

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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## TRIAL CHAMBER X

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

## SITUATION IN THE REPUBLIC OF MALI

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

**Public**

Public redacted version of the "Prosecution's response to "Urgent Defence request for interim release", 30 March 2020, ICC-01/12-01/18-697-Conf-Exp

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

**The Office of the Prosecutor**

Ms Fatou Bensouda  
Mr James Stewart

**Counsel for the Defence**

Ms Melinda Taylor  
Ms Marie-Hélène Proulx  
Mr Thomas Hannis

**Legal Representatives of the Victims**

Mr Seydou Doumbia  
Mr Mayombo Kassongo  
Mr Fidel Luvengika Nsita

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

Nigel Verrill

**Detention Section**

Paddy Craig

**Victims Participation and Reparations  
Section**

**Other**

## Introduction

1. Trial Chamber X ("Chamber") should dismiss the Defence's urgent request for conditional release of Mr. AL HASSAN ("Accused") to [REDACTED] [REDACTED] for the duration of the COVID-19 pandemic ("Defence request").<sup>1</sup> The Defence request does not meet the requirements for conditional release under article 60(2) of the Statute.
2. Mr. AL HASSAN is accused of 13 counts of war crimes and crimes against humanity committed in the context of a brutal and violent campaign of persecution by Ansar Dine and AQIM against vulnerable and defenceless men, women and children in Tombouctou and its region for approximately 10 months in 2012-2013.<sup>2</sup> He admittedly participated in floggings and other acts of violence and persecution as charged in this case.<sup>3</sup>
3. At the time of his arrest by the French forces in April 2017, he was still actively involved in the activities of the armed groups operating in the north of Mali, including attacks on, and killings of, MINUSMA personnel.<sup>4</sup> He worked under the instructions of Iyad Ag GHALY, the founder and leader of Ansar Dine and the main leader of the umbrella organisation called the *Jama'at Nusrat Al-Islam wal-Muslimin* (JNIM).
4. In light of, *inter alia*, the gravity of the charges and his profile, the risks enumerated under article 58(1)(b) of the Statute justifying detention of the Accused continue to exist. The alleged [REDACTED] condition of the Accused does not negate any of the risks that he might abscond, disrupt the investigation and the Court's proceedings, or continue the commission of crimes within the jurisdiction of the Court.
5. Moreover, the Defence fails to substantiate the willingness and ability [REDACTED] to [REDACTED] impose conditions which may be attached to his release. [REDACTED], the

<sup>1</sup> ICC-01/12-01/18-680 [REDACTED].

<sup>2</sup> ICC-01/12-01/18-461 [REDACTED] Corr.

<sup>3</sup> [REDACTED]

<sup>4</sup> See para.36 below.

guarantees proffered by the Accused [REDACTED] and the use of [REDACTED] tracking device [REDACTED] [REDACTED] are wholly insufficient in themselves, let alone to mitigate the risks listed under article 58(1)(b) of the Statute.

6. In fact, in the context of the upcoming trial and disclosure of the Prosecution witnesses' identities, it is vital that the Accused remains in detention, with the continuous restrictions on his contacts as the Chamber determined, in order to mitigate risks to victims and witnesses, and ensure the preservation of the evidence, the integrity of the proceedings and the manifestation of the truth.
7. The issues raised by the Defence regarding the conditions of detention of the Accused are in essence complaints regarding new and necessary measures implemented at the ICC Detention Centre in response to the COVID-19 crisis. While the Prosecution is not in a position to determine the veracity of the Defence allegations regarding the Accused's [REDACTED] situation, there appear to be measures that can be taken to address his concerns while in detention. In any event, the issues relating to detention conditions should first be raised pursuant to the complaint procedure provided for in the Regulations of the Registry ("RoR").
8. The Accused has not been detained for an unreasonable period. Contrary to the Defence's suggestions, the Accused's detention in Mali cannot be taken into consideration when considering the reasonableness of the length of pre-trial detention for the purpose of the ICC proceedings. Any alleged ill-treatment during the Accused's detention in Mali is also irrelevant to the assessment of the necessity and proportionality of his detention at the Court because the Prosecution and the Court have no role of any kind in his arrest, detention or ill-treatment in Mali.
9. At this stage, the Defence allegations regarding possible delays that may be caused to the proceedings as a result of the current pandemic are only speculative. A change in the deadlines would not necessarily have the impact

suggested by the Defence.<sup>5</sup> In addition, disclosure of evidence is continuing. The Defence itself opposed any delay in this regard.

10. Should the Chamber nevertheless be minded to favourably consider conditional release of the Accused, the Prosecution requests that it be afforded sufficient time to assess the Defence expert's opinions and fully respond to the Defence allegations regarding the Accused's [REDACTED] conditions and, if need be, request the Chamber to designate an independent expert. The Chamber should also seek the views of the [REDACTED] and victims that have communicated with the Court and who could be at risk as a result of the release pursuant to rule 119(3) of the Rules of Procedure and Evidence ("Rules"). An assessment should also be instructed as to the feasibility of implementing the Accused's transport from the Detention Centre to [REDACTED] [REDACTED] and of enforcing conditions of his release, including the monitoring of a tracking device in the current circumstances.

### **Confidentiality**

11. This Request is classified as confidential, pursuant to regulation 23*bis*(1) and (2) of the Regulations to maintain the confidentiality of the Defence request. It is also *ex parte* since it contains information that still falls under rule 42 of the Rules. The Prosecution will file confidential and public redacted versions of the Response shortly.

### **Procedural history**

12. Following the Prosecution application on 20 March 2018, Pre-Trial Chamber I issued an arrest warrant against the Accused on 27 March 2018, finding that the arrest of Al Hassan is necessary within the meaning of article 58(1)(b) of the Statute in order to (i) ensure his appearance before the Court; or (ii) ensure

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<sup>5</sup> See, for example, ICC-01/12-01/18-677.

that he does not obstruct or endanger the investigation or the proceedings; or  
(iii) prevent him from continuing with the commission of the crime.<sup>6</sup>

13. On 31 March 2018, the Accused was surrendered to the Court and was placed in custody at the Court's Detention Centre in The Hague.<sup>7</sup>
14. During the period immediately before the arrest of the Accused and during the preliminary phase of the proceedings, the Parties made several requests in relation to the Accused's non-privileged communications. In total, the Single Judge of Pre-Trial Chamber I issued seven decisions regarding restrictions on his contacts ("Restrictions").<sup>8</sup>
15. Following the hearing on the confirmation of charges in July 2019, on 30 September 2019, Pre-Trial Chamber I confirmed the charges against the Accused, comprising of 13 counts of war crimes and crimes against humanity, including torture, passing of sentences without due process, rape, sexual slavery, forced marriage, attacks against protected objects and persecution.<sup>9</sup>
16. On 21 November 2019, the Prosecution submitted to this Chamber an urgent request for the maintenance of the Restrictions ("Prosecution request to maintain the Restrictions").<sup>10</sup>
17. On 21 January 2020, the Single Judge of this Chamber decided that the Restrictions shall remain in place.<sup>11</sup> She further decided to review the Restrictions following receipt of the Registry's report on the measures, including potential alternatives to the regime currently in place, due on 8 April 2020, and the Prosecution's response due on 23 April 2020.<sup>12</sup>
18. On 7 February 2020, the Defence filed, on an *ex parte* basis, a request for confirmation or for modification of the monitoring regime to allow for the

<sup>6</sup> ICC-01/12-01/18-2, para.17. A reasoned decision was issued on 22 May 2018, ICC-01/12-01/18-35- [REDACTED], para.192-198.

<sup>7</sup> ICC-01/12-01/18-12-tENG, para.3.

<sup>8</sup> The procedural history regarding the Restrictions is detailed in paragraphs 12 to 38 of the Prosecution request to main the Restrictions of 21 November 2019, ICC-01/12-01/18-505 [REDACTED].

<sup>9</sup> ICC-01/12-01/18 [REDACTED] orr.

<sup>10</sup> ICC-01/12-01/18-505 [REDACTED], para. [REDACTED]. A confidential redacted version accessible to the Defence was filed on 26 November 2020, ICC-01/12-01/18-505 [REDACTED].

<sup>11</sup> ICC-01/12-01/18-557-Red3, para.12.

<sup>12</sup> ICC-01/12-01/18-557-Red3, para.11.

Accused's attendance at Friday prayers alongside Dutch detainees of Muslim faith at the Scheveningen Penitentiary. The request was reclassified as confidential and notified to the Prosecution on 25 March 2020.<sup>13</sup>

### **Applicable law**

19. According to the Appeals Chamber, conditional release is possible in two situations: "(1) where a Chamber, although satisfied that the conditions under article 58(1)(b) are not met, nevertheless considers it appropriate to release the person subject to conditions; and (2) where risks enumerated in article 58(1)(b) of the Statute exist, but the Chamber considers that these can be mitigated by the imposition of certain conditions of release".<sup>14</sup>
20. The Appeals Chamber judgement in *Bemba* also specified that: "In granting conditional release it is necessary to specify the appropriate conditions that make conditional release feasible, identify the State to which Mr Bemba would be released and whether that State would be able to enforce the conditions imposed by the Court."<sup>15</sup>
21. As confirmed by the Appeals Chamber, "there is no provision in the Court's legal texts that specifically provides for the interim or conditional release of a detained person on health grounds".<sup>16</sup>
22. Rather, the Statute, the Rules and the Regulations of the Court ("RoC") and the RoR provide for specific procedures when the health of a suspect or accused is in question. For example, according to regulation 103(5) of the RoC, a detainee requiring specialist treatment "shall, as far as possible, be treated within the detention centre". Should hospitalisation be necessary, the detained person "shall be transferred to a hospital without delay" while the "Registrar shall ensure the continuous detention of the person both at the place of treatment and when in transit."<sup>17</sup>

<sup>13</sup> ICC-01/12-01/18-583 [REDACTED]. No decision, if any, on this request has been notified to the Prosecution to date.

<sup>14</sup> ICC-01/05-01/08-1626-Red, para.55.

<sup>15</sup> ICC-01/05-01/08-631-Red, para. 2.

<sup>16</sup> ICC-02/11-01/11-278-Red, para.86.

<sup>17</sup> Regulation 103(5) of the RoC.

23. Medical reasons can only play a role in decisions on interim release if they negate the risks under article 58(1)(b) of the Statute, or as a reason for granting conditional release.<sup>18</sup>

### Submissions

#### 1. The requirements for granting conditional release are not met

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

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

24. [REDACTED]  
[REDACTED]  
[REDACTED] The Defense allegation that the Accused has no affiliation with Iyad Ag GHALY is simply misleading. By his own accounts, he joined the armed groups, Ansar Dine and AQMI, at the beginning of the occupation of Timbuktu.<sup>19</sup> At the time of his arrest by the French forces in April 2017, he was still working under instructions of Iyad Ag GHALY,<sup>20</sup> whom he met several times<sup>21</sup> and who specifically sent someone to fetch him from [REDACTED] Libya.<sup>22</sup>

25. [REDACTED]  
[REDACTED]<sup>23</sup> [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>24</sup>

<sup>18</sup> ICC-02/11-01/11-278-Red, para.87.

<sup>19</sup> [REDACTED]

<sup>20</sup> [REDACTED]

<sup>21</sup> [REDACTED]

<sup>22</sup> [REDACTED]

<sup>23</sup> [REDACTED]

<sup>24</sup> [REDACTED]



26. [REDACTED]
- 25 [REDACTED]
27. [REDACTED]
- 26 [REDACTED]
28. [REDACTED]
- 27 [REDACTED]
29. [REDACTED]
- 28 [REDACTED]
- 29 [REDACTED]

- 
- 25 [REDACTED]
- 26 [REDACTED]
- 27 [REDACTED]
- 28 [REDACTED]
- 29 [REDACTED]

[REDACTED]

[REDACTED]<sup>30</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

30. The gravity of the charges against the Accused coupled with the possibility that he faces long prison sentence, if convicted, also supports the existence of a substantial flight risk of the Accused, if released.<sup>31</sup>

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

31. [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]<sup>32</sup>

32. If released, there will be no effective measure or means available to the Court to ensure that the Accused does not tamper with or threaten Prosecution's witnesses, either directly or indirectly through other persons or groups. It will not be possible, for example, to ensure that the Accused does not discuss information related to the case and specific witnesses with [REDACTED] or any other person with whom he might communicate, including members of the armed groups, some of whom were involved in the crimes charged in this case.

33. [REDACTED]
- [REDACTED]

<sup>30</sup> [REDACTED]

<sup>31</sup> ICC-02/11-01/15-992-Red, para. 69: "if the charges brought against the detained person are serious, they may result in a lengthy prison sentence in case of a conviction; this, in turn, indicates a probability that the detained person has motivation to abscond."

<sup>32</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

34. Furthermore, the Accused's [REDACTED] would deter witnesses and victims from continuing to cooperate with the Prosecution and testifying at trial. [REDACTED]

[REDACTED]

[REDACTED]. [REDACTED]

[REDACTED]<sup>33</sup> [REDACTED]

[REDACTED]<sup>34</sup>

35. Releasing the Accused would therefore have an irremediable impact on the security and safety of victims and witnesses, the preservation of evidence, ongoing investigation and the upcoming trial. It would put the lives of witnesses and victims at risk, [REDACTED]

[REDACTED]

[REDACTED].

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

36. There is also a risk of further commission of crimes by the Accused in light of his involvement in the activities of the armed groups until the time of his

<sup>33</sup> [REDACTED]

<sup>34</sup> [REDACTED]

arrest by the French forces in April 2017.<sup>35</sup> His involvement included conducting trainings on first aid for members, upon request by Iyad Ag GHALY himself.<sup>36</sup> Most importantly, the Accused [REDACTED] upon Iyad Ag GHALY's direct order.<sup>37</sup> In this context, he was involved in the violent activities of the groups. [REDACTED]

[REDACTED]<sup>38</sup>

37.

38.

## **1.2. The alleged [REDACTED] conditions of the Accused do not negate the risks under article 58(1)(b) or justify conditional release**

39. The alleged [REDACTED] condition of the Accused does not negate any of the risks under article 58(1)(b) of the Statute.

40. Indeed, nothing in the [REDACTED] opinions of the Defence expert or the excerpts of his [REDACTED] file at the Detention Centre suggests that the [REDACTED] conditions of the Accused are such that he could not take steps towards fleeing from the Court's jurisdiction, disrupting the investigation and the Court's proceedings and furthering the commission of crimes within the jurisdiction of the Court.

41. Even if the Defence submissions as to the Accused's [REDACTED] condition were considered to be sufficiently supported, which would require the

<sup>35</sup> See para.24 [REDACTED] above.

<sup>36</sup> [REDACTED]

<sup>37</sup> [REDACTED]

<sup>38</sup> [REDACTED]

examination by an OTP expert or an independent expert tasked by the Chamber, his continued detention is necessary to mitigate these risks.

42. In this context, the Prosecution must once more stress that it had no role in his alleged ill-treatment in Mali. His interviews were conducted in full compliance with article 55(2) of the Statute. In addition, the Accused [REDACTED]  
[REDACTED]  
[REDACTED]<sup>39</sup>, clearly expressed his voluntariness to talk to the Prosecution, exercised his right to remain silent where and when he decided so, and indicated his understanding of the separate nature of the national proceedings, and that of the ICC proceedings.<sup>40</sup> There is no basis for granting conditional release on account of his alleged ill-treatment in Mali, or its impact on his [REDACTED] health.

### **1.3. There are no guarantees to mitigate the risks or ensure compliance with conditions**

43. The guarantees proffered by the Accused [REDACTED], and the use of an electronic monitoring bracelet proposed by the Defence,<sup>41</sup> are wholly insufficient to ensure his appearance at trial, [REDACTED]  
[REDACTED]. [REDACTED]  
[REDACTED]. The measures proffered by the Defence also fail to mitigate the risks against witness and victims tampering or further commission of crimes.
44. The Defence does not provide details about the technical aspects regarding the use of the monitoring bracelets, including how and by whom such monitoring could be done [REDACTED]. In fact,

<sup>39</sup> [REDACTED]  
[REDACTED]  
[REDACTED]

<sup>40</sup> [REDACTED]  
[REDACTED]  
[REDACTED]

<sup>41</sup> Defence request, para.25.

it is unlikely that such bracelets can be effectively monitored [REDACTED]  
[REDACTED].

There is also no guarantee of any kind that the Accused would keep such bracelets [REDACTED].

45. Most importantly, the Defence fails to substantiate the willingness and ability [REDACTED] to receive the Accused [REDACTED] and impose any additional conditions which may be imposed pursuant to rule 119(1) of the Rules in order to address all the risks under article 58(2)(b) of the Statute. It merely refers to the existence of [REDACTED] it alleges still operating [REDACTED] [REDACTED] without giving any details on the said [REDACTED] their ability and willingness [REDACTED] a detainee such as the Accused, or the escort that would be necessary for such [REDACTED].<sup>42</sup>

46. It is in fact clear that [REDACTED] authorities would not be able to effectively enforce any such conditions [REDACTED]  
[REDACTED]. [REDACTED]  
[REDACTED],<sup>43</sup> [REDACTED]  
[REDACTED]. [REDACTED] [REDACTED]  
[REDACTED]  
[REDACTED].<sup>44</sup> The current pandemic, on which the Accused relies to request his conditional release, would also prevent ICC staff [REDACTED]  
[REDACTED].

47. Lastly, in light of [REDACTED]  
[REDACTED]

<sup>42</sup> Defence request, para.47 [REDACTED].

<sup>43</sup> See, for example, [REDACTED].

<sup>44</sup> [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

██████████<sup>45</sup> it is critical to ascertain the willingness and ability of ██████████  
 ██████████ authorities to enforce conditions that will be attached before  
 authorising the Accused's release ██████████

**2. The issues raised by the Defence only relate to the Accused's detention conditions and can be addressed while in detention**

48. The issues raised by the Defence are in essence complaints regarding new measures implemented by the Chief Commanding Officer at the Detention Centre, which are deemed necessary in response to the COVID-19 crisis.
49. While, in general, detained persons have the right to communicate with others, these rights are not absolute. They can be subject to legitimate restrictions.<sup>46</sup>
50. The current pandemic impacts everyone's life across the world. Different measures are being undertaken by competent authorities at the local, regional and international level in order to contain the pandemic and save lives. Those measures limiting people's physical and social interactions are applied to everyone, including people outside and inside detention facilities.
51. While the Prosecution does not have all necessary information to take a position on the necessity and proportionality of the measures being implemented at the Detention Centre, they appear to be reasonable in the current exceptional circumstances. The Defence does not provide any ground to believe that the measures taken are not reasonable and necessary in the current exceptional circumstances.

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<sup>45</sup> ██████████  
 ██████████

<sup>46</sup> See, for example, article 8 of the European Convention on Human Rights, which allows for interference in the exercise of the right to respect for one's private and family life, their home and their correspondence if it is "in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." See also principle 19 of the [UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#): "A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations."

52. Contrary to the Defence's suggestions,<sup>47</sup> the current conditions of detention of the Accused can in no way be equated to inhuman and degrading treatment. The new restrictions on visits and certain activities are temporary measures designed to protect the health, safety and lives of the detainees, including the Accused, in response to the COVID-19 pandemic.<sup>48</sup> None of the European Court of Human Rights ("ECHR") cases relied upon by the Defence is analogous to his situation as they involve solitary confinement<sup>49</sup> or relative isolation for approximately one year or more because of the profile of the detainee. Even in most of those instances, the ECHR found that the conditions of detention in question had not reached the minimum level of severity necessary to constitute inhuman or degrading treatment within the meaning of article 3 of the European Convention on Human Rights.<sup>50</sup>
53. There are measures and facilities available to the Accused, which can address issues such as lack of stimulation and social interaction, within the parameters of the measures being implemented. For example:

- [REDACTED]

[REDACTED]<sup>51</sup>

<sup>47</sup> Defence request, para.32-38.

<sup>48</sup> [REDACTED].

<sup>49</sup> The [Istanbul Statement on the Use and Effects of Solitary Confinement](#) defines solitary confinement as the physical isolation of individuals who are confined to their cells for 22 to 24 hours a day. See also Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, [A/66/268](#), para.25.

<sup>50</sup> *Ocalan v. Turkey*, Application no. 46221/99, 12 May 2005, para.195-196, finding that the general conditions in which the applicant was being detained had not reached the minimum level of severity required to constitute inhuman or degrading treatment within the meaning of Article 3 of the Convention. Ocalan had been the sole inmate in the prison for more than five years and his social isolation was made worse by the ban on his having a television set or communicating by telephone, and by the practical obstacle inadequate sea transport facilities posed to visits by his lawyers and members of his family; *Rohde v. Denmark*, Application no. 69332/01, 21 July 2005, para.97-98, finding that the period of solitary confinement in itself did not amount to treatment contrary to article 3 of the European Convention because the applicant, held in solitary confinement for eleven and a half months, had access to television and newspapers, had language lessons, was able to meet the prison chaplain and received a visit once a week from his lawyer and some members of his family; *Ramirez Sanchez v. France*, Application no. 59450/00, 4 July 2006, para.131-150, finding no violation of article 4 of the European Convention because the applicant, held in solitary confinement for eight years and two months, received twice-weekly visits from a doctor, a once-monthly visit from a priest and very frequent visits from one or more of his lawyers.

<sup>51</sup> [REDACTED].



- [REDACTED]  
[REDACTED]  
[REDACTED],<sup>52</sup>
- [REDACTED],<sup>53</sup>  
and
- [REDACTED]  
[REDACTED].<sup>54</sup>

54. To accommodate any specific concerns of the Accused, it may be possible to request other measures within the parameters of the existing measures, such as contacts with spiritual leaders or members of his Defence team by audio-visual means of communication.

55. The Prosecution also notes that the Accused's placement in a wing by himself [REDACTED].<sup>55</sup> In light of the advice given to all persons in the Netherlands to keep social distance,<sup>56</sup> it may be possible to move him to another wing with other detainees in order to end his alleged "virtual isolation" as described by the Defence.<sup>57</sup>

56. With respect to his medical treatment, while all non-acute medical appointments are suspended, [REDACTED]  
[REDACTED].<sup>58</sup>  
The Accused therefore has the possibility to request [REDACTED] treatment

[REDACTED],<sup>59</sup> [REDACTED]

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<sup>52</sup> [REDACTED]

<sup>53</sup> [REDACTED]

<sup>54</sup> [REDACTED].

<sup>55</sup> [REDACTED]

<sup>56</sup> [REDACTED].

<sup>57</sup> [REDACTED]

<sup>58</sup> Defence request, para.21.

<sup>59</sup> [REDACTED]

[REDACTED]

This could also be done by audio-visual means of communication, as it has become a practice in certain countries in the context of the current pandemic.<sup>60</sup>

57. In any event, issues relating to detention conditions should first be addressed pursuant to the complaint procedure provided for in of the RoR. The Defence request makes no mention of any efforts made to submit a complaint against the new restrictions introduced by the Chief Custody Officer pursuant to regulations 217 and 218 of the RoR, or to seek the review of his decision by the Registrar pursuant to regulation 219 of the RoR.
58. The opinions of the Defence expert, [REDACTED] may be relevant to his conditions of detention, but not release. Due to the short deadline imposed, and bearing in mind that [REDACTED], the Prosecution is in any event not in a position to make a proper assessment of her opinions. If the Chamber considers that they are relevant for the purposes of release, it should first allow sufficient time for the Prosecution to obtain the full opinions and related report and annexes to assess them, including by seeking an opinion from its own expert. The Chamber may also consider appointing an independent expert to assess the [REDACTED] condition of the Accused prior to rendering a decision on conditional release.

### **3. There are no “exceptional humanitarian circumstances” justifying release**

59. At the ICC, there have been only two instances, both in the *Bemba* case, in which a Chamber authorised conditional release of a suspect or an accused on the basis of “exceptional humanitarian circumstances”.<sup>61</sup>
60. The circumstances and the type of conditional release granted in those instances are markedly different from the present case. Mr. Bemba was allowed to travel to Belgium – at all times escorted by the Dutch or Belgian police [REDACTED] – to attend the funerals of his father and his stepmother. However, the strict conditions imposed effectively meant that he

<sup>60</sup> “Stress? Fear of COVID-19? Therapists treating the vulnerable go online to help”, *Reuters*, 25 March 2020, available at <https://www.reuters.com/article/health-coronavirus-counselling/stress-fear-of-covid-19-therapists-treating-the-vulnerable-go-online-to-help-idUSL8N2BD74G> (last visited on 28 March 2020).

<sup>61</sup> ICC-01/05-01/08-437-Red, para.9; ICC-01/05-01/08-1099-Red, para.13, 15.

was in custody at all times, albeit briefly outside the Court's Detention Centre.<sup>62</sup> In both instances, Mr. Bemba's conditional release did not exceed 24 hours. In contrast, the Defence seeks conditional release of the Accused for the entire duration of the COVID-19 pandemic, which could potentially last for months.

61. It should also be noted that the Appeals Chamber has not confirmed whether a Chamber has the power to order release for "humanitarian reasons" outside the framework of article 60(3) of the Statute.<sup>63</sup>

62. [REDACTED]  
[REDACTED] In fact, as of Saturday 28 March 2020, there were [REDACTED] persons found to have contracted COVID-19 [REDACTED].<sup>64</sup> Given that one contraction is already reported at the Scheveningen prison,<sup>65</sup> it is questionable whether the Accused's [REDACTED], [REDACTED] [REDACTED]. It is also questionable whether this would be beneficial to the health of the Accused himself considering the spread of the virus [REDACTED].<sup>66</sup>

63. While the Defence's refers to some examples of release of prisoners in response to the COVID-19 pandemic at the domestic level,<sup>67</sup> such measures appear to have been implemented or recommended only in relation to low-risk detainees, or those with limited time left to serve in prison.<sup>68</sup> Similarly, the

<sup>62</sup> ICC-01/05-01/08-437-Red, p.5-6; ICC-01/05-01/08-1099-Red, para.17.

<sup>63</sup> ICC-01/05-01/08-1626-Red, para.85.

<sup>64</sup> [REDACTED]

<sup>65</sup> "First Dutch inmate diagnosed with coronavirus", *NLTimes.nl*, 19 March 2020, <https://nltimes.nl/2020/03/19/first-dutch-prison-inmate-diagnosed-coronavirus> (last accessed on 27 March 2020).

<sup>66</sup> [REDACTED]

<sup>67</sup> Defence request, para.31.

<sup>68</sup> **Iran:** By 17 March 2020, Iranian authorities temporarily released some 85,000 prisoners, mostly non-violent offenders serving short prison sentences. See "Hard-hit Iran frees more prisoners amid coronavirus outbreak", *Aljazeera*, 17 March 2020, available at <https://www.aljazeera.com/news/2020/03/hard-hit-iran-frees-prisoners-coronavirus-outbreak-200317110516495.html> (last visited on 29 March 2020); **Italy:** On 16 March 2020, the Italian government adopted a decree that, among other measures, will allow for early supervised release of prisoners with less than 18 months left to serve on their sentence. The NGO Human Rights Watch calls on further measures, which "could include releasing those in

recommendation by the UN High Commissioner for Human Rights, issued on 25 March 2020, is that the authorities consider the release of “those particularly vulnerable to COVID-19, among them older detainees and those who are sick, as well as low-risk offenders” (emphasis added).<sup>69</sup>

64. Similarly, even if the Defence submissions as to the Accused’s [REDACTED] condition were considered to be sufficiently supported, they do not justify conditional release. The ECHR case law relied upon by the Defence<sup>70</sup> does not require that the vulnerability of detainees be taken into account in assessing the necessity and proportionality of detention as such. Rather, such factors must be considered in ensuring that the person is detained in conditions which adequately secure his or her health and well-being.<sup>71</sup> Within the ICC statutory framework, it is the responsibility of the Registrar to make arrangements to protect the health of detained persons, in accordance with regulation 103(1) of the RoC. In this regard, the Prosecution also notes that the treatment offered by the [REDACTED] staff at the Detention Centre [REDACTED] [REDACTED].<sup>72</sup> In fact, he enjoys better access to any necessary support, protection and treatment at the ICC Detention Centre [REDACTED].

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pretrial detention for nonviolent and lesser offenses as well as older prisoners and prisoners with underlying health conditions who do not pose a risk to the general public”. See “Wider Steps Needed to Protect Prisoners’ Health in Italy”, *Human Rights Watch*, 20 March 2020, available at <https://www.hrw.org/news/2020/03/20/wider-steps-needed-protect-prisoners-health-italy> (last visited on 29 March 2020); **Australia:** The NSW government in Australia introduced legislation enabling certain inmates to be released to control the spread of Covid-19 in prisons and beyond, but the eligibility for release includes all offenders who are a low risk and explicitly excludes serious offenders. See “Coronavirus is a ticking time bomb for the Australian prison system”, *The Guardian*, 26 March 2020, available at <https://www.theguardian.com/commentisfree/2020/mar/26/coronavirus-is-a-ticking-time-bomb-for-the-australian-prison-system> (last visited on 27 March 2020); **The United States:** Some states, including California, New York, Ohio and Texas, are reportedly releasing “low-risk” inmates to limit the spread of the coronavirus. “US states release ‘low-risk’ inmates over coronavirus fears”, *Al Jazeera*, 23 March 2020, available at <https://www.aljazeera.com/news/2020/03/states-release-risk-inmates-coronavirus-fears-200323175232427.html> (last visited on 27 March 2020).

<sup>69</sup> “Urgent action needed to prevent COVID-19 ‘rampaging through places of detention’ – Bachelet”, *Office of the High Commissioner for Human Rights*, 25 March 2020, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25745&LangID=E> (last visited on 27 March 2020).

<sup>70</sup> Defence request, para.5.

<sup>71</sup> *Florea v. Romania*, 37186/03, 14 September 2010, para.50.

<sup>72</sup> [REDACTED].

65. In light of the risks that would be posed by releasing the Accused, he cannot be granted conditional release based on “exceptional humanitarian circumstances” claimed by the Defence.

**4. The Accused has not been detained for an unreasonable period nor has there been any inexcusable delay by the Prosecution within the meaning of article 60(4) of the Statute**

66. Contrary to the Defence’s submissions,<sup>73</sup> the Accused’s detention in Mali cannot be taken into consideration when considering the reasonableness of the length of pre-trial detention for the purpose of the ICC proceedings. The Prosecution had no role in his arrest or detention in Mali.

67. The Defence does not claim nor establish any inexcusable delay by the Prosecution nor the Court within the meaning of article 60(4) of the Statute. The Prosecution also recalls that the length of the pre-trial period was based primarily on the unique security situation [REDACTED]  
[REDACTED].<sup>74</sup>

**5. The right to a speedy trial is being respected under the current circumstances**

68. The Defence’s allegations regarding significant delays are only speculative. In its decision of 20 March 2020, the Chamber decided to maintain the key deadlines and the trial commencement date, and encouraged the parties, the participants and the Registry to continue proposing alternative ways to move forward in the following months leading to the start of the trial.<sup>75</sup> Disclosure of evidence, for example, is continuing.<sup>76</sup> Written litigation is also proceeding, with filings and decisions being filed or issued each day. In this regard, the Prosecution notes that if released [REDACTED], the Accused would

<sup>73</sup> Defence request, para.42.

<sup>74</sup> ICC-01/12-01/18-94-Red-tENG, para.19-22.

<sup>75</sup> ICC-01/12-01/18-677, para.20.

<sup>76</sup> [REDACTED]. On 25 March 2020, the Prosecution proceeded to disclose 113 items in Pre-Trial INCRIM package 62. See ICC-01/12-01/18-685.

have less possibility to communicate with his defence team and to access evidence and other case material, than at the ICC Detention Centre.

69. In any event, according to the human rights jurisprudence, where delays result from factors outside the control of the State authorities, it is not a violation of the right to a speedy trial.<sup>77</sup> The right to a speedy trial must be seen in the context of dealing with the current COVID-19 pandemic.

### Conclusion

70. For the foregoing reasons, the Chamber should dismiss the Defence request, and order that the Accused remain in detention.

Should the Chamber be nevertheless minded to favourably consider the Defence request, it should grant the Prosecution and participants sufficient time to assess the Defence expert's opinion and fully respond to the Defence allegations regarding the Accused's medical conditions. It should also seek the views of [REDACTED] authorities and victims that have communicated with the Court and who could be at risk as a result of a release pursuant to rule 119(3) of the Rules. [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED].




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Fatou Bensouda  
Prosecutor

Dated this 30 March 2020

At The Hague, The Netherlands

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<sup>77</sup> See, for example, the judgement of the ECHR in: *Wloch v. Poland*, 19 October 2000, ECHR 2000-XI, para.149-150, finding that the responsibility for the protracted character of the proceedings, caused by delays in the execution of letters rogatory in another jurisdiction, cannot be ascribed to the Polish authorities, and finding no violation of article 6(1) of the European Convention on Human Rights. See also *Pafitis et al. v. Greece*, 26 February 1998, RJD, 1998-1, No.66, para.96, finding that the delays caused by the strike by members of the Athens Bar cannot be attributed to the State.