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No. ICC-01/12-01/18

Date: 18 January 2021

Date of original: 23 December 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 urgent Defence request for a
custodial visit on compassionate grounds’**

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

The Office of the Prosecutor

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Counsel for the Defence

Melinda Taylor
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Legal Representatives of Victims

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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

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States Representatives

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REGISTRY

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Detention Section

Harry Tjonk

**Victims Participation and Reparations
Section**

Other

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 64 and 68(1) of the Rome Statute, issues the following decision.

I. Procedural history

1. On 5 May 2020, the Chamber issued its ‘Decision on the Defence request for interim release’ (the ‘Decision on Interim Release’)¹ in which it rejected a request for Mr Al Hassan’s 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 ‘First Interim Release Request’).²
2. On 17 December 2020, the Defence filed an urgent request for the Chamber to, relevantly, ‘[g]rant Mr. Al Hassan a custodial visit to either Bamako or Timbuktu’ and to 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 (the ‘Request’).³ The Defence seeks the 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, either in Timbuktu or Bamako, and to thereby see his family in person, following the death of his young daughter earlier this month.⁴ The Defence submits, *inter alia*, that 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

¹ Decision on the Defence request for interim release, ICC-01/12-01/18-786-Conf (a public redacted version was notified on 29 May 2020, ICC-01/12-01/18-786-Red).

² 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 five confidential Annexes, two confidential *ex parte* Annexes (available only to the Defence and Registry), and one confidential *ex parte* Annex (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).

³ Urgent Request for Custodial Visit on Compassionate Grounds, ICC-01/12-01/18-1212-Conf (with confidential *ex parte* Annex A (available only to the Registry and Defence) and confidential Annex B), para. 20.

⁴ Request, ICC-01/12-01/18-1212-Conf, paras 1, 11.

⁵ Request, ICC-01/12-01/18-1212-Conf, para. 4.

3. On 18 December 2020, the Single Judge shortened the deadline for responses to the Request to 22 December 2020 and invited observations from the Registry, if any, by the same deadline.⁶
4. On 21 December 2020, the Office of the Prosecutor (the ‘Prosecution’) responded to the Request, seeking that it be dismissed (the ‘Prosecution Response’).⁷ The Prosecution submits, *inter alia*, that the Request effectively amounts to a request for conditional release,⁸ that although it is sincerely sympathetic to Mr Al Hassan’s wish to meet his family in person to mourn the recent death of his daughter,⁹ the conditions justifying detention under Article 58(1)(b) of the Statute continue to exist,¹⁰ and that in light of the recent developments in Mali, in particular the prisoners-hostages exchange, the conditions proposed by the Defence cannot adequately mitigate the risks under Article 58(1)(b) of the Statute.¹¹ The Prosecution also distinguishes the present circumstances from those where limited conditional release was granted in the *Bemba* case on humanitarian grounds.¹² It further suggests that instead of a conditional release, other measures may be explored.¹³
5. On 22 December 2020, the Legal Representatives of Victims (the ‘LRVs’) also responded to the Request (the ‘LRVs Response’).¹⁴ The LRVs refer to the Prosecution Response as regards the nature of the Request, its consequences in terms of security for witnesses, its feasibility and alternative measures proposed. The LRVs further submit, *inter alia*, that there would be serious consequences from Mr Al Hassan’s return to Malian territory, even in detention, as regards the

⁶ Email from the Single Judge, 18 December 2020, at 09:33. The Defence had requested the Chamber to shorten the deadline for responses to the Request, see Request, ICC-01/12-01/18-1212-Conf, para. 20.

⁷ Prosecution’s response to Defence’s “Urgent Request for Custodial Visit on Compassionate Grounds”, ICC-01/12-01/18-1224-Conf-Exp (confidential *ex parte* available only to the Prosecution, Victims and Witnesses Unit, and the Detention Unit; a confidential redacted version was notified simultaneously, ICC-01/12-01/18-1224-Conf-Red; a further confidential redacted version was notified on 22 December 2020, ICC-01/12-01/18-1224-Conf-Red2, in accordance with the instructions of the Single Judge: see email from the Single Judge, 22 December 2020, at 12:26).

⁸ Prosecution Response, ICC-01/12-01/18-1224-Conf-Red2, para. 1.

⁹ Prosecution Response, ICC-01/12-01/18-1224-Conf-Red2, para. 2.

¹⁰ Prosecution Response, ICC-01/12-01/18-1224-Conf-Red2, paras 2, 13-18.

¹¹ Prosecution Response, ICC-01/12-01/18-1224-Conf-Red2, paras 2, 19-23.

¹² Prosecution Response, ICC-01/12-01/18-1224-Conf-Red2, paras 26-29.

¹³ Prosecution Response, ICC-01/12-01/18-1224-Conf-Red2, paras 4, 24-25.

¹⁴ Email from the LRVs, 22 December 2020, at 14:30.

safety of victims, [REDACTED]. In addition, the LRVs submit that if the Chamber were to grant the Request in one form or another, it is essential that the LRVs be given sufficient time to properly inform the victims.

6. On 22 December 2020, the Registry submitted detailed observations on the Request (the ‘Registry Observations’).¹⁵ The Observations address the questions of whether the Registry could facilitate the transfer of Mr Al Hassan to Mali at this time,¹⁶ and if this is not possible, whether the Registry can offer any alternative modes of contact with the family.¹⁷ In sum, prior to any consultation with the Malian authorities and the UN, the Registry’s preliminary assessment is that implementation of the Request would be extremely difficult at this time due to the challenges currently being encountered by the Malian Government and MINUSMA.¹⁸ In addition, the Registry submits that Mr Al Hassan’s detention in Mali may lead to [REDACTED].¹⁹

II. Analysis

A. The Request

7. As a preliminary matter, the Chamber notes that the Prosecution Response contains information which is *ex parte* and not available to the Defence. The Chamber notes that this information is minimal, concerns protected information relating to witnesses, and has had no bearing on the outcome of this decision.
8. The Chamber notes that other pre-trial and trial chambers of this Court have considered that an accused may be transferred temporarily out of the detention centre in ‘exceptional humanitarian circumstances’,²⁰ although the Appeals

¹⁵ Registry Observations on Defence’s “Urgent Request for Custodial Visit on Compassionate Grounds” (ICC-01/12-01/18-1212-Conf), ICC-01/12-01/18-1225-Conf (with three confidential annexes).

¹⁶ Registry Observations, ICC-01/12-01/18-1225-Conf, paras 8-39.

¹⁷ Registry Observations, ICC-01/12-01/18-1225-Conf, paras 40-45.

¹⁸ Registry Observations, ICC-01/12-01/18-1225-Conf, para. 46.

¹⁹ Registry Observations, ICC-01/12-01/18-1225-Conf, para. 46.

²⁰ See Pre-Trial Chamber II, *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, 22 July 2009, ICC-01/05-01/08-437-Red (original version notified on 3 July 2009), para. 9; Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public redacted version of ICC-01/05-01/08-1099-Conf Decision on the Defence Request for Mr Jean-Pierre Bemba to Attend his Stepmother’s Funeral, 12 January 2011, ICC-01/05-01/08-1099-Red (original version notified on 7 January 2011), para. 13; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*,

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’.²¹ For the purpose of this decision, the Chamber will follow the approach of the other pre-trial and trial chambers of this Court. The Chamber considers Mr Al Hassan’s request to be transferred to Mali to be able to see his family in person following the recent death of his young daughter to constitute an exceptional humanitarian circumstance. The Chamber expresses its sympathy for Mr Al Hassan.

9. The Chamber has taken into consideration that for the purpose of the present Request, Mr Al Hassan is not requesting release from a custodial environment and is willing to be detained by Malian authorities or by MINUSMA, in a secure custodial facility [REDACTED] for the duration of the visit (on the understanding that Mr Al Hassan will be detained in a lawful custodial facility, which falls under the responsibility of the Malian Minister of Justice and that the ICC will continue to exercise overall supervisory authority over Mr Al Hassan’s custody for the duration of the visit).²² It has also noted the Defence submission that Mr Al Hassan is willing to comply with any additional conditions.²³ The Chamber has also noted that Mr Al Hassan is not requesting to adjourn or delay the proceedings,²⁴ and the Defence’s submission that several airlines have return flights to Bamako over the judicial recess period and [REDACTED].²⁵
10. The Chamber has further taken into account the Defence’s submission that Mr Al Hassan has not seen his wife (the mother of his daughter who has died) and at least three of his other children since his arrest in April 2017,²⁶ and that unless

Public redacted version of Decision on the urgent request of the Defence for Mr Gbagbo to attend his mother’s funeral, 29 October 2014, ICC-02/11-01/11-711-Red (original version notified on the same day), para. 25.

²¹ 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.

²² Request, ICC-01/12-01/18-1212-Conf, para. 17.

²³ Request, ICC-01/12-01/18-1212-Conf, para. 17. See also ICC-01/12-01/18-1212-Conf-Exp-AnxA and ICC-01/12-01/18-1212-Conf-AnxB.

²⁴ Request, ICC-01/12-01/18-1212-Conf, para. 18.

²⁵ Request, ICC-01/12-01/18-1212-Conf, para. 16.

²⁶ Request, ICC-01/12-01/18-1212-Conf, para. 12.

Mr Al Hassan travels to Mali, he will not be able to see his family during their mourning process, or in the coming months.²⁷

11. The Chamber recalls that in its Decision on Interim Release, it found, *inter alia*, that Mr Al Hassan's continued detention appeared necessary to ensure his appearance at trial under Article 58(1)(b)(i)²⁸ and to prevent him from continuing to commit crimes within the Court's jurisdiction under Article 58(1)(b)(iii),²⁹ and that the serious risks established under Articles 58(1)(b)(i) and (iii) of the Statute could not be adequately mitigated at that time by conditions on a release to Mali.³⁰ In particular, the Chamber noted the extremely violent working methods of the armed groups in the North of Mali and the information that their primary targets continued to be national defence and security forces, the MINUSMA, and international forces.³¹ It also noted that security information indicated persistent insecurity and lack of State authority in certain areas in the North of Mali.³² The Chamber also did not consider the risks to be mitigated by 'strong family ties', as submitted by the Defence.³³
12. On balance and in the circumstances, the Chamber is not convinced that, at this time, specific conditions can sufficiently mitigate the risks found in the Chamber's Decision on Interim Release. In particular, the Chamber notes that since the Decision on Interim Release was issued, information indicates that the security situation in Mali has not improved: (i) updated security information from the Registry indicates that, in relation to Bamako, the threat environment remains characterised by the threat of terrorism and civil unrest which is still assessed as high,³⁴ and, in relation to Timbuktu, threat levels of terrorism and criminality are

²⁷ Request, ICC-01/12-01/18-1212-Conf, para. 15; and generally paras 7-14. See also Registry Observations, ICC-01/12-01/18-1225-Conf, paras 44-45.

²⁸ Decision on Interim Release, ICC-01/12-01/18-786-Conf, paras 57-68.

²⁹ Decision on Interim Release, ICC-01/12-01/18-786-Conf, paras 71-73.

³⁰ Decision on Interim Release, ICC-01/12-01/18-786-Conf, paras 74-79.

³¹ Decision on Interim Release, ICC-01/12-01/18-786-Red, paras 64, 75.

³² Decision on Interim Release, ICC-01/12-01/18-786-Red, para. 64.

³³ Decision on Interim Release, ICC-01/12-01/18-786-Red, para. 79.

³⁴ Second Registry Report on the Security Situation in Mali, 3 July 2020, ICC-01/12-01/18-928-Conf-Exp (confidential *ex parte* available only to the Registry; with one confidential Annex; confidential redacted version filed simultaneously, ICC-01/12-01/18-928-Conf-Red) (the 'Second Registry Security Report'), para. 24. The report covers the period 1 February to 24 June 2020.

assessed as extreme alongside a substantial threat of civil unrest;³⁵ (ii) a military coup took place in August 2020 and Mali is currently hit by the second wave of the COVID-19 pandemic.³⁶ The Registry notes that [REDACTED];³⁷ and (iii) in October 2020, open sources reported an alleged exchange of 180 prisoners for hostages between Malian authorities and armed groups.³⁸ The Registry submits that some of these persons are directly related or are known to closely support threat actors, with a real risk existing that those persons have rekindled prior relationships with threat actors.³⁹ In addition, the Chamber notes the Registry's submission that should the Chamber grant the Request, [REDACTED].⁴⁰

13. Contrary to the Defence's submissions,⁴¹ the Chamber does not consider there to be a significant difference between the present proposal that Mr Al Hassan be detained in a lawful custodial facility by the Malian authorities or MINUSMA as compared to the proposal under consideration in the First Interim Release Request, which was that Mr Al Hassan remain in supervised confinement or house arrest [REDACTED].⁴² In addition, the Chamber has taken note of the logistical difficulties highlighted by the Registry in relation to this matter, including its preliminary assessment that: (i) [REDACTED];⁴³ and (ii) [REDACTED].⁴⁴ In relation to the latter, the Registry notes, for example, that [REDACTED],⁴⁵ [REDACTED],⁴⁶ [REDACTED].⁴⁷

³⁵ Second Registry Security Report, ICC-01/12-01/18-928-Conf-Red, para. 26. See also Annex III to the Registry Observations, ICC-01/12-01/18-1225-Conf-AnxIII, p. 7.

³⁶ Registry Observations, ICC-01/12-01/18-1225-Conf, para. 23. See also Annex III to the Registry Observations, ICC-01/12-01/18-1225-Conf-AnxIII.

³⁷ Registry Observations, ICC-01/12-01/18-1225-Conf, para. 24. See also Annex III to the Registry Observations, ICC-01/12-01/18-1225-Conf-AnxIII.

³⁸ See e.g. <https://apnews.com/article/mali-archive-prisoner-exchange-6ef5691bdbc75fa000c01a30a6c9ed8e>. See also Annex III to the Registry Observations, ICC-01/12-01/18-1225-Conf-AnxIII, p. 3; and Prosecution Response, ICC-01/12-01/18-1224-Conf-Red2, para. 23.

³⁹ Registry Observations, ICC-01/12-01/18-1225-Conf, para. 34.

⁴⁰ Registry Observations, ICC-01/12-01/18-1225-Conf, para. 37.

⁴¹ Request, ICC-01/12-01/18-1212-Conf, para. 19.

⁴² Decision on Interim Release, ICC-01/12-01/18-786-Conf, para. 74.

⁴³ Registry Observations, ICC-01/12-01/18-1225-Conf, para. 24.

⁴⁴ Registry Observations, ICC-01/12-01/18-1225-Conf, para. 29.

⁴⁵ Registry Observations, ICC-01/12-01/18-1225-Conf, para. 27.

⁴⁶ Registry Observations, ICC-01/12-01/18-1225-Conf, para. 27.

⁴⁷ Registry Observations, ICC-01/12-01/18-1225-Conf, para. 28.

14. Furthermore, and in light of these considerations, the Chamber cannot accept the Defence's submission ⁴⁸ that the exceptional humanitarian grounds for the Request outweigh the potential risks.

B. Alternative measures

15. The Chamber recalls that in light of the exceptional circumstances currently facing Mr Al Hassan, on 16 December 2020 the Single Judge authorised a temporary amendment to the restrictions applicable to Mr Al Hassan's contacts in the Detention Centre, [REDACTED] so that Mr Al Hassan could have more contact with his family.⁴⁹ The Chamber extends this temporary amendment until [REDACTED], to enable Mr Al Hassan to have increased contact with his family.
16. In addition, the Chamber notes that the Registry has also contemplated alternative means of communication that may assist Mr Al Hassan, namely video conferencing.⁵⁰ In particular, the Registry states that it may be able to exceptionally request the assistance of [REDACTED], and it identifies two scenarios that could be further explored.⁵¹ The Chamber instructs the Registry to further explore these possibilities to facilitate a family communication via video link, in consultation with the Defence, if Mr Al Hassan wishes to make use of this form of communication.⁵²

⁴⁸ Request, ICC-01/12-01/18-1212-Conf, para. 17.

⁴⁹ Email from the Single Judge, 16 December 2020, at 15:12.

⁵⁰ Registry Observations, ICC-01/12-01/18-1225-Conf, para. 40.

⁵¹ Registry Observations, ICC-01/12-01/18-1225-Conf, para. 41.

⁵² See also email from the Defence, 22 December 2020, at 17:43.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request;

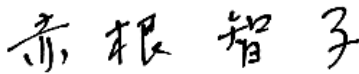
AMENDS the restrictions regime applicable to Mr Al Hassan at the Detention Centre in accordance with paragraph 15 above; and

INSTRUCTS the Registry to proceed in accordance with paragraph 16 above.

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 23 December 2020

At The Hague, The Netherlands