



Original: English

No. ICC-01/12-01/18
Date of original: 05 May 2020
Date: 29 May 2020

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 ‘Decision on the Defence request for interim release’

Decision to be notified in accordance with Regulation 31 of the *Regulations of the Court* to:

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TRIAL CHAMBER X (the ‘Chamber’) of the International Criminal Court, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, having regard to Articles 21, 58(1), 60(2) and (4), 61(11) and 64(2), (6)(a) and (e), and 67(1) of the Rome Statute, Rules 118(1) and (3), and 119 of the Rules of Procedure and Evidence (the ‘Rules’), and Regulation 51 of the Regulations of the Court (the Regulations’), issues this ‘Decision on the Defence request for interim release’.

I. Procedural history

1. On March 20 2018, the Office of the Prosecutor (the ‘Prosecution’) filed a motion seeking the issuance of an arrest warrant against Mr Al Hassan.¹
2. On 27 March 2018, Pre-Trial Chamber I (hereinafter: ‘PTC I’) issued an arrest warrant under Article 58 of the Statute against Mr Al Hassan for the commission of several crimes against humanity and war crimes.² A reasoned decision followed on 22 May 2018.³
3. On 31 March 2018, Mr Al Hassan was surrendered to the Court and placed in custody in the Court’s Detention Centre in The Hague.⁴
4. In a series of seven decisions (the ‘Pre-Trial Restrictions Decisions’),⁵ the PTC I Single Judge ordered restrictions on Mr Al Hassan’s contacts and accesses

¹ Requête urgente du Bureau du Procureur aux fins de délivrance d’un mandat d’arrêt et de demande d’arrestation provisoire à l’encontre de M. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18-1-Secret-Exp (secret *ex parte*, available only to the Prosecution; a confidential *ex parte* redacted version, available only to the Prosecution and the Defence, and a public redacted version were filed on 31 March 2018, respectively ICC-01/12-01/18-1-Conf-Exp-Red2 and ICC-01/12-01/18-1-Red).

² Mandat d’arrêt à l’encontre d’Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18-2 (reclassified as public on 28 March 2018).

³ Decision on the Prosecutor’s Application for the Issuance of a Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18-35-US-Exp (under seal *ex parte*, available only to the Prosecution and the Registry; a confidential *ex parte* redacted version, available only to the Prosecution and the Defence, and a public redacted version were filed simultaneously, respectively ICC-01/12-01/18-35-Conf-Exp-Red-tENG and ICC-01/12-01/18-35-Red2-tENG).

⁴ Order Scheduling the First Appearance of Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 3 April 2018, ICC-01/12-01/18-12-tENG, para.3.

⁵ [REDACTED].

while in pre-trial detention (the ‘Pre-Trial Restrictions’). These orders were implemented by the Registry who reported thereon in several filings.⁶

5. Following a hearing on the confirmation of charges in July 2019, on 30 September 2019, PTC I confirmed charges against Mr Al Hassan.⁷
6. On 21 January 2020, the Single Judge of this Chamber decided that the Pre-Trial Restrictions shall, in the interim, remain in place, pending review.⁸ In order to undertake the review, the Single Judge requested a report from the Registry on the measures, including potential alternatives to the regime currently in place, submissions from the Prosecution containing up to date, concrete and detailed information, and a response from the Defence.⁹
7. On 23 March 2020, the Defence filed an urgent request seeking the Chamber to grant Mr Al Hassan interim release to Mali ‘for the duration of the COVID-19 pandemic’ or such time as it deems appropriate, subject to all conditions imposed by the Chamber (the ‘Request’).¹⁰ The Defence submits that Mr Al Hassan’s detention fails to satisfy the criteria set out in Article 58(1) of the Statute, namely that his detention is not necessary to ensure his presence at

⁶ Refer Decision on Mr Al Hassan’s restrictions and accesses while in detention, ICC-01/12-01/18-557-Conf-Exp (confidential *ex parte*, available only to the Registry; separate confidential *ex parte* redacted versions available only to the Registry and Defence, ICC-01/12-01/18-557-Conf-Exp-Red, and only to the Registry and the Prosecution, ICC-01/12-01/18-557-Conf-Exp-Red2, were filed simultaneously; a public redacted version was filed on 14 February 2020, ICC-01/12-01/18-557-Red3), footnote 2.

⁷ Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18-461-Conf (a corrected version of the decision was filed on 8 November 2019, ICC-01/12-01/18-461-Conf-Corr; a public redacted version was filed on 13 November 2019, ICC-01/12-01/18-461-Conf-Corr-Red) (the ‘Confirmation Decision’).

⁸ Decision on Mr Al Hassan’s restrictions and accesses while in detention, ICC-01/12-01/18-557-Conf-Exp (confidential *ex parte*, available only to the Registry; separate confidential *ex parte* redacted versions available only to the Registry and Defence, ICC-01/12-01/18-557-Conf-Exp-Red, and only to the Registry and the Prosecution, ICC-01/12-01/18-557-Conf-Exp-Red2, were filed simultaneously; a public redacted version was filed on 14 February 2020, ICC-01/12-01/18-557-Red3).

⁹ The report and submissions were filed by the Registry and Prosecution respectively on 8 and 23 April 2020 in accordance with the deadlines set by the Single Judge. A response by the Defence is due on 7 May 2020.

¹⁰ Urgent Defence request for interim release, ICC-01/12-01/18-680-Conf-Exp (confidential *ex parte*, available only to the Defence and Registry, with confidential Annexes A, B, D to L and O, confidential *ex parte* Annexes C and M (available only to the Defence and Registry), and confidential *ex parte* Annex N (available only to the Defence, Prosecution and Registry); confidential redacted and public redacted versions were filed simultaneously, respectively ICC-01/12-01/18-680-Conf-Red and ICC-01/12-01/18-680-Red2; a French translation of the public redacted version of the Request was filed on 6 April 2020, ICC-01/12-01/18-680-Red2-tFRA).

trial,¹¹ to ensure that he does not obstruct or endanger the investigations, or continue the commission of any crimes.¹² It further submits that there exist humanitarian factors and unreasonable delays which militate in favour of release during this period,¹³ and that the requested duration of release is proportionate, and mitigates any risks.¹⁴

8. The core of the Defence's Request is that Mr Al Hassan's detention has transformed into an overly prejudicial and disproportionate situation, due to the cumulative impact of: (i) his current conditions of detention – in particular, changes brought about as a result of the COVID-19 pandemic; (ii) the overall length of his pre-trial detention and the significant delays that will be engendered as a result of COVID-19; and (iii) the impact of these factors on his mental well-being, which the Defence submits is aggravated by the fact that Mr Al Hassan is a torture survivor.¹⁵ In sum, the Defence submits that it is no longer necessary or proportionate to maintain Mr Al Hassan's detention.¹⁶
9. On 23 March 2020, the Single Judge shortened the deadline for responses to the Request to 30 March 2020 and invited observations from the Registry, if any, by the same deadline.¹⁷
10. On 30 March 2020, the Prosecution responded to the Request, opposing it (the 'Prosecution Response').¹⁸ It submits, *inter alia*, that (i) the risks enumerated under Article 58(1)(b) of the Statute justifying the detention of Mr Al Hassan continue to exist, taking into account the gravity of the charges and Mr Al Hassan's profile,¹⁹ and that his alleged psychological condition does not negate any of the risks that he might abscond, disrupt the investigation and the Court's

¹¹ Request, ICC-01/12-01/18-680-Red2, paras 24-25.

¹² Request, ICC-01/12-01/18-680-Red2, paras 26-28.

¹³ Request, ICC-01/12-01/18-680-Red2, paras 29-46.

¹⁴ Request, ICC-01/12-01/18-680-Red2, para. 47.

¹⁵ Request, ICC-01/12-01/18-680-Red2, paras 1-3. 29.

¹⁶ Request, ICC-01/12-01/18-680-Red2, para. 3.

¹⁷ Email from the Single Judge to the parties and participants, 23 March 2020, at 19:18.

¹⁸ Prosecution's response to "Urgent Defence request for interim release", ICC-01/12-01/18-697-Conf-Exp (confidential *ex parte*, available only to the Prosecution, the Detention Centre and Victims and Witnesses Unit ('VWU')); a confidential redacted version was notified on 31 March 2020, ICC-01/12-01/18-697-Conf-Red).

¹⁹ Prosecution Response, ICC-01/12-01/18-697-Conf-Red, paras 2-4, 24-27, 29--38.

proceedings, or continue the commission of crimes within the jurisdiction of the Court;²⁰ (ii) the measures proposed by the Defence, even if feasible in light of the current COVID-19 travel restrictions, are insufficient to mitigate those risks;²¹ (iii) in the context of the upcoming trial and disclosure of witness identities, Mr Al Hassan's continued detention is vital to mitigate risks to victims and witnesses, and ensure the preservation of the evidence and integrity of the proceedings;²² (iv) there are measures which can be taken to address the Defence's concerns regarding the new COVID-19 measures applicable at the Detention Centre;²³ (v) there are no 'exceptional humanitarian circumstances' justifying release;²⁴ (vi) Mr Al Hassan has not been detained for an unreasonable period;²⁵ and (vii) at this stage, Defence submissions about possible delays in the proceedings are speculative.²⁶

11. On 30 March 2020, the legal representatives of victims (the 'LRVs') also responded to the Request, opposing it on the basis that the conditions set out in Article 58(1) of the Statute continue to be met and are not mitigated by the measures proposed by the Defence (the 'LRVs Response').²⁷ The LRVs similarly argue, *inter alia*, that the Defence allegations of unacceptable delays in proceedings are premature and unfounded²⁸ and that Mr Al Hassan's complaints are the result of problems in the implementation of decisions impacting his conditions of detention which can be addressed within the Detention Centre.²⁹ Moreover, the LRVs recall that the participating victims live together with perpetrators of the alleged crimes in the region and submit that the release of Mr Al Hassan, as sought, would bring insecurity, disturb the local peace, and be perceived as a provocation.³⁰ In this regard, they submit that, should he be

²⁰ Prosecution Response, ICC-01/12-01/18-697-Conf-Red, paras 4, 39-41.

²¹ Prosecution Response, ICC-01/12-01/18-697-Conf-Red, paras 5, 28, 43-47.

²² Prosecution Response, ICC-01/12-01/18-697-Conf-Red, para. 6.

²³ Prosecution Response, ICC-01/12-01/18-697-Conf-Red, paras 7, 48-58.

²⁴ Prosecution Response, ICC-01/12-01/18-697-Conf-Red, paras 59-65.

²⁵ Prosecution Response, ICC-01/12-01/18-697-Conf-Red, paras 8, 66-67.

²⁶ Prosecution Response, ICC-01/12-01/18-697-Conf-Red, paras 9, 68-69.

²⁷ Réponse à la requête urgente de la Défense portant demande de libération conditionnelle (ICC-01/12-01/18-680-Conf-Red), ICC-01/12-01/18-696-Conf (a public redacted version was filed on 9 April 2020, ICC-01/12-01/18-696-Red).

²⁸ LRVs Response, ICC-01/12-01/18-696-Red, para. 14.

²⁹ LRVs Response, ICC-01/12-01/18-696-Red, paras 34-35

³⁰ LRVs Response, ICC-01/12-01/18-696-Conf, paras 21-27.

released in the region, victims and witnesses would withdraw from the ongoing trial procedure before the Court.³¹

12. On 30 March 2020, the Registry submitted its observations (the ‘Registry Observations’)³² on three areas: (i) the current situation in Mali and international cooperation aspects; (ii) the detention conditions of Mr Al Hassan – including on, *inter alia*, the feasibility of various measures to address Defence concerns; and (iii) the anticipated impact of the Request on the situation of victims and witnesses.
13. On 1 April 2020, the Defence filed a request for leave to reply to the Prosecution Response and Registry Observations in respect of five issues (the ‘Request for Leave to Reply’).³³ The Single Judge granted, by email, leave to reply on all but the third issue, by 9 April 2020 at the latest, noting that reasons would follow in due course.³⁴
14. On 9 April 2020, in accordance with permission granted by the Single Judge,³⁵ the Defence filed a reply (the ‘Reply’):³⁶ (i) contesting what it submits is an unfair reliance on *ex parte* allegations by the Prosecution and Registry, and the Prosecution’s reliance on evidence which the Defence submits ‘cannot be fairly tested, and/or is the direct and indirect fruits of torture’;³⁷ (ii) submitting that the

³¹ LRVs Response, ICC-01/12-01/18-696-Red, para. 24.

³² Registry’s Observations on the “Urgent Defence Request for Interim Release”(ICC-01/12-01/18-680-Conf-Exp), ICC-01/12-01/18-698-Conf-Exp (confidential *ex parte*, available only to the Registry, with one confidential *ex parte* Annex, available only to the Registry and Defence; two confidential *ex parte* redacted versions were filed simultaneously, the first available only to the Registry and Defence, ICC-01/12-01/18-698-Conf-Exp-Red, and the second available only to the Registry and the Prosecution, ICC-01/12-01/18-698-Conf-Exp-Red2).

³³ Defence Request for Leave to Reply to Prosecution and Registry Responses to Interim Release Request, ICC-01/12-01/18-712-Conf-Corr (with confidential Annexes A and C and confidential *ex parte* Annex B, available only to the Defence and Registry).

³⁴ Email from the Single Judge to the parties and participants, 2 April 2020, at 11:36. The Single Judge also noted that in light of the nature of the Request for Leave to Reply and the Request, she considered it appropriate to make the determination without first receiving responses to the Request for Leave to Reply.

³⁵ The Single Judge granted a Defence request for leave to file after 16:00, *see* email from the Defence to the Chamber, 9 April 2020, at 13:20 and email from the Single Judge to the parties and participants, 9 April 2020, at 14:04.

³⁶ Defence Reply to Prosecution and Registry Responses to Interim Release Request, ICC-01/12-01/18-737-Conf (with confidential *ex parte* Annex A (available only to the Prosecution, Registry and Defence), public Annex B and confidential Annexes C, D, E, and F; the filing was filed on 9 April 2020 but notified on 14 April 2020).

³⁷ Reply, ICC-01/12-01/18-737-Conf, paras 2-15.

COVID-19 pandemic impacts directly on the Chamber's appreciation of the criteria under Article 58(1) of the Statute, in contest to what the Defence submits is an attempt by the Prosecution to address the implications of the COVID-19 pandemic in a 'hermetically sealed manner', treating it as an isolated and independent basis for release;³⁸ (iii) replying to submissions on practical issues concerning the modalities of Mr Al Hassan's release;³⁹ and (iv) contesting what it submits are 'general protection concerns' put forward by the Prosecution and Registry to justify Mr Al Hassan's continued detention on the grounds that Mr Al Hassan would engage in witness intimidation or interference, if granted temporary release.⁴⁰

15. On 23 April 2020, PTC I issued a decision, *inter alia*, amending the confirmed charges against Mr Al Hassan, following a request from the Prosecution.⁴¹ The Defence filed a request seeking leave to appeal this decision on 28 April 2020.⁴²

II. Applicable law

16. When dealing with requests for interim release, the Chamber must bear in mind the fundamental principle that deprivation of liberty is the exception and not the rule.⁴³
17. A person subject to a warrant of arrest may apply for interim release pending trial, pursuant to Article 60(2) of the Statute. In the first such decision under that provision - like the present one - the Chamber must 'inquire anew into the

³⁸ Reply, ICC-01/12-01/18-737-Conf, paras 16-23.

³⁹ Reply, ICC-01/12-01/18-737-Conf, paras 24-28.

⁴⁰ Reply, ICC-01/12-01/18-737-Conf, paras 29-34.

⁴¹ Décision portant modification des charges confirmées le 30 septembre 2019 à l'encontre d'Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18-767-Conf (with a confidential Annex, ICC-01/12-01/18-767-Conf-Anx; a corrigendum was issued on 1 May 2020, ICC-01/12-01/18-767-Conf-Corr).

⁴² Defence request for leave to appeal Pre-Trial Chamber I's "Décision portant modification des charges confirmées le 30 septembre 2019 à l'encontre d'Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud" (ICC-01/12-01/18-767-Conf), ICC-01/12-01/18-774-Conf.

⁴³ Pre-Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Application for Interim Release, 16 December 2008, ICC-01/05-01/08-321, para. 31; Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Application for Interim Release, 14 April 2009, ICC-01/05-01/08-403, para. 36; Pre-Trial Chamber I, *The Prosecutor v. Katanga and Mathieu Ngudjolo Chui*, Decision on the Conditions of the Pre-Trial Detention of Germain Katanga, 21 April 2008, ICC-01/04-01/07-426, p. 6; Pre-Trial Chamber II, *The Prosecutor v. Bosco Ntaganda*, Decision on the Defence's Application for Interim Release, 18 November 2013, ICC-01/04-02/06-147, para. 33.

existence of facts justifying detention’.⁴⁴ The Chamber may refer to the decision on the warrant of arrest, as well as materials cited therein, but must assess them *de novo*.⁴⁵

18. The Chamber must determine whether, pursuant to Article 58(1)(a) of the Statute, there are reasonable grounds to believe that Mr Al Hassan committed a crime within the jurisdiction of the Court and whether, pursuant to Article 58(1)(b), the continued detention of Mr Al Hassan appears necessary to: (i) ensure his appearance at trial, (ii) ensure the investigation or court proceedings are not obstructed or endangered, or (iii) prevent him from continuing to commit crimes within the Court’s jurisdiction. The Article 58(1)(b) conditions are in the alternative - if one is satisfied, the other conditions do not have to be addressed or fulfilled.⁴⁶

III. Analysis

19. Before turning to the assessment under Article 60(2) of the Statute, the Chamber deems it necessary to address a number of issues.

A. Reasons for the decision on the Request for Leave to Reply

20. The Chamber did not consider that it would be assisted in its determinations by a reply from the Defence on the third issue identified in its Request for Leave to Reply.⁴⁷ Leave to reply on that issue was therefore rejected.

⁴⁴ Appeals Chamber, *The Prosecutor v. Katanga and Mathieu Ngudjolo Chui*, Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, 9 June 2008, ICC-01/04-01/07-572 (OA4), para. 10 (*‘Katanga OA4’*).

⁴⁵ Appeals Chamber, *The Prosecutor v. Laurent Koudou Gbagbo*, Public redacted version of Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled ‘Decision on the “Requête de la Defense demandant la mise en liberté provisoire du président Gbagbo”’, 26 October 2012, ICC-02/11-01/11-278-Red (OA), paras 27, 69 (*‘Gbagbo OA’*).

⁴⁶ Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted Version of Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s “Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic and the Republic of South Africa”, 2 December 2009, ICC-01/05-01/08-631-Red (OA2), para. 89 (*‘Bemba OA2’*).

⁴⁷ The third issue in the Defence Request for Leave to Reply relates to contesting the Registry and Prosecution suggestion that Chamber should disregard any arguments concerning the impact of the current conditions of detention on Mr Al Hassan, on the ground that Mr Al Hassan should have sought

B. *Ex parte* nature of information adduced by the Prosecution and the Registry

21. The Defence submits that the fair and adversarial nature of the current release proceedings has been undermined by, *inter alia*, *ex parte* submissions adduced by the Prosecution and the Registry.⁴⁸
22. The Chamber notes that the *ex parte* Prosecution information – which relates to information related to protective measures – is minimal and has no bearing on the Chamber’s conclusions. As to *ex parte* information provided by the Registry which is not available to either the Defence or the Prosecution,⁴⁹ this also relates to the protection of victims and witnesses,⁵⁰ and has had no bearing on the Chamber’s conclusions.

C. Mr Al Hassan’s health

23. The Chamber takes note of the information provided by the Defence about the state of Mr Al Hassan’s health, contained in two reports prepared by a [REDACTED] appointed by the Defence to conduct an assessment of Mr Al Hassan over five days in July and August 2019.⁵¹ The reports describe Mr Al Hassan at the time as impaired and suffering with moderate to severe symptoms of Post-traumatic Stress Disorder, with dissociative symptoms (‘PTSD’) arising from his ‘capture, imprisonment and torture’ in Mali.⁵² It is also reported that he had discontinued certain treatment at the Detention Centre.⁵³ The Defence appointed expert expressed the view that despite good faith efforts from Detention Centre medical staff to treat Mr Al Hassan, they had not been able to

relief through the detention unit complaints mechanism, rather than including these issues in the release request, Defence Request for Leave to Reply, ICC-01/12-01/18-712-Conf-Corr, paras 12-16.

⁴⁸ Reply, ICC-01/12-01/18-737-Conf, paras 2-3.

⁴⁹ See Registry Observations, ICC-01/12-01/18-698-Conf-Exp-Red, and ICC-01/12-01/18-698-Conf-Exp-Red2, noting that paras 29-34 of ICC-01/12-01/18-698-Conf-Exp are redacted from both the Defence and the Prosecution, apart from the first sentence of para. 29.

⁵⁰ Registry Observations, ICC-01/12-01/18-698-Conf-Exp, paras 29-34.

⁵¹ The first report, dated 4 March 2020, ICC-01/12-01/18-680-Conf-AnxF (the ‘First Report’), was prepared before COVID-19 measures came into force in the Detention Centre. The second report, dated 20 March 2020, ICC-01/12-01/18-680-Conf-AnxK (the ‘Second Report’), was an update to the First Report, taking account of the changes in Mr Al Hassan’s detention regime after COVID-19 measures came into force in the Detention Centre. The Defence submits that the doctor specialises in assessing and treating victims of torture, including detained individuals, Request, ICC-01/12-01/18-680-Red2, para. 15. See also ICC-01/12-01/18-737-Conf-AnxD.

⁵² First Report, ICC-01/12-01/18-680-Conf-AnxF, pp 2-3.

⁵³ First Report, ICC-01/12-01/18-680-Conf-AnxF, p. 3, 5.

successfully treat, and inadvertently worsened, his condition.⁵⁴ Although the expert was unable to speak to Mr Al Hassan since the assessments in 2019, she expressed the view that the conditions of Mr Al Hassan's detention, as of 4 March 2020 and thus before the imposition of COVID-19 measures, were likely to exacerbate his psychological distress.⁵⁵ In a subsequent report dated March 2020, the expert, who again was not able to speak to Mr Al Hassan, assessed that the conditions of detention, specifically due to the precautions taken because of COVID-19, are notably and substantially worse for his psychological well-being, and that Mr Al Hassan is at risk of serious psychological deterioration.⁵⁶

24. The Chamber notes that information related to Mr Al Hassan's health was previously provided to and considered by PTC I.⁵⁷
25. In making its assessment below, the Chamber has taken into consideration the reported health condition of Mr Al Hassan as described by the Defence expert. Without prejudice to future requests on this issue, the Chamber does not consider it necessary for the purpose of this decision to order any further medical examination of Mr Al Hassan.⁵⁸

D. The impact of COVID-19 on the conditions of Mr Al Hassan's detention

26. The Defence submits that the COVID-19 pandemic has radically changed Mr Al Hassan's conditions in detention, such that they are not compatible with fundamental human rights, and the combined effects amount to a situation of cruel and inhumane treatment, and 'causes suffering, which exceeds the level

⁵⁴ First Report, ICC-01/12-01/18-680-Conf-AnxF, pp 3-4.

⁵⁵ First Report, ICC-01/12-01/18-680-Conf-AnxF, p. 6. The conditions of detention referred to are segregation, monitored contact with his family, and no opportunity for private visits in the future.

⁵⁶ Second Report, ICC-01/12-01/18-680-Conf-AnxK, p. 3, the report states, 'The combination of isolation, lack of stimulation and lack of meaningful contact with trusted team members and family is directly in opposition to what he needs for even a modicum of emotional stability'.

⁵⁷ Fifth PTC Restrictions Decision, ICC-01/12-01/18-367-Conf-Exp-Red, para. 120.

⁵⁸ See Rule 135 of the Rules. This option is noted by the Registry, Registry Observations, ICC-01/12-01/18-698-Conf-Exp-Red, para. 25. Further, the Prosecution submits that should the Chamber be minded to favourably consider conditional release, it should be afforded sufficient time to assess the Defence expert's opinions and fully respond to the Defence allegations regarding Mr Al Hassan's psychological conditions and, if need be, request the Chamber to designate an independent expert: Prosecution Response, ICC-01/12-01/18-697-Conf-Red, paras 10, 41, 58.

that is acceptable in lawful forms of detention for an individual, such as Mr. Al Hassan, who is presumed innocent'.⁵⁹

27. The Chamber notes that as a result of measures taken at the Detention Centre in response to the pandemic, since 13 March 2020,⁶⁰ *inter alia*, the following were suspended: (i) physical visits with detainees (privileged or non-privileged) – with all contacts restricted to telephone (with some exceptions for emergencies);⁶¹ (ii) the import of all external materials (privileged or non-privileged);⁶² (iii) all Detention Centre activities;⁶³ (iv) spiritual visits;⁶⁴ and (v) all non-acute medical appointments.⁶⁵ [REDACTED].⁶⁶ [REDACTED].⁶⁷
28. As a result of the measures imposed, the Defence submits that Mr Al Hassan is detained in a state of virtual isolation,⁶⁸ which is aggravated in that he cannot receive religious visits from his Imam,⁶⁹ and that the limited and monitored telephone contacts with his family ([REDACTED]) do not alleviate the isolating effects of the restrictions.⁷⁰ The Defence notes that it would also appear that Mr Al Hassan's family will not be able to visit him for several more months.⁷¹ It submits that Mr Al Hassan's medical history, and the current absence of appropriate psychological treatment, increases the risk that Mr Al Hassan will experience irreversible mental harm from such measures.⁷² The Defence notes that there is no clear picture of when this will end, causing further anguish.⁷³

⁵⁹ Request, ICC-01/12-01/18-680-Red2 paras 32-38; Reply, ICC-01/12-01/18-737-Conf, para. 21. *See also* Defence Response to "Urgent Third Prosecution Request for variation of the time limit to file Trial Brief", 21 April 2020, ICC-01/12-01/18-762-Conf (with confidential *ex parte* Annexes A to D, available only to the Defence and Registry, and confidential Annex E) para. 33 (the 'Defence 21 April 2020 Submissions').

⁶⁰ ICC-01/12-01/18-680-Conf-AnxJ; *see also* ICC-01/12-01/18-680-Conf-AnxG.

⁶¹ ICC-01/12-01/18-680-Conf-AnxJ, p.3 paras 1-2; Request, ICC-01/12-01/18-680-Red2, para. 20. *See also* ICC-01/12-01/18-680-Conf-AnxG.

⁶² ICC-01/12-01/18-680-Conf-AnxJ, p.3 para. 3; Request, ICC-01/12-01/18-680-Red2, para. 20.

⁶³ ICC-01/12-01/18-680-Conf-AnxJ, p. 3, para. 5; Request, ICC-01/12-01/18-680-Red2, para. 21.

⁶⁴ ICC-01/12-01/18-680-Conf-AnxJ, p. 3, para. 5; Request, ICC-01/12-01/18-680-Red2, para. 21, 37.

⁶⁵ ICC-01/12-01/18-680-Conf-AnxJ, p. 4, para. 6; Request, ICC-01/12-01/18-680-Red2, para. 43.

⁶⁶ Request, ICC-01/12-01/18-680-Red2, para. 21.

⁶⁷ ICC-01/12-01/18-680-Conf-AnxJ, p. 2.

⁶⁸ Request, ICC-01/12-01/18-680-Red2, para. 2, 21, 33; Reply, ICC-01/12-01/18-737-Conf, para. 21.

⁶⁹ Request, ICC-01/12-01/18-680-Red2, paras 2, 21, 37. *See also* Defence 21 April 2020 Submissions, ICC-01/12-01/18-762-Conf, para. 33.

⁷⁰ Request, ICC-01/12-01/18-680-Red2, para. 33; Reply, ICC-01/12-01/18-737-Conf, para. 21.

⁷¹ Request, ICC-01/12-01/18-680-Red2, para. 33.

⁷² Request, ICC-01/12-01/18-680-Red2, para. 35.

⁷³ Request, ICC-01/12-01/18-680-Red2, para. 36; Reply, ICC-01/12-01/18-737-Conf, para. 20(f).

The Defence further submits that these conditions, in particular the cessation of physical visits between the Defence and Mr Al Hassan, also impede the right to effective legal preparation.⁷⁴ As at 21 April 2020, the conditions had not, according to the Defence, improved even after the Defence raised its concerns regarding these conditions on 23 March 2020.⁷⁵

29. The Chamber notes that the Court, the Detention Centre, and the Host State - like almost all countries in the world - are presently facing exceptional circumstances in light of the COVID-19 pandemic. However, as the Defence submits,⁷⁶ even in a public health crisis, the duty to protect detainees from conditions that amount to inhuman or degrading treatment is non-derogable.⁷⁷
30. As noted by the Prosecution,⁷⁸ restrictions limiting physical and social interactions apply not only to Mr Al Hassan as a detained person but also to all citizens in the Host State and many other citizens worldwide. Notwithstanding, the Chamber is fully aware that since Mr Al Hassan is already in detention, under a regime of restrictions on his contact, the impact of further restrictive measures imposed on him may be increased, also in light of the current state of his health as reported by the Defence expert, set out above. In this regard, the Chamber understands and acknowledges Mr Al Hassan's wish and need, which was clearly expressed in the Request and highlighted by the supporting documentation, to be closer and to reunite with loved ones.
31. However, on the basis of the available information, for reasons set out below, the Chamber is satisfied that the current conditions of Mr Al Hassan's detention,

⁷⁴ Request, ICC-01/12-01/18-680-Red2, para. 37; Reply, ICC-01/12-01/18-737-Conf, para. 20(e). Specifically, the Defence notes that this impedes the Defence's ability to seek instructions and review particularly sensitive documents with Mr Al Hassan, such as medical documents, and reports. *See also* Defence 21 April 2020 Submissions, ICC-01/12-01/18-762-Conf, para. 36.

⁷⁵ Defence 21 April 2020 Submissions, ICC-01/12-01/18-762-Conf, para. 33.

⁷⁶ Request, ICC-01/12-01/18-680-Red2, para. 30.

⁷⁷ *See e.g.*, ECHR, Grand Chamber, *Ramírez Sanchez v. France*, 4 July 2006, 59450/00, para. 116. *See also* European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic, 20 March 2020, <https://rm.coe.int/16809cfa4b>.

⁷⁸ Prosecution Response, ICC-01/12-01/18-697-Conf-Red, para. 50.

while not ideal, are necessary and proportional in the face of the current situation, and do not amount to a situation of inhuman or degrading treatment.

32. First, the Chamber notes that these are temporary measures, instituted at the Detention Centre, in line with the procedures of the Host State, which have the ultimate goal to protect the health, safety and lives of detainees and staff.⁷⁹
33. Next, the Chamber notes that a number of mitigation measures and facilities are available to Mr Al Hassan (and other detainees) to address issues of isolation, within the parameters of the measures being implemented, *inter alia*:⁸⁰ fresh air and sport activities remain open and available for detainees and are encouraged;⁸¹ alternatives for detained persons to have spiritual visits have and are being explored;⁸² and books, DVDs and CDs and other material are available to detainees in the Detention Centre library.⁸³ In addition, the Chamber notes that Mr Al Hassan is in a wing by himself - [REDACTED] - [REDACTED].⁸⁴ [REDACTED].
34. Specifically in relation to Mr Al Hassan's health, the Chamber notes the concerns expressed by the Defence and its appointed expert that Mr Al Hassan is not receiving appropriate psychological treatment at the Detention Centre, and regarding the impact of the COVID-19 measures on him given his state of health.⁸⁵
35. The Chamber notes in this regard that the Court's framework provides for specific procedures when the health of an accused person is in question. These provide that even where specialist treatment or hospitalisation is necessary, the

⁷⁹ ICC-01/12-01/18-680-Conf-AnxJ, p. 2. The Registry in particular notes that the measures are aimed at minimising the number of contacts to detained persons and thus the risk of contamination.

⁸⁰ ICC-01/12-01/18-680-Conf-AnxJ.

⁸¹ ICC-01/12-01/18-680-Conf-AnxJ, p. 3, para. 5, point c.

⁸² Registry Observations, ICC-01/12-01/18-698-Conf-Red, paras 20-21. The Registry reports that on 25 March 2020, the Chief Custody Officer decided that [REDACTED]. *See also* Defence 21 April 2020 Submissions, ICC-01/12-01/18-762-Conf, para. 33.

⁸³ ICC-01/12-01/18-680-Conf-AnxJ, p. 3, para. 3, point b. The Detention Centre also undertook to do the best possible under the circumstances to keep normalcy for the routines of the detained persons, even with the measures in place, ICC-01/12-01/18-680-Conf-AnxJ, p. 2.

⁸⁴ Registry Observations, ICC-01/12-01/18-698-Conf-Red, para. 26; *see also* First Report, ICC-01/12-01/18-680-Conf-AnxF, p. 5.

⁸⁵ Request, ICC-01/12-01/18-680-Red2, paras 2, 35, 43; Reply, ICC-01/12-01/18-737-Conf, paras 1, 20(c); First Report, ICC-01/12-01/18-680-Conf-AnxF, pp 3-5.

Registrar shall ensure the continuous detention of the person both at the place of treatment and when in transit.⁸⁶

36. The Chamber notes that, importantly, in spite of the pandemic, all medically necessary treatment continues to be offered to detained persons at the Detention Centre.⁸⁷ Although the Defence submits that there are no available mechanisms for addressing Mr Al Hassan's psychological suffering in a meaningful manner,⁸⁸ and implies that further dialogue with the Registry is not an adequate solution,⁸⁹ it appears to the Chamber that further exchanges between the Registry and the Defence are ongoing on this matter.⁹⁰ In particular, the Chamber notes the Registry's recent statement that it stands ready to [REDACTED].⁹¹

37. The Chamber emphasises the importance of continued psychological and medical treatment, bearing in mind the current state of Mr Al Hassan's health but also the current circumstances of the pandemic. The Chamber considers itself actively seised of this matter, but directs the Registry and Defence to engage constructively on this issue. The Registry, for example, should explore, as requested by the Defence, opportunities for Mr Al Hassan to [REDACTED].⁹² Likewise, the Defence should, to the extent possible, share with the Registry any information, concerns or recommendations related to Mr Al Hassan's health or well-being whilst in detention before seising the

⁸⁶ Regulation 103(5) of the Regulations. This regulation also provides that a detained person who requires specialist treatment shall, as far as possible, be treated within the Detention Centre.

⁸⁷ The advice from the Registry is that, while all medical staff will avoid unnecessary visits to the detained persons in order to limit contact during the COVID-19 pandemic, in accordance with the directives of the Host State, should a detained person request to see the Medical Officer or a member of medical services, then they will visit them in person, and are also available on the telephone, Registry Observations, ICC-01/12-01/18-698-Conf-Red, para. 27. This addresses the Defence's related submission that the degree of medical assistance afforded to Mr Al Hassan is likely to significantly decrease due to the pandemic: Request, ICC-01/12-01/18-680-Red2, para. 43; Reply, ICC-01/12-01/18-737-Conf, para. 20(c).

⁸⁸ Reply, ICC-01/12-01/18-737-Conf, paras 21(d), 22.

⁸⁹ The Defence states that the Registry has so far failed to substantively respond to Defence concerns regarding adequacy of treatment first raised on 4 March 2020 (Reply, ICC-01/12-01/18-737-Conf, para. 22. *See also* Defence 21 April 2020 Submissions, ICC-01/12-01/18-762-Conf, para. 33), and that dialogue with the Registry is patently inadequate in the face of the COVID-19 pandemic (Reply, ICC-01/12-01/18-737-Conf, para. 16).

⁹⁰ ICC-01/12-01/18-762-Conf-Exp-AnxC.

⁹¹ ICC-01/12-01/18-762-Conf-Exp-AnxC, p. 4. The Chamber clarifies, for the avoidance of doubt, that [REDACTED].

⁹² ICC-01/12-01/18-762-Conf-Exp-AnxC, p. 3.

Chamber.⁹³ The Chamber recalls that it is firstly and foremost the Registrar, who has the overall responsibility for all aspects of management of the Detention Centre.⁹⁴

38. The Chamber further considers, despite the Defence argument to the contrary,⁹⁵ that there are additional measures available that are capable of relieving some of the impact of the current conditions of Mr Al Hassan's detention. It is necessary to give particular attention to the increased need for emotional and psychological support, including contact with family and relatives, and to compensate for the lack of in-person contact facing Mr Al Hassan with increased access to alternative means of communication.

39. The Chamber notes the Defence complaint that the Registry has not provided a substantive response to Defence concerns and requests related to the possibility of adopting measures that would otherwise alleviate the effects of the lockdown on Mr Al Hassan.⁹⁶ Therefore, in addition to generally encouraging the Registry to continue to explore such measures, the Chamber provides the following specific directives:

- a) **Spiritual visits:** The Chamber confirms that [REDACTED],⁹⁷ are compatible with the current restrictions regime applicable to Mr Al Hassan's contacts,⁹⁸ and directs the Registry to make this available to Mr Al Hassan, at the earliest possible opportunity;
- b) **Contact with the Defence:** The Chamber instructs the Registry to explore the options of (i) [REDACTED], (ii) [REDACTED];

⁹³ Registry Observations, ICC-01/12-01/18-698-Conf-Red, para. 24. *See also* Decision on Defence request to permit Mr Al Hassan to attend Friday prayers, 4 March 2020, ICC-01/12-01/18-624-Conf (reclassified as confidential on 6 April 2020), para. 8. The Single Judge determined: 'In general, the Defence and the Registry should hold consultations and continued discussions to reach possible solutions before seizing the Chamber'.

⁹⁴ Regulation 90 of the Regulations.

⁹⁵ Reply, ICC-01/12-01/18-737-Conf, para. 22. *See also* contrary argument in Prosecution Response, ICC-01/12-01/18-697-Conf-Red, paras 7, 53-56.

⁹⁶ Reply, ICC-01/12-01/18-737-Conf, para. 22. *See also* Defence 21 April 2020 Submissions, ICC-01/12-01/18-762-Conf, para. 33.

⁹⁷ Decision on Defence request to permit Mr Al Hassan to attend Friday prayers, 4 March 2020, ICC-01/12-01/18-624-Conf.

⁹⁸ In line with the request for guidance in the Registry Observations, ICC-01/12-01/18-698-Conf-Exp-Red, para. 21.

- c) **Family videos:** the Chamber directs the Registry to make available to Mr Al Hassan immediately [REDACTED];⁹⁹
- d) **Communication:** [REDACTED],¹⁰⁰ [REDACTED];¹⁰¹ and
- e) **Video-conferencing:** The Chamber strongly encourages the Registry to continue efforts in its assessment of the feasibility of video-conferencing communications more generally.¹⁰²

40. The Chamber notes, in addition, that Mr Al Hassan has received a first family visit [REDACTED]¹⁰³ and that the Registry informs that [REDACTED].¹⁰⁴
41. The Chamber further notes that a review of the restrictions on Mr Al Hassan's contacts is currently pending, awaiting the receipt of further submissions.¹⁰⁵ The Chamber will be mindful of the current situation facing Mr Al Hassan in detention when conducting this review.

E. The impact of COVID-19 on the trial

42. The Chamber notes that the Court's headquarters premises presently remain closed until at least 19 May 2020.¹⁰⁶
43. Apart from Mr Al Hassan's conditions of detention, the pandemic has, inevitably, already had some impact on the trial proceedings. It has impacted the deadline for final disclosure¹⁰⁷ and the filing of the Trial Brief;¹⁰⁸ the Prosecution has indicated that the pandemic has an impact, *inter alia*, on its

⁹⁹ Defence 21 April 2020 Submissions, ICC-01/12-01/18-762-Conf, para. 33; ICC-01/12-01/18-762-Conf-Exp-AnxA.

¹⁰⁰ See ICC-01/12-01/18-481-Conf, para. 10, p.7. See *also* Request, ICC-01/12-01/18-680-Red2, para. 20; Defence 21 April 2020 Submissions, ICC-01/12-01/18-762-Conf, para. 33.

¹⁰¹ [REDACTED].

¹⁰² Registry Observations, ICC-01/12-01/18-698-Conf-Red, para. 18.

¹⁰³ Request, ICC-01/12-01/18-680-Red2, para. 14.

¹⁰⁴ Registry Observations, ICC-01/12-01/18-698-Conf-Red, para. 13.

¹⁰⁵ See paragraph 6 above. The report and submissions were filed by the Registry and Prosecution respectively on 8 and 23 April 2020 in accordance with the deadlines set by the Single Judge. A response from the Defence is due on 7 May 2020.

¹⁰⁶ The premises have been closed since 17 March 2020.

¹⁰⁷ See Decision on the Prosecution request for extension of deadlines relating to the disclosure of evidence and a postponement of the starting date for trial, 20 March 2020, ICC-01/12-01/18-677 (the '20 March 2020 Extension Decision').

¹⁰⁸ See Decision on the Prosecution request for a further extension of the time limit to file the Trial Brief, 23 April 2020, ICC-01/12-01/18-770-Conf (the '23 April 2020 Extension Decision').

ability to finalise its final list of witnesses – including witness order – and list of evidence;¹⁰⁹ and the Defence has foreshadowed significant difficulties in preparing for the start of trial.¹¹⁰

44. However, as previously expressed, the Chamber is firmly committed to ensuring fair and expeditious proceedings, even in the face of this unprecedented global situation.¹¹¹ Concretely at this stage, the pandemic has only resulted in the moving of the final deadline for disclosure by one month,¹¹² and the deadline for the Trial Brief by 18 days.¹¹³ The Chamber previously rejected requests for blanket extensions of all deadlines in the case¹¹⁴ and has recently sought submissions on how it can effectively organise the proceedings to minimise the delays arising from the COVID-19 restrictions.¹¹⁵ All other deadlines, including the start of trial on 14 July 2020 and the start of the presentation of Prosecution evidence on 25 August 2020, remain, at this stage, unchanged. In addition, disclosure and written litigation have been continuing robustly throughout the closure of the Court's physical premises. In concrete terms therefore, the Defence submission that 'key aspects of the proceedings have ground to a halt'¹¹⁶ are without merit and are a manifest distortion of the current state of the proceedings. The Chamber will of course, however, keep the issue of the impact of COVID-19 on the timing of proceedings under close review. However, at this stage, the general submission that significant delays to the proceedings will be engendered as a result of COVID-19,¹¹⁷ are premature.

¹⁰⁹ See Rapport sur l'état de préparation de l'Accusation, 17 April 2020, ICC-01/12-01/18-739-Conf-Red; Dépôt de la Liste des témoins de l'Accusation, des résumés des dits témoins et de la Liste provisoire des éléments de preuve à charge, 15 April 2020, ICC-01/12-01/18-740-Conf.

¹¹⁰ Request, ICC-01/12-01/18-680-Red2, para. 39; Reply, ICC-01/12-01/18-737-Conf, paras 1, 20(e).

¹¹¹ 20 March 2020 Decision, ICC-01/12-01/18-677, para. 20. The Chamber has already emphasised that in spite of these exceptional circumstances, the rights of Mr Al Hassan to be tried without undue delay must remain central to this case, and that parties, participants and the Court as a whole must adapt to this new situation, and that it encourages 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.

¹¹² 20 March 2020 Extension Decision, ICC-01/12-01/18-677.

¹¹³ 23 April 2020 Extension Decision, ICC-01/12-01/18-770-Conf.

¹¹⁴ 20 March 2020 Extension Decision, ICC-01/12-01/18-677, para. 16.

¹¹⁵ Order to provide information on methods of work to minimise the impact of COVID-19 and related measures on the conduct of proceedings, 29 April 2020, ICC-01/12-01/18-776.

¹¹⁶ Request, ICC-01/12-01/18-680-Red2, para. 24.

¹¹⁷ Request, ICC-01/12-01/18-680-Red2, para. 39.

45. Regarding the Defence's submission that the cessation of personal privileged visits at the Detention Centre impedes fundamental forms of Defence preparation,¹¹⁸ the Chamber also notes that this issue would not be solved, and indeed may even be made more difficult, through a release to Mali.
46. The Chamber similarly finds no merit in the Defence's submission that the current suspension of hearings eliminates the possibility of Mr Al Hassan being heard in relation to the legality of his detention, his mental welfare, or particularly problematic aspects of his detention.¹¹⁹ The Chamber notes that there is no stay in the proceedings and that no blanket suspensions or extensions of deadlines have been granted. The Chamber furthermore notes that written litigation on the above issues has continued in the normal course, the present decision being an example.

F. Assessment under Article 60(2) of the Statute

47. The Chamber has conducted its assessment under Article 60(2) of the Statute, in particular of the necessity and proportionality of Mr Al Hassan's continued detention, against the background of the observations above.
48. In relation Article 58(1)(a) of the Statute, the Chamber considers the criteria of reasonable grounds to believe that Mr Al Hassan committed a crime within the jurisdiction of the Court to be plainly satisfied, noting that charges against Mr Al Hassan have been confirmed.¹²⁰ The Chamber notes additionally that the Defence made no submissions contesting this point.
49. The Chamber will now assess whether the criteria under Article 58(1)(b) are satisfied.

¹¹⁸ Reply, ICC-01/12-01/18-737-Conf, para. 20(e). *See also* Request, ICC-01/12-01/18-680-Red2, para. 37.

¹¹⁹ Request, ICC-01/12-01/18-680-Red2, para. 37; Reply, ICC-01/12-01/18-737-Conf, para. 21(e).

¹²⁰ *See in this regard the approach taken in by Trial Chamber III, The Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted Version of the "Decision on Applications for Provisional Release" of 27 June 2011, 16 August 2011, ICC-01/05-01/08-1565-Red, para. 53; Pre-Trial Chamber II, *Prosecutor v. Bosco Ntaganda*, Third Decision on Bosco Ntaganda's Interim Release, 17 July 2014, ICC-01/04-02/06-335, para. 24.

(a) Preliminary issue

50. Before turning to the substantive consideration of the evidence before it on this matter, the Chamber will address the Defence submission that the Prosecution's arguments in support of detention rely primarily on 'highly prejudicial' extracts from interviews with Mr Al Hassan [REDACTED], [REDACTED] detained at the *Direction générale de la sécurité d'Etat* (the 'DGSE') in Bamako, in conditions which would trigger the application of an exclusionary rule in relation to evidence that was derived directly or indirectly from torture or cruel treatment.¹²¹
51. The Defence submits that the Prosecution's own evidence gives rise to a reasonable basis for concluding that Mr Al Hassan [REDACTED] interviewed while held in arbitrary and incommunicado detention, in an extremely coercive environment, which involved threats, beatings, and treatment that would trigger the application of the abovementioned exclusionary rule.¹²² It submits that it does not appear to be disputed, or reasonably capable of dispute, that while detained at the DGSE, [REDACTED]: (i) informed the Prosecution that [REDACTED] had been beaten, threatened, and interrogated by Malian authorities; (ii) [REDACTED] not brought before a judge, or otherwise brought within the protection of the law; (iii) apart from the limited duration of [REDACTED] interview with Prosecution investigators, had no access to the outside world [REDACTED], independent legal representation, or independent monitors (such as the UN or the ICRC); and (iv) at various points, reported that [REDACTED] experienced severe physical and/or mental ailments, and [REDACTED] otherwise extremely vulnerable.¹²³
52. The Chamber has also noted, on the other hand, submissions of the Prosecution, namely that it had no role in Mr Al Hassan's alleged ill-treatment in Mali, that Mr Al Hassan's interviews were conducted in full compliance with Article 55(2) of the Statute, that Mr Al Hassan clearly expressed his voluntariness to

¹²¹ Reply, ICC-01/12-01/18-737-Conf, para. 8, and generally paras 4-7.

¹²² Reply, ICC-01/12-01/18-737-Conf, para. 8. In relation to Mr Al Hassan, see Request, ICC-01/12-01/18-680-Red2, paras 6-9.

¹²³ Reply, ICC-01/12-01/18-737-Conf, para. 8.

talk to the Prosecution, exercised his right to remain silent where and when he decided to do so, and indicated his understanding of the separate nature of the national proceedings and that of the ICC proceedings.¹²⁴

53. The Chamber notes that the Defence's foreshadowed motion on the arrests, detention and interrogation of Mr Al Hassan and other individuals in Mali is pending.¹²⁵ As such, the Chamber is not, at this stage, in a position to make any determination on whether the statements of Mr Al Hassan are 'tainted by torture, cruel treatment, or arbitrary detention' as alleged by the Defence. Further, as noted by the Appeals Chamber, a Chamber need not assess the admissibility of evidence pursuant to Article 69 for purposes of a decision on release or detention, 'in the absence of obvious *male fides*'.¹²⁶ While this finding related to an interim release assessment by a Pre-Trial Chamber at an earlier stage of proceedings than the present case, it is equally applicable in the particular circumstances before this Chamber. As noted, the Chamber does not have before it the full information to properly decide on this issue, and the evidentiary standard for an assessment under Article 69(7) is quite different from that applicable to Article 58. Further, in line with the principle expressed by the Appeals Chamber, the Chamber considers that conducting the assessment under Article 69(7) at this stage, in the absence of all relevant information, would similarly 'overload' the Article 58 analysis with the consideration of factors extraneous to the critical issue of whether the conditions for detention are met.

54. The Chamber further notes the Defence argument that should the Chamber not be in a position to make such a determination, the Chamber should still exclude these statements of Mr Al Hassan, due to the fact that the Defence has been prevented from substantiating such matters, for reasons that are attributable to

¹²⁴ Prosecution Response, ICC-01/12-01/18-697-Conf-Red, para. 42.

¹²⁵ See e.g. Defence Motion for Disclosure Order – Prosecution Biographical and Security Questionnaires, 17 March 2020, ICC-01/12-01/18-667-Conf, para. 2

¹²⁶ Appeals Chamber, *The Prosecutor v. Bemba et al.*, Judgment on the appeal of Mr Jean-Jacques Mangenda Kabongo against the decision of Pre-Trial Chamber II of 17 March 2014 entitled "Decision on the 'Requête de mise en liberté' submitted by the Defence for Jean-Jacques Mangenda", 11 July 2014, ICC-01/05-01/13-560 (OA4), para. 73.

the Prosecution, and not the Defence.¹²⁷ In support of this allegation, the Defence refers to (i) alleged partial disclosure in relation to the conditions of detention [REDACTED];¹²⁸ (ii) alleged late disclosure of [REDACTED];¹²⁹ and (iii) the fact that the Prosecution has also confirmed that it is still in the process of preparing and disclosing additional investigators' notes concerning [REDACTED], '[n]otwithstanding its commitment to prioritise the disclosure of materials related to [REDACTED]'.¹³⁰

55. The Chamber acknowledges that the delay in accessing Mr Al Hassan's medical record, for reasons which were entirely not the fault of the Defence, has potentially contributed to the delay in the Defence formulating this application.¹³¹ However, the Chamber notes that the deadline for full disclosure in this case, 12 May 2020, has not yet passed, and that the deadline for the Defence to bring any such application is 1 June 2020. The Chamber therefore does not make any determinations on this basis.

56. The Chamber finally notes that it has not used the Prosecution's evidence from [REDACTED], nor the information from Mr Al Hassan's Biographical and Security Questionnaire, in establishing any of the criteria in Article 58(1)(b) below and therefore does not address further specific Defence arguments on this point.¹³²

(b) Article 58(1)(b)(i) of the Statute

57. The Chamber will first consider whether Mr Al Hassan's continued detention appears necessary to ensure his appearance at trial. In relation to the standard for the assessment of the Article 58(1)(b) conditions, the Chamber notes that the Statute refers to the 'appearance' that a continued detention is necessary, and

¹²⁷ Reply, ICC-01/12-01/18-737-Conf, para. 12.

¹²⁸ Reply, ICC-01/12-01/18-737-Conf, paras 11-12.

¹²⁹ Reply, ICC-01/12-01/18-737-Conf, paras 11-12. [REDACTED], and disclosed on 31 March 2020.

¹³⁰ Reply, ICC-01/12-01/18-737-Conf, paras 11-12.

¹³¹ See Second decision on access to Mr Al Hassan's medical record, 28 February 2020, ICC-01/12-01/18-614-Conf (with Annex A; decision and annex reclassified as confidential on 7 April 2020).

¹³² Reply, ICC-01/12-01/18-737-Conf, paras 9-10, *namely*, that the Prosecution uses information ([REDACTED]) obtained from Mr Al Hassan while they were completing the security and protection evaluation on the first day of interviews, where there is no clear indication that Mr Al Hassan was aware that the information collected during the security assessment could be used against him.

that the Appeals Chamber has held that the question ‘revolves around the possibility, not the inevitability, of a future occurrence’.¹³³

58. Mr Al Hassan is facing charges comprising 13 different 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. The Chamber considers that the charges are numerous and of such gravity that they might result in a lengthy overall sentence, which creates an incentive for Mr Al Hassan to abscond. The incentive is increased given that charges against Mr Al Hassan have been confirmed and trial is due to commence in a matter of months.¹³⁴ These factors combined create a strong incentive for Mr Al Hassan to abscond.
59. Next, the Chamber will consider whether there is concrete evidence that Mr Al Hassan has the means to abscond.
60. The Chamber notes the evidence that Mr Al Hassan joined the armed groups, Ansar Dine and AQMI, shortly after their arrival in Timbuktu in 2012.¹³⁵ Further the Chamber considers that the available information indicates that at the time of his arrest by the French forces in April 2017, Mr Al Hassan was still working under instructions of Iyad Ag Ghaly, part of his group, and was still actively involved in the violent activities of the armed groups operating in the North of Mali.¹³⁶
61. Iyad Ag Ghaly is, according to the available information, the founder and leader of Ansar Dine and the main figure of the umbrella organisation called the *Jama'at Nusrat Al-Islam wal-Muslimin* (‘JNIM’), which brings together different armed groups from the North of Mali, including Ansar Dine.¹³⁷

¹³³ Katanga OA4, ICC-01/04-01/07-572, para. 21.

¹³⁴ See similarly Bemba OA2, para. 70.

¹³⁵ [REDACTED] MLI-OTP-0051-1257, at 1275-1285, lines 583-945.

¹³⁶ Mr Al Hassan’s interviews with the Prosecution indicate that: [REDACTED].

¹³⁷ MLI-OTP-0041-0041, at 0043; Video, ‘Announcement of the victory of Islam and Muslim groups/ Speech Sheikh Abou Fadl’, March 2017, MLI-OTP-0042-0178; MLI-OTP-0061-1303 (English translation of aforementioned video), in particular at 1306; MLI-OTP-0043-0498. As noted in the Confirmation Decision, Iyad Ag Ghaly is also designated by the names Iyad or Abou Fadl (ICC-01/12-01/18-461-Conf-Corr-Red, footnote 104); JNIM also means ‘Group to support Islam and Muslims’, see

62. The Chamber notes that the armed groups operating in the North of Mali, including JNIM as one of the main actors, are allegedly responsible for continuing violent attacks in Mali against civilian populations, national defence and security forces, the United Nations Multidimensional Integrated Stabilization Mission ('MINUSMA'), and international forces.¹³⁸
63. As noted by the Prosecution, at least one other member or associate of Ansar Dine/AQMI who has been released by the Malian authorities has returned to the North of Mali, and resumed his interactions with the armed groups.¹³⁹
64. In addition, the Chamber notes the extremely violent working methods of the armed groups in the North of Mali and the information that their primary targets continue to be national defence and security forces, the MINUSMA, and international forces.¹⁴⁰ Recent security information also indicates persistent insecurity and lack of State authority in certain areas in the North of Mali.¹⁴¹
65. On the basis of all of the above, the Chamber considers that if released to Mali, there is a risk that Mr Al Hassan would resume his relationship with the armed groups in the North of Mali, and that his connection with Iyad Ag Ghaly, the

Déclaration à la presse faite par le Conseil de sécurité sur l'attaque ayant visé la MINUSMA, SC/12810-PKO/636, 4 May 2017, MLI-OTP-0046-9012; Déclaration à la presse faite par le Conseil de sécurité à l'occasion de l'attentat terroriste perpétré contre la MINUSMA, SC/12837-PKO/644, 23 May 2017, MLI-OTP-0046-9011. See also First Registry Report on the Security Situation in Mali, 31 January 2020, ICC-01/12-01/18-571-Conf (with confidential Annex I and confidential ex parte Annex II, available only to the Registry), paras 9, 11-13 (the 'Registry Security Report').

¹³⁸ See e.g. recent Report of the Secretary General on the Situation in Mali, 20 March 2020, S/2020/223 ('20 March 2020 UN Report'), cited by the Prosecution in footnote 27 of its Response, at para. 35: 'Terrorist attacks remained the main threat in northern and central Mali. Such attacks were recorded in Gao, Kidal and Timbuktu Regions in the north and in Mopti and Ségou Regions in the centre. Most of the attacks were attributed to or claimed by Jama'a Nusrat ul-Islam wa al-Muslimin or Islamic State in the Greater Sahara. The national defence and security forces, MINUSMA and international forces continued to be their main targets. Civilians were targeted as well, mostly in Mopti Region'. See also generally paras 34-37, 41-46, 93. See also Registry Security Report, ICC-01/12-01/18-571-Conf, paras 8-9, 16, 20, 31-32.

¹³⁹ [REDACTED].

¹⁴⁰ See e.g. 20 March 2020 UN Report cited by the Prosecution in footnote 27 of its Response, at paras 35, 41-44, 93. In addition, as the Prosecution notes, for example, security guards were recently shot dead in front of the *Banque Malienne de Solidarité* (BMS) in the middle of the town of Timbuktu, see *Tombouctou : Deux gardes tués devant la Banque malienne de solidarité (BMS)*, *Malijet.co*, 9 March 2020, <http://malijet.co/crise-malienne/tombouctou-deux-gardes-tues-devant-la-banque-malienne-desolidarite-bms>; 'Crisis in the Sahel Becoming France's Forever War', *The New York Times*, 29 March 2020, <https://www.nytimes.com/2020/03/29/world/africa/francesahel-west-africa.html>, cited in Prosecution Response, ICC-01/12-01/18-697-Conf, para. 46. See also Registry Security Report, ICC-01/12-01/18-571-Conf, paras 8-9, 16, 19-20, 31; ICC-01/12-01/18-571-Conf-AnxI, p. 2.

¹⁴¹ See 20 March 2020 UN Report, paras 3, 15, 35-36, 47, 93, 96.

founder of Ansar Dine and main leader of JNIM, and the armed groups operating in the North of Mali, could provide him with sufficient resources to abscond if released, and thereby elude prosecution. The Chamber considers that securing Mr Al Hassan's arrest and surrender, should he abscond, would be difficult in light of the security situation in Mali as set out above. In the opinion of the Chamber, the risk of flight is increased in circumstances where evidence indicates that Mr Al Hassan previously sought refuge in [REDACTED] and subsequently in Libya, when the armed groups escaped from Timbuktu in January 2013.¹⁴² As noted above, Iyad Ag Ghaly on a previous occasion in 2014 sent someone to retrieve Mr Al Hassan from Libya. The Chamber considers that the Court could face difficulties in securing his arrest and surrender should he abscond again to those countries.

66. The Prosecution also states that Mr Al Hassan was, at the time of his arrest, also a base commander of the *Congrès pour la justice dans l'Azawad* (the 'CJA') in the region of Timbuktu, [REDACTED].¹⁴³ The Defence submits that this is a 'volte face' from the Prosecution's previous stance that Mr Al Hassan was actively working with Ansar Dine at the time of his arrest, and that 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.¹⁴⁴ The Defence states, *inter alia*, that the CJA is a Tuareg movement linked to the Kel Ansar tribe, created in 2016, and which was part of the Alger peace process; that it has never been under the command of Iyad Ag Ghaly; that it is not an Islamist group, does not work alongside JNIM or AQIM; and that it has been subject to attacks from AQIM and JNIM due to the perception that CJA was aligned with (not against) international peacekeeping forces.¹⁴⁵ Noting the

¹⁴² [REDACTED].

¹⁴³ Prosecution Response, ICC-01/12-01/18-697-Conf-Red, para. 25, citing [REDACTED].

¹⁴⁴ Reply, ICC-01/12-01/18-737-Conf, para. 15.

¹⁴⁵ Reply, ICC-01/12-01/18-737-Conf, paras 13-14. *See also* Defence response to Prosecution urgent application to maintain restrictions on Mr. Al Hassan's contacts and access to others while in detention, 9 December 2019, (confidential *ex parte*, available only to the Defence; with confidential *ex parte* Annexes A and B available only to the Defence and the Prosecution, and the Defence, respectively; a confidential *ex parte* redacted version of the main filing available to the Defence, the Prosecution, the VWU and the Detention Section was filed on 17 December 2019, ICC-01/12-01/18-520-Conf-Exp-

applicable standard of assessment under Article 58(1)(b), and that the information underlying the proposition that at the time of his arrest Mr Al Hassan was the base commander at the CJA also [REDACTED], the Chamber does not consider this information to be incompatible with its conclusions in paragraph 60 above.

67. Relatedly, the Chamber does also not consider [REDACTED], to underscore the absence of a link between Mr Al Hassan and those groups, as argued by the Defence.¹⁴⁶ In the Registry Report cited by the Defence in support of this argument, the Registry rather highlights that [REDACTED].¹⁴⁷

68. On the basis of the above, the Chamber considers the criteria under Article 58(1)(b)(i) is satisfied.

(c) Article 58(1)(b)(ii) of the Statute

69. The assessment under Article 58(1)(b)(ii) of the Statute requires the Chamber to consider whether Mr Al Hassan's continued detention appears necessary to ensure the investigation or court proceedings are not obstructed or endangered.

70. The Chamber notes that matters related to this issue are presently being litigated by the parties in the context of the restrictions on Mr Al Hassan's contacts while in detention, in which information from the Defence is presently outstanding.¹⁴⁸ Accordingly, and recalling that the conditions in Article 58(1)(b) are in the alternative, the Chamber will not consider Article 58(1)(b)(ii) further for the purpose of this decision.

(d) Article 58(1)(b)(iii) of the Statute

71. Next, the Chamber will consider whether Mr Al Hassan's continued detention appears necessary to prevent him from continuing to commit crimes within the Court's jurisdiction.

Red; a public redacted version was filed on 11 February 2020, ICC-01/12-01/18-520-Red2), paras 15-16.

¹⁴⁶ Reply, ICC-01/12-01/18-737-Conf, para. 15.

¹⁴⁷ Registry Security Report, ICC-01/12-01/18-571-Conf, para. 27.

¹⁴⁸ See paragraph 6 above.

72. As noted above, the Chamber considers it established to the standard necessary under Article 58(1)(b) that as at the time of his arrest, Mr Al Hassan was still actively involved in the violent activities of the armed groups operating in the North of Mali. The Chamber also recalls, as noted above, that the armed groups operating in the North of Mali, including JNIM as one of the main actors, are allegedly responsible for continuing violent attacks in Mali. In addition, the Chamber notes that Mr Al Hassan has been charged with directly participating in floggings.¹⁴⁹ On the basis of all of the above, the Chamber considers that if released to Mali, there is a risk that Mr Al Hassan would resume his relationship with the armed groups in the North of Mali, and continue with the commission of crimes within the Court's jurisdiction.
73. On the basis of the above, the Chamber considers the criteria under Article 58(1)(b)(iii) is also satisfied.

(e) Mitigating conditions

74. The Chamber notes that Mr Al Hassan has given written assurances that he would abide by all conditions imposed by the Chamber, pursuant to Rule 119 of the Rules, and agreed, *inter alia*, to (i) remain in supervised confinement or house arrest [REDACTED]; (ii) comply with security arrangements to facilitate release, including wearing an electronic monitoring bracelet, which would allow his location to be tracked in real time; (iii) not to reveal confidential information, discuss the case, or contact, directly or indirectly, any victims or witnesses, or persons associated with armed groups; and (iv) maintain the confidentiality of his release, and location of release.¹⁵⁰ [REDACTED].¹⁵¹
75. The Chamber notes, however, the extremely violent working methods of the armed groups in the North of Mali, and the information that their primary targets continue to be national defence and security forces, the MINUSMA, and

¹⁴⁹ Confirmation Decision, ICC-01/12-01/18-461-Conf-Corr-Red.

¹⁵⁰ Request, ICC-01/12-01/18-680-Red2, paras 25, 28; ICC-01/12-01/18-680-Conf-AnxL; Reply, ICC-01/12-01/18-737-Conf, para. 25; ICC-01/12-01/18-712-Conf-AnxC.

¹⁵¹ Request, ICC-01/12-01/18-680-Conf-Red, para. 28; ICC-01/12-01/18-680-Conf-Exp-AnxM; Reply, ICC-01/12-01/18-737-Conf, para. 25; ICC-01/12-01/18-737-Conf-AnxF.

international forces.¹⁵² Taking this into account, the Chamber does not consider that the serious risks established above can be adequately mitigated at this time by conditions on a release to Mali.

76. In addition, concerning the assurance provided that Mr Al Hassan that he would maintain the confidentiality of his release as well as the location thereof, the Chamber notes that, in filing a public redacted version of its Request on 24 March 2020, the Defence made available to the public the current litigation as well as a few relevant and revealing details. This public document, which is now also available in the French language, mentions [REDACTED].¹⁵³ Specifically, [REDACTED]. In this context, the Chamber considers that, at this stage, confidentiality of a release of the accused to Mali, [REDACTED], can no longer be guaranteed and has, in fact, been rendered impossible.
77. The Chamber also notes that the duration of Mr Al Hassan's requested release – 'for the duration of the COVID-19 pandemic or such other time as the Chamber deems appropriate', implies either: (i) release for a potentially extended period of time – noting that there are at present no global indications on when the pandemic will end; or (ii) for a period that, while in control of the Chamber, depends on numerous unknown factors, including the ability to secure Mr Al Hassan's return to the Netherlands while the pandemic is ongoing, at some unknown time in the future. In this light, the Chamber cannot agree with the Defence's suggestion that the duration of the requested release mitigates the established risks under Article 58(1)(b) of the Statute.¹⁵⁴
78. In addition, contrary to the Defence's submissions,¹⁵⁵ the Chamber does not consider that the risk of flight is mitigated by the current COVID-19 movement and travel restrictions. While air travel in and out of Mali is currently suspended,¹⁵⁶ the possibility that Mr Al Hassan would be able to abscond overland into neighbouring countries remains. Furthermore, even if

¹⁵² See footnote 140 above.

¹⁵³ [REDACTED].

¹⁵⁴ Request, ICC-01/12-01/18-680-Red2, para. 47; Reply, ICC-01/12-01/18-737-Conf, para. 20(g).

¹⁵⁵ Request, ICC-01/12-01/18-680-Red2, para. 47; Reply, ICC-01/12-01/18-737-Conf, para. 20(b), (g).

¹⁵⁶ Registry Observations, ICC-01/12-01/18-698-Conf-Exp-Red, para. 4.

international travel is not possible, Mr Al Hassan could still abscond within Mali itself. Noting the persistent insecurity and lack of State authority in certain areas in the North of Mali,¹⁵⁷ the Chamber considers that securing his arrest and surrender would be difficult in such circumstances.

79. Similarly, in light of the history of Mr Al Hassan's involvement with the armed groups, the Chamber does also not consider the risks enumerated above to be mitigated by 'strong family ties', as submitted by the Defence.¹⁵⁸

(f) Mr Al Hassan's health

80. The Appeals Chamber has addressed how issues related to a detainee's medical condition could have an impact on a decision as to interim release. It found that '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',¹⁵⁹ but considered nevertheless that medical reasons can play a role in decisions on interim release in at least two ways: (i) the medical condition of a detained person may have an effect on the risks under Article 58(1)(b) of the Statute, for instance on his or her ability to abscond, potentially negating those risks; and (ii) the medical condition of the detained person may be a reason for a Chamber to grant interim release with conditions – the ill health of a detained person may be a factor in the exercise of its discretion.¹⁶⁰

81. The Chamber does not consider Mr Al Hassan's condition to negate the risks of him absconding or continuing with the commission of crimes. The Chamber further observes that, in the Detention Centre, Mr Al Hassan is detained in a safe environment, which has taken all related measures to protect his health in light of the pandemic, with continuing access to psychological and medical care. Mr Al Hassan's health, as acknowledged by the Defence in its submissions,

¹⁵⁷ See footnote 141 above.

¹⁵⁸ Request, ICC-01/12-01/18-680-Red2, para. 25; Reply, ICC-01/12-01/18-737-Conf, para. 20(a).

¹⁵⁹ *Gbagbo* OA, ICC-02/11-01/11-278-Red, para. 86. See also Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 10 March 2017 entitled "Decision on Mr Gbagbo's Detention", 19 July 2017, ICC-02/11-01/11-992, para. 55.

¹⁶⁰ *Gbagbo* OA, ICC-02/11-01/11-278-Red, para. 87.

cannot be guaranteed in Mali.¹⁶¹ Further, contrary to the Defence submission,¹⁶² the Chamber does not consider that Mr Al Hassan's continued detention places him at greater risk of catching COVID-19 than if he was released [REDACTED], noting the measures already taken at the Detention Centre, and noting that it is not a crowded institution. In fact, several of the conditions of detention opposed by the Defence have been put in place to protect Mr Al Hassan's health in view of the current pandemic.

82. The Chamber has taken note of the Defence submission that Mr Al Hassan would benefit from the family contact,¹⁶³ and related views of the Defence expert that Mr Al Hassan's psychological condition would be improved by being with his family and that he would benefit from contact with, support and care from his family, as well as from attending to their welfare and needs during the stress of this current global health crisis.¹⁶⁴ As set out above, the Chamber has also considered ways in which family contact for Mr Al Hassan can be increased during the pandemic. In light of these considerations, Mr Al Hassan's health does not impact the Chamber's findings above on the Article 58(1)(b) risks, nor does it constitute a reason for granting conditional release.

(g) Duration of detention

83. As found by the Appeals Chamber, a Chamber may determine that a detained person has been in detention for an unreasonable period, even in the absence of inexcusable delay by the Prosecution, in its decision pursuant to Article 60(2) of the Statute.¹⁶⁵ The duration of time in detention pending trial is a factor that needs to be considered along with the risks that are being reviewed, in order to

¹⁶¹ Request, ICC-01/12-01/18-680-Conf-Red, para. 45.

¹⁶² Request, ICC-01/12-01/18-680-Red2, para. 2.

¹⁶³ Request, ICC-01/12-01/18-680-Red2, para. 45.

¹⁶⁴ Second Report, ICC-01/12-01/18-680-Conf-AnxK, p. 3.

¹⁶⁵ Appeals Chamber, *The Prosecutor v. Bemba et al.*, Judgment on the appeals against Pre-Trial Chamber II's decisions regarding interim release in relation to Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu, and Narcisse Arido and order for reclassification, 29 May 2015, ICC-01/05-01/13-969 (OA5-9) para. 43 ('*Bemba et al.* OA5-9'); Appeals Chamber, *The Prosecutor v. Bemba et al.*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II of 23 January 2015 entitled "Decision on 'Mr Bemba's Request for provisional release'", 29 May 2015, ICC-01/0501/13-970 (OA10), para. 23. See also Trial Chamber VII, *The Prosecutor v. Bemba et al.*, Decision Regarding Interim Release, 17 August 2015, ICC-01/05-01/13-1151, para. 16 (the '*Bemba et al.* 17 August 2015 Decision').

determine whether, all factors being considered, the continued detention ‘stops being reasonable’ and the individual accordingly needs to be released.¹⁶⁶

84. At the outset, the Chamber notes the Defence submissions that there have been repeated failures of the Medical Officer to comply with judicial directives which delayed the provision to the Defence of parts of Mr Al Hassan’s medical file.¹⁶⁷ However, these have been dealt with and resolved by the Chamber and the Medical Officer has now complied with the relevant judicial decisions.¹⁶⁸
85. In making its assessment on the duration of detention, the Chamber first notes that it does not taken into account Mr Al Hassan’s detention in Mali, prior to being surrendered to the Court in considering the reasonableness of the length of pre-trial detention for the purpose of the ICC proceedings.¹⁶⁹ The Defence itself acknowledges that it is premature for it to litigate the issue as to whether Mr Al Hassan’s detention in Mali should be formally included in any calculation as concerns the length of Mr Al Hassan’s detention. Second, the Chamber considers that the confirmation process in this case was not unreasonably long, nor was its length due to inexcusable delay by the Prosecution.¹⁷⁰ Third, as set out above, the Chamber considers any arguments that the COVID-19 pandemic has significantly delayed proceedings at this stage to be speculative: deadlines leading to trial have been adjusted considering situation brought about by COVID-19 but also bearing in mind the need for expeditious proceedings.

¹⁶⁶ *Bemba et al.* OA5-9, ICC-01/05-01/13-969, para. 45. *See also Bemba et al.* 17 August 2015 Decision, ICC-01/05-01/13-1151, para. 16. Such a determination requires balancing the risks under Article 58(1) that are found to exist against the duration of detention, taking into account relevant factors that may have delayed the proceedings and the circumstances of the case as a whole.

¹⁶⁷ Request, ICC-01/12-01/18-680-Red2, para. 41.

¹⁶⁸ *See* Decision on access to Mr Al Hassan’s medical record, 17 December 2019, ICC-01/12-01/18-533-Conf (reclassified as confidential on 7 April 2020); Decision on the Registrar’s Request for Reconsideration, 24 December 2009, ICC-01/12-01/18-54-Conf (reclassified as confidential on 7 April 2020); Second decision on access to Mr Al Hassan’s medical record, 28 February 2020, ICC-01/12-01/18-614-Conf (with one confidential annex; filing and annex reclassified as confidential on 7 April 2020); Registry’s Third Report on Medical Issues, 12 March 2020, ICC-01/12-01/18-654-Conf-Exp (with one annex; filing and annex reclassified as confidential *ex parte*, available only to the Defence and Registry on 12 March 2020).

¹⁶⁹ Contrary to the Defence submissions on this point, Request, ICC-01/12-01/18-680-Red2, para. 42.

¹⁷⁰ The time between transfer to the Court and issuance of the confirmation decision in other recent cases at the Court is commensurate: 15 months in the *Ntaganda* proceedings, 14 months in the *Ongwen* proceedings, and 12 months in the *Yekatom and Ngaïssona* proceedings. Contrary to the Defence submissions on this point, Request, ICC-01/12-01/18-680-Red2, para. 40.

86. Considered as a whole, balancing the serious risks established above under Article 58(1)(b) of the Statute with the duration of Mr Al Hassan’s detention and these other factors, the Chamber does not consider that Mr Al Hassan has been in detention for an unreasonable period.

(h) Exceptional humanitarian circumstances

87. The Defence submits that Mr Al Hassan seeks release on the basis of compelling humanitarian circumstances, namely to allow him to be with his family ([REDACTED]) and support them during a time of global crisis.¹⁷¹

88. The Chamber notes that provisional or temporary transfer, subject to strict conditions, in ‘exceptional humanitarian circumstances’, has been granted twice before at the Court,¹⁷² but that the Appeals Chamber has deferred consideration of ‘whether a Trial Chamber actually has the power to order release for “humanitarian reasons” outside the framework of article 60(3) of the Statute’.¹⁷³

89. The Chamber notes that the present situation is distinguishable from the two other cases where transfer for exceptional humanitarian circumstances was ordered at the Court, noting that in both cases the measure granted did not exceed 24 hours and the person was at all times in custody.¹⁷⁴ As noted above, Mr Al Hassan’s sought release to Mali ‘for the duration of the COVID-19 pandemic or such other time as the Chamber deems appropriate’, on the other hand, implies release for a potentially unknown period of time. As set out above in paragraphs 74 to 79, the Chamber is not satisfied that the risks established

¹⁷¹ Request, ICC-01/12-01/18-680-Conf-Red, paras 28, 46; Reply, ICC-01/12-01/18-737-Conf, paras 1, 20(d).

¹⁷² Pre-Trial Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public redacted version of ICC-01/05-01/08-437-Conf Decision on the Defence’s Urgent Request concerning Mr Jean-Pierre Bemba’s Attendance of his Father’s Funeral, 3 July 2009, ICC-01/05-01/08-437-Red, para. 9; Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Defence Request for Mr Jean-Pierre Bemba to Attend his Stepmother’s Funeral, ICC-01/05-01/08-1099, 12 January 2011, para. 13.

¹⁷³ Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted version of Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled “Decision on Applications for Provisional Release”, 19 August 2011, ICC-01/05-01/08-1626-Red (OA7), para. 85.

¹⁷⁴ In both instances, Mr Bemba was allowed to travel to Belgium – at all times escorted by the Dutch or Belgian police– to attend the funerals of his father and his stepmother: ICC-01/05-01/08-437-Red, pp 5-6; ICC-01/05-01/08-1099-Red, para.17.

under Article 58(1)(b) of the Statute can be adequately mitigated at this time by conditions on a release to Mali.

90. In relation to the Defence's reference to measures being undertaken at a domestic level to release prisoners from detention,¹⁷⁵ the Chamber notes, as pointed out by the Prosecution,¹⁷⁶ that these steps have been generally taken in relation to prisoners with low-risk profiles or with little time left to serve in prison.¹⁷⁷ In addition, as noted above, since the Detention Centre is not a crowded institution, the risk of contracting the virus in prison is less for Mr Al Hassan than in other domestic prison systems. This practice therefore does not have much bearing on the present case.

91. In this context, the Chamber does not consider there to be exceptional humanitarian circumstances militating in favour of release.

(i) Conclusion

92. The Chamber therefore finds that Mr Al Hassan's continued detention is necessary within the meaning of Article 58(1)(b) of the Statute in order to ensure his appearance before the Court and to prevent him from continuing with the commission of crimes. It does not consider conditions on a release to Mali to adequately mitigate those risks. In addition, it does not consider that there exist other factors which outweigh these risks so as to justify release, including Mr Al Hassan's health, the duration of his detention, or any exceptional humanitarian circumstances.

93. The Chamber also clarifies that it decided not to seek observations from States under Regulation 51 of the Regulations for the purpose of the present decision,

¹⁷⁵ Request, ICC-01/12-01/18-680-Red2, para. 31, referring to steps taken in Iran, Australia, Egypt and the United States.

¹⁷⁶ Prosecution Response, ICC-01/12-01/18-697-Conf-Red, para. 63 and the citations therein. *See also e.g.* World Health Organization Regional Office for Europe, Preparedness, prevention and control of COVID-19 in prisons and other places of detention, Interim guidance, 15 March 2020, http://www.euro.who.int/_data/assets/pdf_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf?ua=1, p. 4, para. 1.

¹⁷⁷ *See also* United Nations Office of the High Commissioner for Human Rights, 'COVID-19: "No excuse for impunity for those convicted of crimes against humanity" – UN expert on transitional justice', 29 April 2020, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25840&LangID=E>.

as in light of its' conclusion on the applicable legal principals, such observations were unnecessary.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request;

AMENDS the restrictions regime applicable to Mr Al Hassan at the Detention Centre in accordance with paragraph 39 above.

ORDERS the continued detention of Mr Al Hassan; and

INSRUCTS the Prosecution, Registry and Defence to respectively file public redacted versions of the Prosecution Response, the Registry Observations and the Reply within 10 days of notification of this decision.

Done in both English and French, the English version being authoritative.

Judge Antoine Kesia-Mbe Mindua
Presiding Judge

Judge Tomoko Akane

Judge Kimberly Prost

Dated this Tuesday, 05 May 2020
At The Hague, The Netherlands