), paras. 15-21; *Re Broes* [\[2020\] VSC 128](#), paras. 35-42; **Netherlands:** [ECLI:NL:RBNHO:2020:2101](#): "However, there are very special circumstances related to the current crisis as referred to above. This concerns the fragile health of the parents of the suspect, as shown by the submitted documents. A further deterioration [of the parents' health] occurred"; [ECLI:NL:RBNHO:2020:2102](#): "However, there are very special circumstances related to the current crisis as referred to above. In particular, this relates to the vulnerable health of the accused as evidenced by the documents submitted. Moreover, she is 67 years old. It is important that the suspect minimises the risk of contamination." (Translations at Annex B).

Appeals Chamber has affirmed that issues concerning the personal circumstances of the defendant (such as age or health),⁵² and humanitarian considerations, can be relevant to the Chamber's determination. These factors must also be construed and applied in a manner, which is consistent with international standards as concerns whether they militate in favour of, or against release.⁵³ Any pre-conviction deprivation of an accused's liberty must also comport with the principles of necessity and proportionality. The notion of pre-trial release itself is also intrinsically tied to compassionate considerations:⁵⁴ that is, that pre-trial detention is a measure of last resort that should not anticipate punishment, occasion unnecessary or disproportionate hardship, or extinguish fundamental rights to life, to health, and to family life.⁵⁵

18. 'Humanitarian/compassionate grounds' are not, therefore, free-standing considerations; they form the overarching lens through which the criteria under Article 58(1) should be evaluated. The ECHR has thus taken into consideration 'compassionate grounds' in its assessment as to whether a denial of temporary release to attend a funeral was a necessary and proportionate restriction of the right to family life.⁵⁶ In such cases, compassionate grounds did not equate to a positive right to release, but rather a factor that could lessen the risk of absconding, or otherwise heighten the obligation to consider alternative measures that are financially or logistically feasible.⁵⁷ Such compassionate considerations are triggered not only by the death of a close relative, but also by exigencies concerning the ill-health or vulnerability of a close family member. The ICTY has thus granted custodial release to allow a defendant to visit his sick

⁵² [ICC-02/11-01/15-992-Red](#), para. 1: See also WGAD Guideline 19, [A/HRC/30/37](#): "When assessing whether the measures taken are in compliance with international standards, the prohibition of particular grounds of detention or forms of detention are to be complied with, and the needs of specific persons affected and any vulnerability are to be taken into consideration, given that the arbitrariness and unlawfulness of detention may include the unsuitability of detention for the persons in question."

⁵³ [ICC-02/11-01/15-992-Red](#), para. 54.

⁵⁴ *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. 14: "The Appeals Chamber deems that the inclusion of a provision on provisional release in the Rules was driven by humane and compassionate considerations together with concerns related to the principle of proportionality in international law."

⁵⁵ *Ploski v. Poland*, [26761/95](#); *X v. United Kingdom*, [9054/80](#), p. 113.

⁵⁶ *Ploski v. Poland*, [26761/95](#), paras. 38-39.

⁵⁷ *Ploski v. Poland*, [26761/95](#), para. 37: "It is aware of the problems of a financial and logistical nature caused by escorted leaves and the instances of shortage of police and prison officers. However, taking into account the seriousness of what is at stake, namely refusing an individual the right to attend the funerals of his parents, the Court is of the view that the respondent State could have refused attendance only if there had been compelling reasons and if no alternative solution – like escorted leaves – could have been found".

sister,⁵⁸ and another to visit his ailing mother.⁵⁹ Since these defendants had been sentenced, it was necessary to demonstrate ‘special circumstances’; in contrast, since Mr. Al Hassan is held in pre-trial detention, and continues to benefit from the presumption of innocence, a lower threshold should apply. Furthermore, domestic courts have also granted bail, in circumstances where the defendant’s family were at a particular risk due to the COVID-19 pandemic.⁶⁰

19. Applications for detention and release must also be considered in light of the circumstances that exist at the time of the application. Since it is necessary for the Chamber to consider the possibility, rather than the inevitability of future risks of release,⁶¹ it follows that the Chamber cannot impose a higher standard of certainty as concerns the risks of ongoing detention, and the likelihood of future delay. If anything, the presumption of liberty dictates that a more lenient approach should be adopted in relation to factors that militate in favour of release.
20. In line with the above principles, the existence of the COVID-19 pandemic, and the related restrictions imposed at the detention centre operate as multiplier factors, in the sense that they enhance the importance or weight that should be attributed to certain factors, including compassionate and hardship considerations, lessen that of others, such as the risk of absconding, and increase the probability of substantial and unreasonable delays.⁶² The net effect is to militate in favour of Mr. Al Hassan’s

⁵⁸ *Prosecutor v. Pavle Strugar*, [Decision on the Renewed Defence Request Seeking Provisional Release on Compassionate Grounds](#), para. 11.

⁵⁹ *Prosecutor v. Krajisnik*, [Decision on Krajisnik’s Application for a Custodial Visit](#), para. 18: “The medical condition and age of the Applicant’s mother in combination demonstrate a sufficient humane compassionate basis for granting the Motion. Further, detainees at the United Nations Detention Unit are accommodated far away from the former Yugoslavia and as a consequence have limited opportunities for seeing their families.”

⁶⁰ *Rakielbakhour v DPP* [2020] NSWSC 323, paras. 11, 15; *Re Broes* [2020] VSC 128, para. 40.

⁶¹ [ICC-02/11-01/15-992-Red](#), para. 43.

⁶² See fn. 51, in particular *Rakielbakhour v DPP* [2020] NSWSC 323, para.15. See also: Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ‘[Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic \(adopted on 25th March 2020\)](#)’, advising authorities to:

“Reduce prison populations and other detention populations wherever possible by implementing schemes of early, provisional or temporary release for those detainees for whom it is safe to do so, taking full account of non-custodial measures indicated as provided for in the Tokyo Rules; (...) Review all cases of pre-trial detention in order to determine whether it is strictly necessary in the light of the prevailing public health emergency and to extend the use of bail for all but the most serious of cases...”

See also European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), [Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease \(COVID-19\) pandemic](#) calling on authorities to, inter alia, make greater use of alternatives to pre-trial detention, and increase the level of psychological care available to vulnerable detainees.

temporary release, for the duration of the pandemic (or until otherwise ordered by the Chamber). This is because:

- a. Close family ties, in particular, Mr. Al Hassan's increased desire and right to be with his immediate family during the pandemic, lessen the hypothetical risk of absconding⁶³
- b. Travel restrictions, and quarantine measures (which are directly linked to Mr. Al Hassan's health), limit the risks of absconding or of potential interference with witnesses or the investigation;
- c. The COVID-19 restrictions at the detention centre (in particular, the reduction of access to specialized health care, and the elimination of any meaningful social contacts) have radically and unacceptably increased the degree of hardship experienced by Mr. Al Hassan;
- d. This hardship is exacerbated as Mr. Al Hassan has only seen his family once in the last three years, over ten months have elapsed since the last time that Mr. Al Hassan had face to face contact with anyone who was not affiliated with the Court or his Defence, and the COVID-19 restrictions render it impossible for him to see his family in the near future, if he remains detained in The Hague. Delays in implementing the family visit are also attributable to the unreasonable refusal by the detention centre CCO to [REDACTED];⁶⁴
- e. The current lock down measures will continue until at least 28 April 2020. Notwithstanding the best efforts of ICC staff and officials, the COVID-19 pandemic, and related restrictions, have delayed, and will continue to delay and impede fundamental forms of Defence preparation.⁶⁵ The prejudice occasioned by delays in the proceedings is compounded by the difficulties faced by the Defence in conducting effective forms of preparation, in collaboration with Mr. Al Hassan, through in person visits. Mr. Al Hassan's ongoing detention will create a conflict between the right of the Defence to have adequate time and facilities to prepare for trial, and Mr. Al Hassan's protection against unreasonably lengthy pre-trial detention. As things stand, in light of Mr. Al Hassan's personal circumstances, there is a real risk that either the Defence will be compelled to renounce fundamental preparation steps, in order to avoid further hardship to Mr.

⁶³ *Rakielbakhour v DPP* [2020] NSWSC 323, paras. 11, 15; *Re Broes* [2020] VSC 128, para. 40.

⁶⁴ [REDACTED].

⁶⁵ [REDACTED].

Al Hassan, or Mr. Al Hassan's detention will be unreasonably prolonged, for reasons that are not related to the size and complexity of the case;⁶⁶

- f. The current level of uncertainty as concerns the duration of the pandemic, and the possible consequences for Mr. Al Hassan himself (in detention), or his loved ones, further increases his mental anguish; and
- g. Any hypothetical flight risks/risks of interference are lessened by the discrete and limited nature of the release request, and the corollary assurances provided by Mr. Al Hassan.

21. Although the Chamber is required to exercise a degree of discretion in evaluating the above factors, the Chamber has no discretion to countenance the continuation of a situation that amounts to a violation of the protection against cruel and inhumane treatment. The Defence would like to underscore from the outset that it is not impugning the conduct or the good faith intentions of the Registry, including the detention centre staff. The protection against cruel and inhumane treatment is non-derogable, and as such, the Chamber has a duty to act as soon as the threshold has been met, irrespective as to the reasons that led to this situation. And there are objective grounds to conclude that the threshold has been met:

- a. Mr. Al Hassan [REDACTED].⁶⁷ [REDACTED], and only very limited forms of distraction;
- b. All visits have been suspended for the foreseeable future;⁶⁸
- c. Mr. Al Hassan's limited, and monitored telephone contacts with his family [REDACTED] do not alleviate the isolating effects of the above restrictions;⁶⁹

⁶⁶ P. van Dijk et al. (eds). *Theory and Practice of the European Convention on Human Rights* (Intersentia 4th ed, 2006), p. 492: "This implies (...) that the criteria for 'reasonable' in Article 5(3) are different from those for the same term in Article 6(1), or at least, have to be applied in a different way. Some delays may in fact violate Article 5(3) and still be compatible with Article 6(1)."

⁶⁷ [REDACTED]

⁶⁸ Cf. ICC-01/12-01/18-557-Red3, para. 10: "The Chamber considers that contact with the outside world and visits are imperative for a detained person's well-being".

⁶⁹ "[i]nterception and registration of telephonic conversations is a far-reaching intervention into the private life of the prisoner, which seriously hampers communication about personal issues and may lead to emotional isolation of the prisoner." Dirk van Zyl Smit & Sonja Snacken, *Principles of European Prison Law and Policy*, Oxford University Press, 2009, p. 213; See also, [Commission nationale consultative des droits de l'homme: Sanctionner dans le respect des droit de l'homme](#). I. Les droit de l'homme dans la prison (2005), p. 50: « Ce contrôle opéré sur la correspondance aboutit à une auto-censure de la part des détenus et de leurs proches dans leurs échanges. Les uns comme les autres s'abstiennent d'évoquer des sujets trop personnels. Cette autolimitation peut conduire à un appauvrissement des rapports affectifs et en définitive à un isolement sentimental de la personne détenue ».

- d. He is experiencing severe psychological suffering that goes far beyond the hardship that is inherent in pre-trial detention,⁷⁰ and there are no available mechanisms for addressing his psychological suffering in a meaningful manner; and
 - e. He cannot appear before a Judge or the Chamber in person, during this critical period.⁷¹
22. There are also no alternative measures, short of release and family reunification, that are capable of rectifying the situation. The [REDACTED] and it has not given any concrete indication as to if and when it will be able to do so.⁷² Mr. Hassan's [REDACTED]. This delay is particularly problematic given that it is squarely attributable to the unjustified refusal of the CCO to [REDACTED].⁷³ The Registry has also yet to respond to Defence concerns, first voiced on 4 March, [REDACTED].⁷⁴
23. Although the Prosecution has claimed that it is necessary to obtain an independent medical expert opinion on such matters, they have not raised any specific grounds for contesting Dr. [REDACTED]'s expertise,⁷⁵ or the validity of her opinion that [REDACTED], even though this is an issue that can be considered on the basis of medical literature, including those cited in her opinion.⁷⁶ It is also necessary to stress that the Detention centre psychologist also evaluated Mr. Al Hassan as displaying symptoms of severe PTSD, and further recorded his adverse, and severe reactions [REDACTED].⁷⁷

Issue 4: Practical issues concerning the modalities of Mr. Al Hassan's release

24. Article 60(2) must be interpreted and applied in a manner that does not render it a dead letter as concerns defendants who do not enjoy means or political support. The notion

⁷⁰ [REDACTED].

⁷¹ ICC hearings, which were tentatively scheduled for this period, have now been cancelled. As underlined by WGAD, for fair and impartial detention hearings, the Court must have the ability to "ensure the presence of the detainee regardless of whether he or she has asked to appear": A/HRC/30/37, p. 14.

⁷² [REDACTED].

⁷³ [REDACTED].

⁷⁴ [REDACTED].

⁷⁵ Dr. [REDACTED] is on the list of ICC experts. The Prosecution is fully familiar with, and have acknowledged Dr. [REDACTED]'s expertise, given that they have appointed her as an expert consultant for training purposes: Annex D.

⁷⁶ International Society for the Study of Trauma and Dissociation [Chu et al]. (2011). [Guidelines for treating dissociative identity disorder in adults, third revision](#), *Journal of Trauma & Dissociation*, 12(2): 115–187.

⁷⁷ ICC-01/12-01/18-680-Conf-AnxD.

that detention is a measure of last resort, that must be justified by the Prosecution, would also be turned on its head if the Court were to make this right contingent on the actions of third parties and States (that is, actors, who have no link to Mr. Al Hassan or his conduct). Rather, the presumption of liberty, which is at its apex within the context of an Article 60(2) application, places the duty of exploring such options, and obtaining the necessary forms of State cooperation, squarely at the feet of the Court. It further requires the Court to consider whether measures falling short of detention at the seat of the Court would suffice to address any well-founded risks of flight or witness interference,⁷⁸ and to review the ongoing necessity and proportionality of particular restrictive measures ordered by the Chamber.⁷⁹

25. Mr. Al Hassan has given unequivocal assurances that he will comply fully with all and any conditions imposed by the Chamber.⁸⁰ This includes any security arrangement that would allow Mr. Al Hassan to see, and be with his children in the coming months, including supervised confinement or house arrest [REDACTED],⁸¹ [REDACTED].⁸² Given Mr. Al Hassan's record of complying fully with Court-ordered restrictions,⁸³ the Chamber should place significant weight on his assurances. If release to [REDACTED] is not feasible, Mr. Al Hassan's [REDACTED], and comply with all necessary conditions that will allow the Court and the Malian authorities to verify Mr. Al Hassan's location, and compliance with the requirements of release.⁸⁴
26. In terms of logistical issues, repatriation flights continue to fly to and from Bamako, and it appears that ICRC operations and internal flights in Mali are still functioning, notwithstanding the COVID-19 pandemic.⁸⁵ Mr. Al Hassan is a Malian national, and has a right to reside in Mali: the consent of the Malian authorities is not required to implement his return. Mali is also a State Party, and thus bound by Part 9 of the Statute to cooperate fully with the Court's orders.⁸⁶ This includes an obligation to assist with orders concerning the identification and location of persons, searches and seizures, and

⁷⁸ See Principle 6 of the [UN Standard Minimum Rules for Non-custodial Measures](#) (The Tokyo Rules).

⁷⁹ [ICC-01/04-02/06-1817-Red](#), para. 23.

⁸⁰ [REDACTED].

⁸¹ [REDACTED].

⁸² [REDACTED].

⁸³ [REDACTED].

⁸⁴ [REDACTED].

⁸⁵ ICRC, "[In Africa, racing to slow the spread of COVID-19](#)", 31 March 2020; UrduPoint News, "[ICRC To Continue Work In Africa Amid COVID-19, Takes Steps To Prevent Pandemic – Official](#)", 7 April 2020.

⁸⁶ Article 86 of the Statute.

to ensure Mr. Al Hassan's surrender to the Court.⁸⁷ Mali has already demonstrated that it is willing to cooperate with such orders, given its arrest and surrender of Mr. Al Hassan.

27. As a State Party, Mali's obligations towards the Court must be construed in line with the principle of *pacta sunt servanda*, enshrined in Article 26 of the *Vienna Convention on the Law of Treaties*. The ICJ held in *Gabčíkovo-Nagymaros* that good faith performance "obliges the Parties to apply [the treaty] in a reasonable way and in such a manner that its purpose can be realized".⁸⁸ In the *Nicaragua* case, the ICJ accepted Nicaragua's submission that the principle of *pacta sunt servanda* can be violated without the direct breach of a treaty provision.⁸⁹ These principles translate to a clear obligation to cooperate with all Court orders related to the fair investigation and prosecution of this case. Since full compliance with Mr. Al Hassan's rights is an indispensable component of this process, and Mali has explicitly acceded to the Court's exercise of jurisdiction over Mr. Al Hassan, it follows that Mali is required to give effect to measures, set out in the Statute, that would give effect to Mr. Al Hassan's rights (including the fundamental right to pre-trial liberty).⁹⁰ Mali has also confirmed that there are no extant legal proceedings concerning Mr. Al Hassan,⁹¹ and in accordance with Articles 94 and 95 of the Statute, Mr. Al Hassan cannot be arrested and detained in relation to domestic proceedings (in particular, in the absence of an existing admissibility challenge).⁹²
28. The obligation to seek the views of Mali, pursuant to Rule 119(3) also only arises if the Chamber decides to impose conditions as a precursor to release: it does not apply to

⁸⁷ Articles 89 and 93 of the Statute.

⁸⁸ *Gabčíkovo-Nagymaros* [1997] ICJ Rep 7, para. 142.

⁸⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14, para. 270.

⁹⁰ See [ICC-01/09-01/11-1274-Corr](#), para. 124, concerning the fact that State Parties: "must be presumed to have created a court with every necessary competence, power, ability and capability to exercise its functions and fulfil its mandate in an effective way. The intention of the States Parties to create an effective court—and not an illusory one—is sufficiently clear from the provisions of article 4(1), saying, as seen earlier, that the Court 'shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.'"

⁹¹ [REDACTED].

⁹² [ICC-01/11-01/11-72](#); [ICC-01/11-01/11-100](#). The fact that a defendant was previously in domestic custody was not a barrier to provisional release at the ICTY: *Prosecutor v. Alagic*, Decision on Provisional Release, 13 December 2001, para. 15.

considerations of temporary release in general.⁹³ It is also arguable that it does not apply to the personal assurances volunteered by the defendant. In any case, the principles of necessity and proportionality dictate that the Trial Chamber should first consider whether the threshold for unconditional temporary release has been met. If that is not the case, the Chamber may then consider whether Rule 119 conditions could mitigate any risks of flight or interference, and in such case, invite submissions from Mali.⁹⁴

Issue 5: General protection concerns are not a sufficient basis to reject release

29. Neither the Prosecution nor the Registry have adduced evidence, or concrete grounds to conclude that there is either a real likelihood or reasonable suspicion that Mr. Al Hassan would engage in witness intimidation or interference, if granted temporary release. The mere fact that the threshold for active monitoring was found to be met does not justify such a conclusion, nor do general concerns regarding the instability or insecurity in a particular region.⁹⁵
30. *Firstly*, in the context of an Article 60(2) application, the Chamber cannot rely on previous determinations by the Single Judge: its determination must be based on the evidence, presented by the Prosecution, at the time of the application.⁹⁶ Moreover, given the difficulties faced by the Defence in obtaining access to relevant documentation (including medical documentation), the very existence of past decisions concerning active monitoring should not be relied upon to extinguish the fundamental right to seek release.⁹⁷ Active monitoring also constitutes a restriction rather than a deprivation of liberty: given the consequence of the latter, a more rigorous degree of judicial scrutiny is required.

⁹³ [ICC-01/05-01/08-1626-Red](#), para. 82: “rule 119 (3) does not apply to requests for interim release generally, but to a situation where a Chamber is considering the conditional release of detained person or the amendment of conditions already imposed.”

⁹⁴ When the only remaining reason for detention is the fear that the accused will flee and thus avoid appearing for trial, he or she must be released pending trial if it is possible to obtain guarantees that will ensure that appearance: *Merabishvili v. Georgia*, [72508/13](#), para. 223.

⁹⁵ [ICC-01/04-01/06-824](#), para. 139, noting that the reasoning as to the potential endangerment of witnesses was ‘scarce’. The risk of witness interference cannot be based only on the likelihood of a severe penalty, but must be linked to specific facts: *Merabishvili v. Georgia*, [72508/13](#), para. 224; *A.B. v. Hungary*, [33292/09](#), paras. 26-28.

⁹⁶ [ICC-01/04-01/07-572](#), paras. 26-27.

⁹⁷ ICC-01/12-01/18-520-Red2, paras. 51-52.

31. *Secondly*, the Single Judge's conclusions concerning active monitoring were, in some regards, motivated by resource considerations, that would not apply if Mr. Al Hassan were to be released. For example, in early 2019, Mr. Al Hassan [REDACTED]⁹⁸ This particular restriction [REDACTED]:⁹⁹ it is not linked to an objective risk to witnesses. Apart from the fact that such risks lessen with the effluxion of time,¹⁰⁰ [REDACTED] Mr. Al Hassan has complied fully with the conditions imposed by the Single Judge.¹⁰¹ These reports should be given particular weight given that they are more recent.¹⁰²
32. *Thirdly*, neither Mr. Al Hassan, nor the CJA, are affiliated with extremist groups, including those, which are responsible for initiating attacks against civilians. On a personal level, Mr. Al Hassan condemns such attacks in the strongest terms.¹⁰³ It would, moreover, be entirely inappropriate to base Mr. Al Hassan's personal application for release on considerations that apply to unrelated groups, who merely share the same religion or ethnicity as him.¹⁰⁴ The Trial Chamber has previously found "the general security situation in Mali, [REDACTED] and the fact that there is a general threat to Prosecution witnesses cannot be the sole basis to continue to impose all of the restrictions ordered by the PTC I Single Judge on Mr Al Hassan".¹⁰⁵ This finding applies with even greater force as concerns the ongoing deprivation, rather than restriction, of Mr. Al Hassan's liberty.
33. *Fourthly*, the power of a Court to implement release is a precondition for fair trial.¹⁰⁶ Article 64(2) of the Statute requires the Trial Chamber to ensure that the proceedings "are conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses". Mr. Al Hassan's right to release cannot, therefore,

⁹⁸ [REDACTED].

⁹⁹ [REDACTED].

¹⁰⁰ *Clooth v. Belgium*, 12718/87, para. 44: "With the effluxion of time, the requirements of the investigation do not suffice to justify the detention of a suspect: the risks diminish with the passing of time as the inquiries are effected, statements taken and verifications carried out."

¹⁰¹ [REDACTED].

¹⁰² The Appeals Chamber has stressed the necessity of assessing restrictive measures in light of recent information: [ICC-01/04-02/06-1817-Red](#), para. 44.

¹⁰³ Mr. Al Hassan has publicly expressed his opposition to the activities of Al Qaeda and JNIM: [ICC-01/12-01/18-520-Red2](#), para. 40.

¹⁰⁴ *A and others v. United Kingdom*, 3455/05, paras. 108-109; al Baluchi, [A/HRC/WGAD/2017/89](#), paras. 62-65

¹⁰⁵ ICC-01/12-01/18-557-Red3, para. 10.

¹⁰⁶ A/HRC/30/37, para. 3: "The effective exercise of this fundamental safeguard of personal liberty in all situations of deprivation of liberty, without delay and without exception, resulting in appropriate remedies and reparations, including an entitlement to release upon a successful challenge, must be guaranteed by the State". See also Annex, p. 7: "A court shall review [the detention] (...) It shall be (...) a competent, independent and impartial judicial authority capable of exercising recognizable judicial powers, including the power to order immediate release ..."

be compromised due to any potential inability on the part of the Registry to implement certain protective measures: there is, instead, a positive obligation on the Court to ensure that appropriate measures are taken to reconcile Mr. Al Hassan's right to release, and the protection of victims and witnesses.

34. *Fifthly*, restrictions of fundamental rights cannot be based solely, or predominantly, on what might offend the opinion of third persons or the public.¹⁰⁷ It is of profound importance that the Court refutes any suggestion that interim release is incompatible with the rights and interests of victims. The right to release is a fundamental aspect of justice;¹⁰⁸ victims have no legitimate expectation that an accused, who has yet to be convicted, remains locked up in The Hague.



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¹⁰⁷ *Dickson v. United Kingdom*, [44362/04](#), para. 68.

¹⁰⁸ *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: "Achieving justice, however, also requires respect for the convicted persons' fundamental rights, in particular their right for private life and family life. By granting provisional release to convicted persons pending an appeal when the special circumstances of a case allow it, the International Tribunal fulfils its obligation to pursue justice for all parties involved."