

**Cour
Pénale
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**International
Criminal
Court**

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

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December 2020**

TRIAL CHAMBER X

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

SITUATION IN THE REPUBLIC OF MALI

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

Public

**With Confidential ex parte Annex A [Registry and Defence only] and Confidential
Annex B**

**Public redacted version of “Urgent Request for Custodial Visit on Compassionate
Grounds” (ICC-01/12-01/18-1212-Conf+Anxs)**

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

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

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I. Introduction

1. For exceptional compassionate grounds, the Defence for Mr. Al Hassan respectfully requests the Trial Chamber to modify the location of Mr. Al Hassan's detention, on a temporary basis, to allow him to be detained on the territory of Mali, and to thereby see his family in person ('the Request').
2. In light of the urgency of the Request, the Defence further requests the Trial Chamber to shorten the deadline for responses.
3. This request is filed on a confidential basis in light of the potential security ramifications due to the nature of the request.

II. Submissions

4. On 5 May 2020, the Trial Chamber rejected the Defence request for interim release, finding that the conditions of Article 58(1)(b)(i) were satisfied, and that the assurance provided by the Defence did not adequately mitigate this risk.¹ The death of Mr. Al Hassan's daughter, and his request to meet his family in person to mourn with them, constitutes a change in circumstances, and a compelling basis to order a limited release under custodial conditions.
5. As recognized by the ICTY, and different ICC Chambers, an "accused may be transferred out of the detention centre when compelling humanitarian circumstances justify such a transfer."² The ICTY has thus granted

¹ [ICC-01/12-01/18-786-Red.](#)

² [ICC-02/11-01/11-711-Red](#), para. 25; [ICC-01/05-01/08-437-Red](#); [ICC-01/05-01/08-1099-Red](#)

compassionate release to several defendants, including an individual who had been charged with genocide,³ and convicted individuals.⁴

6. Within the context of the ICC, such circumstances were found to exist in connection with Mr. Bemba's attendance at the funeral/memorial service of his father and stepmother.⁵ Although Trial Chamber I rejected the request of Mr. Gbagbo to be released to attend the funeral of his mother, his case was clearly distinguishable from that of Mr. Al Hassan. Mr. Gbagbo requested to travel to Cote d'Ivoire, a country where he enjoyed considerable military and political support as the former President. Mr. Gbagbo also enjoyed extremely frequent visits from his family at the ICC detention unit. The decision did not therefore impinge his right to maintain close contacts with his immediate family while mourning the death of his mother.
7. In line with the position under human rights law,⁶ ICC case law further affirms that telephone communications are not a full and effective substitute for in person contacts and visits.⁷ Accordingly, in order to ensure that the right to family life is effective and not illusory, there is also a positive obligation on the part of the Court to take steps to ensure that indigent defendants are able to

³ *Prosecutor v. Vinko Pandurevic*, [Decision on Motion for Provisional Release](#), 21 July 2008.

⁴ *Prosecutor v. Krajisnik*, [Decision on Krajisnik's Application for a Custodial Visit](#), para. 18: "The medical condition and age of the Applicant's mother in combination demonstrate a sufficient humane compassionate basis for granting the Motion. Further, detainees at the United Nations Detention Unit are accommodated far away from the former Yugoslavia and as a consequence have limited opportunities for seeing their families."

⁵ [ICC-01/05-01/08-437-Red](#); [ICC-01/05-01/08-1099-Red](#)

⁶ *Cantoral-Benavides v. Peru*, Series C, No. 69, (2000), p. 24, citing the fact that although the prisoner was allowed to see his family once a month, he "could have no physical contact with them". See also '[Guidance Document on the Nelson Mandela Rules](#)', August 2018, p. 122, concerning the position that "other forms of remote communication are not substitutes for in-person visits."

⁷ [ICC-RoR217-02/08-8](#), para. 36: "The Presidency also observes that while the maintenance of family links is furthered by other methods of communication, such as telephone and mail, the availability of these alternative forms of communication are not a complete substitute for the right to receive face-to-face visits".

exercise this right.⁸ This extends to a further duty on the part of the Registry to actively obtain the means necessary to fulfil this right.⁹ It follows that a defendant should not be denied compassionate release simply because the defendant is unable to remunerate flights, or adduce State guarantees in advance of a decision from the Chamber.

8. The ECHR has further underscored refusing a detainee leave to visit “an ailing relative or to attend a relative’s funeral constituted an interference with the right to respect for family life”.¹⁰ And, in addition to facilitating the right to family life, “Sous l’angle d’une autre disposition, la Cour a reconnu le but légitime d’une politique de réinsertion sociale progressive des personnes condamnées à des peines d’emprisonnement et a, dans cette optique, considéré que des mesures de sorties temporaires peuvent contribuer à la réinsertion sociale du détenu, même lorsque celui-ci a été condamné pour des crimes violents”.¹¹
9. Although prisoners do not have an unconditional right to attend funerals or memorial services, any restriction of this right must be circumscribed to what

⁸ [ICC-RoR217-02/08-8](#), para. 31: “It has held that in addition to negative undertakings, there may be positive obligations inherent in effective respect for the rights guaranteed by the European Convention on Human Rights. The Presidency accepts the merits of the detainee’s argument that in his particular circumstances “his right to receive family visits can...only be effective and tangible” if the costs of these visits are borne by the Court.⁸⁶ The right to receive family visits necessitates the provision of funding for such visits since this is the only mechanism by which the right may be rendered effective in the circumstances of the detainee for the reasons set out below”.

⁹ [ICC-RoR220-01/19-2-Red](#), para. 26: “the Presidency recognises that, in circumstances where the TFFV is depleted, the Court may be impeded from ensuring that the fundamental right to receive family visits of persons detained in its custodial detention is rendered meaningful, with such situation being most detrimental to indigent detainees. Such circumstances cannot however justify, as a matter of law, a suspension, even temporary, of the Court’s obligation to ensure the effectiveness of the right for indigent detainees to receive family visits.”

¹⁰ *Lind v. Russia*, [25664/05](#), para. 92.

¹¹ *Schemkamper v. France*, [75833/01](#), para. 31.

is strictly necessary and proportionate.¹² In determining what constitutes such a necessary and proportionate restriction, the ECHR has found the following factors to be relevant: “the stage of the criminal proceedings against the applicant, the nature of the criminal offence, the applicant’s character, the gravity of the relative’s illness, the degree of kinship, the possibility of escorted leave, and so on.”¹³ Of note, in the *Schemkamper* case, the ECHR found the restriction to be justified because the applicant’s sick relative was sufficiently healthy and able to visit the applicant in detention on a regular basis.¹⁴ In contrast, in *Lind*, in concluding that Article 8 had been violated, the ECHR considered the State’s failure to take sufficient steps to seek the assistance of The Netherlands (where the funeral took place) to arrange an escorted leave to attend the funeral, and the fact that a very limited telephone call failed to provide an adequate alternative means to bid farewell.¹⁵

10. In terms of the application of the above principles to the current case, the exceptional, and humanitarian basis for the Request is as follows.

11. On 14 December 2020, Mr. Al Hassan’s daughter – Fatma – died of Malaria. She was buried the same evening.

12. Mr. Al Hassan has been able to speak to his family by telephone and is very grateful to have been afforded the opportunity to do so. There is, nonetheless, a substantial difference as concerns the ability to grieve and share affection in person, as compared to through electronic means. This difference is particularly stark as concerns Mr. Al Hassan’s interactions with Fatma’s

¹² *Lind v. Russia*, [25664/05](#), para. 92.

¹³ *Lind v. Russia*, [25664/05](#), para. 95.

¹⁴ *Schemkamper v. France*, [75833/01](#), para. 35.

¹⁵ *Lind v. Russia*, [25664/05](#), para. 98.

younger siblings. Mr. Al Hassan has never had the opportunity to hold or meet his youngest (Mostapha) in person. And, whereas the ICC Presidency underscored that “it is to the benefit of the detainee to receive several family visits in the course of a year”,¹⁶ Mr. Al Hassan has also not seen his wife Asmaho (Fatma’s mother), and his children Ahmed and Aicha since his arrest in April 2017.

13. It is worth noting that compassionate leave and family visits seek to promote the rights of the family as a unit, including children. In upholding the importance of regular family visits, the ICC Presidency has thus emphasized that:¹⁷

Beyond this, it is, at the barest minimum, a humane gesture that underscores the better aspects of human civilisation. It may be useful to keep in mind that ‘family visits’ means simply that. It is the ability of members of a family to visit one of their members who no longer enjoys the liberty of such visits at will. Family visits aim at maintaining the family ties of the detained person, which not only contributes to such person’s eventual re-integration or rehabilitation but also his well-being, as well as that of his family members.

14. The above finding should also be construed in light of Rules 3 and 106 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the “Mandela Rules”), which stipulate that:¹⁸

Imprisonment and other measures that result in cutting off persons from the outside world are afflictive by the very fact of taking from these persons the right of self-determination by depriving them of their liberty. Therefore the prison system shall not, except as incidental to

¹⁶ [ICC-RoR217-02/08-8](#), para. 54.

¹⁷ [ICC-RoR220-01/19-2-Red](#), para. 19.

¹⁸ UN General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules)*: note / by the Secretariat, 29 September 2015, A/C.3/70/L.3.

justifiable separation or the maintenance of discipline, aggravate the suffering inherent in such a situation.

[...]

Special attention shall be paid to the maintenance and improvement of such relations between a prisoner and his or her family as are desirable in the best interests of both.

15. Unless Mr. Al Hassan travels to Mali, he will not be able to see his family during their mourning process, or in the coming months. Mr. Al Hassan is indigent and relies wholly on the assistance of the Registry to facilitate family visits. Earlier this year, the Registry agreed in principle to arrange for members of Mr. Al Hassan's family to travel to The Hague for a family visit. This visit has been postponed indefinitely due to the COVID-19 pandemic. The Registry has further indicated that family members of detainees will not be permitted to enter the ICC detention unit until all the ICC detainees first receive a vaccine. Since detainees are not considered to be a priority in the vaccination process,¹⁹ this is unlikely to occur in the near future.

16. In contrast, several airlines have return flights to Bamako over the judicial recess period. The Defence also understands that the ICRC and MINUSMA continue to operate flights between Bamako and Timbuktu.

17. The exceptional humanitarian grounds for the Request also outweigh potential risks. Mr. Al Hassan is not requesting the Trial Chamber to release him from a

¹⁹ As of 17 December 2020, the [National Institute for Public Health and the Environment](#) (*Rijksinstituut voor Volksgezondheid en Milieu*) and [Federal Government](#) (*Rijksoverheid*) have not listed detainees as a priority group for its initial vaccine deployment nor have they given any indication as to the timeline within which a vaccine will be made available to this particularly vulnerable group. In the event that the ICC has an independent ability to obtain and deploy the vaccine, it would be consistent with EU recommendations to prioritise detainees: ([COM\(2020\) 680 final](#), pg. 12.).

custodial environment, or to modify or relax the conditions of his detention, including as concerns the live monitoring of his interactions with his family. He is willing to be detained by Malian authorities or by MINUSMA, in a secure custodial facility in either Bamako ([REDACTED])²⁰ or Timbuktu for the duration of the visit.²¹ He is also willing to comply with any additional conditions, which would address potential risks or security concerns.²²

18. The Defence is also not seeking to adjourn or delay the proceedings. Mr. Al Hassan is aware that he will need to quarantine upon arrival in Mali and accepts that the duration of contact with his family will necessarily be limited.

19. The Request is also distinguishable from the previous request for interim release in that Mr. Al Hassan is not requesting to be released from custody, or to obtain any variation as concerns the conditions of monitoring that would apply to his in-person interactions with his family. Mali also remains subject to an ongoing obligation to enforce the existing arrest warrant against Mr. Al Hassan, and to ensure his custody in the territory of Mali. Mali has already demonstrated that it is willing to cooperate with such surrender orders, through its arrest and surrender of Mr. Al Hassan to the Court in 2018. The Defence is not privy to the modalities employed by the Registry to obtain the attendance of witnesses, [REACTED].

²⁰ [REDACTED].

²¹ This is subject to the understanding that first, Mr. Al Hassan will be detained in a lawful custodial facility, which falls under the responsibility of the Malian Minister of Justice and second, the ICC will continue to exercise overall supervisory authority over Mr. Al Hassan's custody for the duration of the visit.

²² See Annex A and Annex B.

III. Relief Sought

20. For the reasons set out above, the Defence for Mr. Al Hassan respectfully requests the Trial Chamber to:

- Shorten the deadline for responses to the Request;
- Grant Mr. Al Hassan a custodial visit to either Bamako or Timbuktu; and
- Request the Registry to make the necessary arrangements with the Dutch and Malian authorities to ensure Mr. Al Hassan's detention for the duration of this visit, and the monitoring of his interactions with his family members.



Melinda Taylor
Counsel for Mr. Al Hassan

Dated this 17th Day of December 2020
At The Hague, The Netherlands