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APPEALS CHAMBER

Before: Judge Luz del Carmen Ibáñez Carranza, Presiding
 Judge Chile Eboe-Osuji
 Judge Howard Morrison
 Judge Piotr Hofmański
 Judge Solomy Balungi Bossa

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 "Prosecution's Response to Defence's "Appeal of the Trial Chamber's 'Decision on the urgent Defence request for a custodial visit on compassionate grounds'", 22 January 2021, ICC-01/12-01/18-1262-Conf

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

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I. INTRODUCTION

1. Mr Al Hassan’s appeal¹ against the “Decision on the urgent Defence request for a custodial visit on compassionate grounds” (“Decision” or “Impugned Decision”)² should be rejected. First, the Appeal is inadmissible because the Impugned Decision is not a decision “granting or denying release” within the terms of article 82(1)(b) and because the Appeal was filed out of time. Second, the Decision was reasonable and correct. None of the three grounds of appeal advanced by the Defence show otherwise. In particular, the Trial Chamber did not err by relying on evidence and previous evidential findings that fall under the exclusionary rule set out in Article 15 of the United Nations Convention against Torture (UNCAT) (first ground); it did not err by weighing risks that are unrelated to article 58(1) (second ground); and it properly weighed Mr Al Hassan’s exceptional humanitarian circumstances against all relevant factors (third ground).

II. CONFIDENTIALITY

2. This response is filed as confidential pursuant to regulation 23bis(2) of the Regulations of the Court because the Al Hassan’s Appeal to which it responds has the same classification. In addition, this response refers to several other documents that are also confidential.

III. SUBMISSIONS

(A) The Appeal is inadmissible

3. In its decision on the conduct of these appeal proceedings,³ the Appeals Chamber instructed the Parties and Participant to also address the admissibility of the appeal, both as concerns whether the Impugned Decision is a decision “granting or denying release” in terms of article 82(1)(b), and the timeliness of the Appeal.

4. The Prosecution submits that the Appeal is inadmissible. Because the Impugned Decision is not a decision “granting or denying release”, the Defence cannot directly appeal it under article 82(1)(b). But even if it could, the Appeal is also inadmissible because it was not filed within the mandatory deadline prescribed by rule 154(1).

¹ [ICC-01/12-01/18-1249-Conf-Red-Corr](#) (“Appeal”). The Defence also filed an ex-parte version of the Appeal, to which the Prosecution has no access (ICC-01/12-01/18-1249-Conf-Exp).

² [ICC-01/12-01/18-1227-Conf](#).

³ [ICC-01/12-01/18-1242-Conf](#).

(a) The Appeal is inadmissible because the Decision does not grant or deny release under article 82(1)(b)

5. The Appeal is inadmissible because the Decision is not “[a] decision granting or denying release” under article 82(1)(b). As such, the Decision could not be appealed under rule 154(1). Accordingly, the Appeal should be rejected because it was filed in violation of rule 155.

6. The Appeals Chamber has repeatedly indicated that “it is the nature or character of a decision [...] which determine whether a party is entitled to bring an appeal pursuant to article 82(1)(b) of the Statute.”⁴ Thus, for article 82(1)(b) to apply, the Chamber should have issued a decision on release or detention under article 60(3).⁵

7. In this case, the Defence did not request that Mr Al Hassan be conditionally released under rule 119.⁶ Instead, the Defence submitted that Mr Al Hassan did not require being “released from custodial environment and is willing to be detained by Malian authorities or by MINUSMA, in a secure custodial facility.”⁷ Accordingly, irrespective of whether the remedy requested by the Defence would have been granted or not, Mr Al Hassan would not have been released with conditions, as that would have exceeded the scope of the Request.

8. The Chamber noted 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)*’”.⁸ But “for the purpose of this [D]ecision”, the Chamber decided to follow the practice of other Pre-Trial and Trial Chambers of this Court which had not applied article 60(3) to decide on similar requests.⁹ The Trial Chamber’s Decision is therefore not a decision on interim release under article 60(3).¹⁰

⁴ [ICC-01/04-01/10-438 OA2](#), para. 17; [ICC-01/04-01/06-926 OA8](#), para. 15; [ICC-01/09-78 OA](#), para. 17; [ICC-01/04-01/07-3424 OA](#) 14, para. 35. The Prosecution appreciates that in its submissions before the Trial Chamber it argued that the Request effectively amounted to a request for conditional release ([ICC-01/12-01/18-1224-Conf-Red](#), para. 1).

⁵ See [ICC-01/05-01/08-1626-Red](#), para. 84 (distinguishing between decisions on release on exceptional humanitarian circumstances under article 64(6)(f) invoking the Chamber’s inherent powers, and decisions under the article 60(3) regime).

⁶ [ICC-01/12-01/18-1212-Conf](#) (“Request”).

⁷ [Request](#), para. 17; [Decision](#), para. 9.

⁸ [Decision](#), para. 8 (emphasis added), fn. 21 (citing [ICC-01/05-01/08-1626-Red](#), para. 84).

⁹ [Decision](#), para. 8; see fn. 20 where the Chamber relied on [ICC-01/05-01/08-437-Red](#), where the Single Judge of Pre-Trial Chamber II rejected Mr Bemba’s request for interim release, but authorized his transfer from the Court’s detention center to the Kingdom of Belgium to attend his father’s funeral under custody-like conditions. Similarly, see [ICC-01/05-01/08-1099-Red](#); [ICC-02/11-01/11-711-Red](#), para. 25. See also fn. 21 (where the Chamber cited [ICC-01/05-01/08-1626-Red](#), para. 84, where the Appeals Chamber distinguished between decisions of release on exceptional humanitarian circumstances under article 64(6)(f) and decisions under the article 60(3) regime).

¹⁰ This is consistent in particular with [ICC-01/05-01/08-437-Red](#), where the Single Judge of Pre-Trial Chamber II rejected Mr Bemba’s request for interim release.

9. Accordingly, the Chamber did not review the previous decision on Mr Al Hassan's detention ("Interim Release Decision")¹¹ issued pursuant to article 60(3). In particular, it did not assess whether Mr Al Hassan's detention remained justified under article 58(1)(a) and (b). This means that the latest decision on Mr Al Hassan's detention or release under article 60(3) remains the Interim Release Decision, which the Impugned Decision does not affect.

10. Thus, consistent with the practice of other Chambers of this Court, the Trial Chamber used its inherent power to assess whether in light of recent developments in Mali,¹² a confined custodial visit of Mr Al Hassan to Mali could be conducted in a way that would mitigate the risks found in the Interim Release Decision,¹³ and whether humanitarian reasons outweighed those overall risks.¹⁴ It did so for the limited purpose of deciding whether Mr Al Hassan could be transferred to another detention facility under custody-like conditions and for a limited amount of time.

11. As a result of the above, article 82(1)(b) allowing for direct appeal of "decision granting or denying release" does not apply in this case. No direct appeal against the Decision was therefore available to the Defence. Accordingly, the Appeal could not be properly filed under rule 155; it should therefore be rejected as inadmissible.

(b) The Appeal is inadmissible because it was filed after the deadline under rule 154(1)

12. Even if, *arguendo*, the Appeal fell within the scope of article 82(1)(b), it is still inadmissible because it was filed out of time. Pursuant to rule 154(1), an appeal under article 82(1)(b) may be filed not later than five days from the date upon which the party filing the appeal is notified of the decision. The Decision was notified to Mr Al Hassan on 23 December 2020. Mr Al Hassan was thus required to file his Notice of Appeal not later than 29 December 2020. Instead, it was filed on 4 January 2021. For this reason the Appeal is inadmissible.

13. The Trial Chamber's decision to suspend the time limits during the judicial recess pursuant to regulation 19(2)*bis* of the Regulations of the Court¹⁵ did not affect the deadline to file a notice of appeal *before the Appeals Chamber* under rule 154(1).

¹¹ [ICC-01/12-01/18-786-Red](#) ("Interim Release Decision").

¹² [Decision](#), para. 12.

¹³ [Decision](#), para. 12.

¹⁴ [Decision](#), para. 14.

¹⁵ Email from the Trial Chamber to the Parties and Participants, 04 December 2020 17:21:

14. First, the Trial Chamber cannot vary a deadline prescribed by rule 154(1) which regulates appeals proceedings that do not require the leave of the Trial Chamber. The conduct of appeals proceedings fall within the exclusive remit of the Appeals Chamber.¹⁶

15. Second, the Defence does not accurately describe the record: the Trial Chamber did not postpone the *notification* of the Decision under regulation 31(2), which states that “[u]nless otherwise [...] ordered by the Chamber, a participant is deemed notified [of a] decision [...] on the day it is effectively sent from the Court by the Registry.”¹⁷ Rather, in accordance with regulation 19(2)*bis*, the Chamber held that “the time limits falling between the 11 of December 2020 and the 10 of January 2021 are suspended”¹⁸ with three enumerated exceptions. There is nothing in the Suspension Decision to suggest that the Trial Chamber ordered the postponement of the *notification* of the Decision under regulation 31(2). And the Decision was indeed notified on 23 December 2020—with the consequence that under rule 154(1) the Notice of Appeal should have been filed on 29 December 2020.

16. The Defence further argues that it was entitled to assume that the *notification* of the Decision had been postponed under regulation 31(2) because the Suspension Decision under regulation 19(2)*bis* “resulted in a presumption of suspension” and because “[i]n the Decision, the Trial Chamber did not vary the terms of the suspension”.¹⁹ This argument not only misrepresents the Chamber’s Suspension Decision, but also subverts the logic of regulation 31(2).²⁰

17. As a result of the above, the Appeal should be dismissed because it was filed out of time.

“In accordance Article 64(2) of the Rome Statute and Regulation 19(2)*bis* of the Regulations of the Court, the Chamber decides that time limits falling between 11 December 2020 and 10 January 2021 are suspended, with the exception of the following time limits:

- (i) The time limit for the Defence to propose [REDACTED] to file the redacted version(s) of the report ([ICC-01/12-01/18-1006-Conf](#) para. 39);
- (ii) The time limits set pursuant to paragraph 34(ii-iv) of the directions on the conduct of proceedings ([ICC-01/12-01/18-789-AnxA](#)) which apply following the testimony of witness P-0638; and
- (iii) The time limit for the filing of public redacted versions set pursuant to the email decision dated 10 November 2020 at 17:47.

In case any urgent matter arises during the judicial recess, the Chamber will assess on a case-by-case basis whether earlier submissions are indispensable.”

¹⁶ The Trial Chamber’s powers under article 64(2) are limited to the conduct of trial proceedings.

¹⁷ *Contra* [Appeal](#), paras. 2-3.

¹⁸ Email from the Trial Chamber to the Parties and Participants, 04 December 2020 17:21.

¹⁹ [Appeal](#), para. 3.

²⁰ Regulation 31(2) states that “[u]nless otherwise [...] ordered by the Chamber, a participant is deemed notified [of a] decision [...] on the day it is effectively sent from the Court by the Registry.”

(B) First ground: The Chamber did not err by relying on evidence and previous evidential findings that fall under the exclusionary rule set out in Article 15 of UNCAT

18. The Defence argues that the Trial Chamber erred by relying on evidence and previous findings from the Interim Release Decision where the Chamber had relied on evidence that arguably falls under the exclusionary rule set out in article 15 of the United Nations Convention against Torture (“UNCAT”). The Defence’s first ground of appeal should be dismissed for the following reasons: (a) The Defence is effectively seeking to appeal the Trial Chamber’s previous Interim Release Decision through the present Decision; (b) the Defence did not raise this argument before the Trial Chamber when filing its Request and is raising it for the first time on appeal; (c) substantive considerations on the exclusion of evidence under article 69(7) did not need to be addressed as part of the Decision; and (d) the Defence fails to show that the alleged error materially affected the Decision.

(a) The Defence is seeking to appeal the Interim Release Decision through the Impugned Decision

19. On 5 May 2020, the Trial Chamber issued its Interim Release Decision, in which it rejected a request for Mr Al Hassan’s interim release “for the duration of the COVID-19 pandemic” or such time as it deems appropriate, subject to all conditions imposed by the Chamber.²¹ In this Interim Release Decision, the Trial Chamber found, *inter alia*, that Mr Al Hassan’s continued detention appeared necessary to ensure his appearance at trial under article 58(1)(b)(i)²² and to prevent him from continuing to commit crimes within the Court’s jurisdiction under article 58(1)(b)(iii).²³ It further concluded that the serious risks established under articles 58(1)(b)(i) and (iii) could not be adequately mitigated by imposing conditions on Mr Al Hassan’s release to Mali.²⁴ The Interim Release Decision contains three discrete references to Mr Al Hassan’s prior recorded statements [REDACTED].²⁵ The Defence did not appeal the Interim Release Decision.

20. Nor did the Defence in its Request dispute the Chamber’s findings in the Interim Release Decision that Mr Al Hassan detention was necessary under article 58(b)(i) and (iii). Rather it

²¹ [Interim Release Decision](#).

²² [Interim Release Decision](#), paras. 57-68.

²³ [Interim Release Decision](#), paras. 71-73.

²⁴ [Interim Release Decision](#), paras. 74-79.

²⁵ [ICC-01/12-01/18-786-Conf](#). See references to P-0398, in footnotes 135, 142, 143.

expressly stated that its Request was “distinguishable from the previous request for interim release in that Mr Al Hassan [was] not requesting to be released from custody [...]”.²⁶

21. Yet in *this* Appeal, the Defence challenges the Trial Chamber’s reliance on its previous Interim Release Decision on Mr Al Hassan’s prior recorded statements.²⁷ These arguments must be rejected. As held by the Appeals Chamber, an appellant “cannot raise errors in assessments made in [...] previous decisions as a ground of appeal in challenging the Impugned Decision”.²⁸

22. Moreover, and contrary to the Defence’s submissions, the Impugned Decision does not “hinge” on the Interim Release Decision.²⁹ As noted above, the Impugned Decision is not a decision on release or detention pursuant to article 60(3).³⁰ Accordingly, the Trial Chamber did not review its Interim Release Decision by addressing anew its prior ruling in light of the requirements under article 58.³¹ Instead, the Chamber focussed on the assessment of evidence concerning recent developments in Mali.³² It concluded that Mr Al Hassan’s temporary transfer to Mali under the suggested custodial conditions could not be executed in a way to sufficiently mitigate the previously established risks.³³ It also found that the exceptional humanitarian grounds do not outweigh the potential risks.³⁴

23. Because the Chamber’s findings in the Interim Release Decision cannot be challenged through an appeal against the Impugned Decision, the first ground should be rejected.

(b) The Defence is raising arguments for the first time on appeal

24. As consistently held by the Appeals Chamber, “proceedings on appeal do not constitute a mere continuation of proceedings before the Pre-Trial Chamber, but rather ‘a separate and distinct stage of the proceedings’.”³⁵ They “are corrective in nature, conducted with the purpose of reviewing the proceedings before the Pre-Trial Chamber.”³⁶ Because it would exceed the

²⁶ [Request](#), para. 19.

²⁷ [Appeal](#), paras. 19, 24, 27.

²⁸ [ICC-01/05-01/08-2151-Red OA10](#), para. 29.

²⁹ *Contra*, [Appeal](#), para. 24.

³⁰ *Contra*, [Appeal](#), paras. 9-10.

³¹ [ICC-01/05-01/08-631-Red OA2](#), para. 58.

³² [Decision](#), paras. 11-12.

³³ [Decision](#), para. 12.

³⁴ [Decision](#), para. 14.

³⁵ [ICC-01/09-02/11-202 OA](#), para. 11; [ICC-01/09-01/11-234 OA](#), para. 12; [ICC-01/04-01/06-824 OA7](#), para. 43; [ICC-01/04-01/06-2823 OA20](#), para. 13.

³⁶ [ICC-01/09-02/11-202 OA](#), para. 11; [ICC-01/09-01/11-234 OA](#), para. 12.

Appeals Chamber's review function, it is not appropriate for an appellant to "address [...] arguments in substance [...] for the first time on appeal [as the Trial Chamber would] not have an opportunity to consider them at first instance."³⁷

25. However, this is exactly what the Defence has done in this appeal. In its Request, the Defence did not argue that the Trial Chamber should refrain from relying on Mr Al Hassan's previously recorded testimony as it is allegedly tainted by torture and cruel, inhumane and degrading treatment ("CIDT"). It also did not raise any issues with respect to the previous Interim Release Decision. Instead, it focussed entirely on arguing that "for exceptional compassionate grounds [...] the Trial Chamber [should] 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 thereby see his family in person".³⁸

26. The Defence did not raise these issues in its Request. Yet, the Defence now seeks to fault the Trial Chamber for failing to take into consideration arguments that it did not make and information that was not submitted to it for this purpose.

27. Moreover, the Defence's submissions are inaccurate. The Defence erroneously argues that at the time the Decision was issued, the Trial Chamber had received a substantial body of evidence and argumentation concerning the existence of a real risk that the previously recorded testimony of Mr Al Hassan was obtained in circumstances that amount to torture or CIDT.³⁹ However, what the Defence portrays as established facts, are mere allegations which the Defence anticipated that it would raise in a foreshadowed request under article 69(7) and which will be examined by the Trial Chamber in due course. In addition, the Trial Chamber had previously rejected a Defence request for the termination of proceedings, which was based in part on allegations that Mr Al Hassan was tortured and subjected to CIDT by French and Malian authorities during interrogations over the course of a year.⁴⁰ Although the Trial Chamber took the Defence's allegations of torture and CIDT at their highest,⁴¹ it did not find that they could in any way be attributed to the Prosecution.⁴² It nevertheless indicated that this conclusion was

³⁷ [ICC-02/04-01/15-251 OA3](#), para. 45.

³⁸ [Request](#), para. 1.

³⁹ [Appeal](#), paras. 11, 18, 23.

⁴⁰ [ICC-01/12-01/18-1009-Conf](#), para. 74.

⁴¹ [ICC-01/12-01/18-1009-Conf](#), para. 80.

⁴² [ICC-01/12-01/18-1009-Conf](#), para. 117.

“without prejudice to any challenge to the admissibility of the evidence the Defence may decide to bring pursuant to Article 69(7) of the Statute”.⁴³

28. Because the Defence has since indicated its intention to challenge the admissibility of evidence in this case pursuant to article 69(7) on the basis that it was obtained by means of torture or CIDT,⁴⁴ the Trial Chamber ordered the Prosecution to file its request for the introduction of the relevant evidence by 31 December 2020.⁴⁵ According to the same order, the Defence will then be entitled to file a motion based on article 69(7) in respect of the Prosecution’s request.⁴⁶ As of the submission of this filing, the Defence has not yet filed its motion under article 69(7).

29. Accordingly, the issue whether Mr Al Hassan’s prior recorded statements were obtained by means of torture or CIDT will be fully litigated before the Trial Chamber in due course, if and when the Defence presents a formal challenge under article 69(7). Absent of proper litigation of the matter in the context of the Request or elsewhere, the Defence cannot argue in this Appeal that the Chamber erred in taking into consideration evidence establishing “a real risk” that the previously recorded testimony of Mr Al Hassan was obtained in circumstances that amount to torture or CIDT.⁴⁷ That argument not only misrepresents the amount and type of information currently before the Trial Chamber, but also ignores that the Defence never alleged that the information that is currently before the Chamber was relevant to the Chamber’s assessment of the Request. If the Defence was of the view that such information should have been taken into consideration for the purposes of the Decision, it had a duty to make the arguments to that effect in the Request. The Defence’s failure to do so cannot be remedied in this Appeal.

(c) Substantive considerations on the exclusion of evidence under article 69(7) did not need to be addressed as part of the Decision

30. The Defence argues that the Trial Chamber erred in law by “relying” on evidence and “endorsing” the Chamber’s findings in the Interim Release Decision and by not excluding that

⁴³ [ICC-01/12-01/18-1009-Conf](#), para. 122.

⁴⁴ Email of the Defence, 7 October 2020, at 15:47; email of the Defence, 12 October 2020, 14:56; email of the Defence, 13 October 2020, 15:35.

⁴⁵ [ICC-01/12-01/18-1160](#), para. 10. The Prosecution filed its request on 18 December ([ICC-01/12-01/18-1218-Conf-Exp](#)).

⁴⁶ [ICC-01/12-01/18-1160](#), para. 10.

⁴⁷ [Appeal](#), paras. 11, 18, 23.

evidence (allegedly tainted by torture or CIDT) for the purposes of its Decision.⁴⁸ This argument must be rejected because the Trial Chamber had no obligation to assess whether evidence relied upon in the Interim Release Decision which was allegedly obtained by means of a violation of the UNCAT should have been excluded for the purposes of the Decision.

31. The Appeals Chamber previously rejected the proposition that issues concerning the exclusion of evidence under article 69(7) must be dealt as part of a decision on release or detention, holding as follows:⁴⁹

“The Appeals Chamber does not consider that substantive considerations around admissibility of evidence can be appropriately addressed in the context of a decision taken on interim release, in the absence of obvious *male fides*. Conducting such an assessment would overload article 58(1)(a) of the Statute with the burdensome requirement to adjudicate issues relating to article 69(7) of the Statute at a very early stage of proceedings, in which the proper focus ought to be confined to be reviewing a suspect's detention and the conditions underpinning the same.”

32. Although, as noted above, the Decision is not one on interim release, the same logic applies also here where the Defence did not even seek Mr Al Hassan's interim release, but merely requested a temporary modification of his location of detention. In fact, this is also consistent with the Trial Chamber approach to other procedural decisions, where it held that information submitted in support of a procedural motion is not subject to the same admissibility criteria as evidence being considered in a trial judgment.⁵⁰

33. In addition, the Defence's contention that it has “established the existence of a *prima facie* case”,⁵¹ or a “real risk”⁵² and that this is a situation of “obvious *male fide*” within the meaning of the above Appeals Judgment is unsupported.⁵³ The Prosecution strongly objects to these allegations and will file detailed arguments in response to the upcoming Defence challenge under article 69(7).⁵⁴ And as already advanced, the Trial Chamber previously refused to hold an evidentiary hearing on the matter in the context of its decision on the Defence request

⁴⁸ [Appeal](#), para. 11.

⁴⁹ [ICC-01/05-01/13-560](#) OA4, para. 73.

⁵⁰ [ICC-01/12-01/18-1009-Red](#), para. 123; *see also* [ICC-01/05-01/13-1753](#), para. 11.

⁵¹ [Appeal](#), para. 16.

⁵² [Appeal](#), para. 17.

⁵³ [Appeal](#), para. 14.

⁵⁴ Without going into the merits of the arguments, the Prosecution notes that the Defence misrepresents the Prosecution's position (*see* [Appeal](#), para. 23). In any event, even if *arguendo* Mr Al Hassan had been subject to torture and CIDT by the Malian and/or French authorities, this would not necessarily mean that the Prosecution obtained his prior recorded statements by means of torture and/or CIDT within the meaning of article 69(7).

to terminate the proceedings,⁵⁵ precisely because it held that detailed considerations on the admissibility of evidence were unnecessary to dispose of a procedural motion.⁵⁶

34. The Defence's argument that an article 69(7) determination is not an essential pre-requisite for the Trial Chamber to exclude evidence for the purposes of the Decision⁵⁷ is misplaced. As noted above, considerations regarding the admissibility of evidence or its exclusion under article 69(7) do not equally apply to procedural motions on conditions of detention as they apply to a judgment under article 74. Accordingly, while a formal article 69(7) determination is not a legal pre-requisite for the exclusion of evidence of a procedural motion, there was also no obligation of the Trial Chamber to engage in any substantive considerations regarding the admissibility or the exclusion of evidence as part of its Decision.

35. The Defence's further suggestion that the exclusionary rule set out in article 15 of the UNCAT constitutes an exception to the non-applicability of article 69(7) to decisions on detention and release⁵⁸ defies logic. Article 69(7) provides that evidence obtained by means of a violation of the Statute or internationally recognised human rights shall not be admissible under certain circumstances. The UNCAT is an integral part of internationally recognised human rights law. Evidence that was obtained by means of a violation of the UNCAT squarely falls within the scope of article 69(7): it will be inadmissible if the violation casts substantial doubt on the reliability of the evidence; or if the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings. There is, thus, no need for any exceptional treatment of such evidence under the Statute. Accordingly, like any other considerations regarding article 69(7), they must be addressed prior to a decision under article 74, but they are not a necessary component of a decision on release or detention, and even less of this Decision regarding a request for a custodial visit to Mali.

36. Finally, it would have been impossible for the Trial Chamber to engage in substantive considerations on the exclusion of Mr Al Hassan's prior recorded statements pursuant to article 69(7). The Request was filed on an urgent basis and was not seeking to adjourn or delay the trial proceedings.⁵⁹ Accordingly, under the logic of the Request—which was filed on 17 December 2020, on the eve of the judicial recess that lasted until 11 January 2021—Mr Al

⁵⁵ [Appeal](#), para. 20.

⁵⁶ [ICC-01/12-01/18-1009-Red](#), para. 123; see also [ICC-01/05-01/13-1753](#), para. 11.

⁵⁷ [Appeal](#), para. 25.

⁵⁸ [Appeal](#), paras. 14-15.

⁵⁹ [Request](#), para. 18.

Hassan would again return into the custody at the UNDU by the time the trial was scheduled to resume on 18 January 2021.⁶⁰ Given the complexity of the issues at stake and the fact that the Defence has not yet submitted its formal challenge to the admissibility of Mr Al Hassan's prior recorded statements under article 69(7), the Chamber could not have rendered its decision prior to resuming the trial if it had to engage in substantive considerations around admissibility of the evidence.

(d) The Defence has failed to show that the alleged error materially affected the Decision

37. The Appeals Chamber has previously held that an appellant is not only obliged to set out the alleged error but also to indicate, with sufficient precision, how this error would have materially affected the Impugned Decision.⁶¹ An error materially affects a decision if the chamber "would have rendered a decision that is substantially different from the decision that was affected by the error, if it had not made the error".⁶²

38. In its Appeal (although not in its Request) the Defence extensively argues that Mr Al Hassan's prior recorded statements are tainted by torture and CIDT.⁶³ However, it does show how the Trial Chamber's reliance on those statements impacted on the Decision. In fact, in the Impugned Decision, the Trial Chamber does not rely at all on Mr Al Hassan's prior recorded statements. Accordingly, none of the individual findings in the Decision, nor the Decision as a whole, was materially affected by evidence that is allegedly tainted by torture or CIDT.

39. Even if, contrary to the above arguments on the scope of this appeal,⁶⁴ the Defence were to be permitted to challenge the Chamber's previous Interim Release Decision through an appeal against the Impugned Decision, it equally fails to show that an error in the Interim Release Decision would materially impact on the Impugned Decision.

40. The Interim Release Decision only contains three discrete references to Mr Al Hassan's prior recorded statements.⁶⁵ These three citations support factual findings that are part of—but

⁶⁰ See email from the Trial Chamber's Legal Officer, 27 November 2020 13:59. On 14 January 2021, the Trial Chamber informed the Parties and Participants that the trial that was scheduled to resume on 18 January 2021 was postponed until 25 January 2021 (see email from the Trial Chamber's Legal Officer, 14 January 2021 11:14). It appears that the resumption of the trial may be postponed further. However, that was not apparent at the time when the Chamber issued the Decision.

⁶¹ [ICC-02/11-01/11-321 OA 2](#), para. 44; [ICC-02/11-01/11-548-Red OA 4](#), para. 96.

⁶² [ICC-02/11-01/11-321 OA 2](#), para. 44; [ICC-01/04-169 OA](#), para. 84; [ICC-01/04-01/06-3121-Red A5](#), para. 19; [ICC-01/04-01/06-3121-Red A5](#), paras. 20, 32, 55; [ICC-01/04-02/12-271-Corr A](#), paras. 20-21.

⁶³ [Appeals](#), paras. 18, 23-24.

⁶⁴ See paras. 9, 19-23 above.

⁶⁵ [ICC-01/12-01/18-786-Conf](#). See references to P-0398, in footnotes 135, 142, 143.

not necessarily essential to—the Trial Chamber’s overall conclusion that Mr Al Hassan’s continued detention appeared necessary to ensure his appearance at trial under article 58(1)(b)(i).⁶⁶ As noted above, in the Impugned Decision, the Trial Chamber did not review its prior findings from the Interim Release Decision on the risks under article 58(1)(b). Rather it assessed whether the Request may be granted “outside the framework of article 60(3)”⁶⁷ and examined whether in light of the recent developments in Mali, a custodial visit of Mr Al Hassan to Mali could be conducted in a way that would mitigate the previously found risks.⁶⁸ Accordingly, even if *arguendo*, the Trial Chamber erroneously relied on Mr Al Hassan’s prior recorded statements in its Interim Release Decision, this did not affect in any way the Impugned Decision.

(e) Conclusion on the first ground

41. For the above reasons, the Appeals Chamber should rejected the first ground of appeal.

(C) Second ground: The Chamber did not err by weighing risks that were unrelated to article 58(1)

42. In its second ground of appeal, the Defence argues that the Trial Chamber erred in law, and/or abused its discretions by placing significant weight on risks that were not related to the criteria set out in article 58(1), or which were otherwise inconsistent with its duty to apply article 58(1) in a manner which is consistent with internationally recognised human rights law.⁶⁹ In particular, the Defence argues that the factors discussed at paragraphs 11 and 12 of the Decision do not in any way relate to Mr Al Hassan and the risks that he may abscond or that he may engage in witness intimidation or criminal activity.⁷⁰

43. The Defence’s second ground should be rejected for the following reasons: (a) it is based on a fundamental misunderstanding of the Decision; and (b) the Chamber did not otherwise err in concluding that Mr Al Hassan’s temporary custodial transfer to Mali could not be executed in a way to sufficiently mitigate the previously established risks.

⁶⁶ [ICC-01/12-01/18-786-Conf](#), [REDACTED]

⁶⁷ [Decision](#), para. 8.

⁶⁸ [Decision](#), para. 12.

⁶⁹ [Appeal](#), paras. 28-33.

⁷⁰ [Appeal](#), paras. 28-29.

(a) The second ground is based on a fundamental misunderstanding of the Decision

44. At the core of the Defence's second ground is its argument that the Trial Chamber erred by taking into considerations factors relevant to the current security, political and public health situation in Mali, as well as the fact that the Malian authorities recently exchanged 180 prisoners for hostages held by the armed groups⁷¹ and that the [REDACTED] along with the measures requested by the Defence.⁷² The Defence argues that these factors assess the "ongoing validity of the[...] risks in light of current developments",⁷³ but are irrelevant to assessing the concrete risks under article 58(1)(b) in that they do not specifically relate to the risk that Mr Al Hassan may abscond, or engage in witness intimidation or criminal activity.⁷⁴

45. However, and as noted above,⁷⁵ the Trial Chamber did not review its Interim Release Decision pursuant to article 60(3), addressing anew its prior ruling in light of the requirements under article 58(1).⁷⁶ In fact, it made no findings on the risks under article 58(1)(b). Instead, the Trial Chamber assessed whether the Defence Request may be granted "outside the framework of article 60(3)".⁷⁷ It examined whether, in light of the facts referred to in the previous paragraph, a custodial visit of Mr Al Hassan to Mali could be conducted in a way that would mitigate the previously found risks while taking into account information regarding the current situation in Mali.⁷⁸

46. This misunderstanding of the Decision is fatal to the Defence's second ground. The Decision does not rely on the factors under article 58(1)(b). The Defence's arguments to the contrary therefore fail to identify an error in the Decision, let alone an error that would materially affect the Decision.

⁷¹ [Decision](#), paras. 11-12.

⁷² [Decision](#), para. 13.

⁷³ [Appeal](#), para. 30.

⁷⁴ [Appeal](#), paras. 28-29, 31, 33.

⁷⁵ See paras. 7-11 above.

⁷⁶ [ICC-01/05-01/08-631-Red OA2](#), para. 58.

⁷⁷ [Decision](#), para. 8.

⁷⁸ [Decision](#), para. 12.

(b) The Chamber did not otherwise err

47. In any event, the Trial Chamber considered relevant factors⁷⁹ when assessing whether Al Hassan's temporary custodial transfer to Mali could be executed in a way to sufficiently mitigate the previously established risks.⁸⁰ In particular, it was reasonable to take into consideration factors relevant to the current security, political and public health situation in Mali, as well as the fact that the Malian authorities recently exchanged 180 prisoners [REDACTED].⁸¹ The Chamber also correctly considered the logistical difficulties highlighted by the Registry that [REDACTED]—in part due to the current security, political and health situation in the country—[REDACTED] along with the measures requested by the Defence.⁸²

48. Although these are objective factors, they were relevant to the Chamber's assessment of whether the previously identified risk related to the continued appearance of Mr Al Hassan at this trial under article 58(1)(b)(i) and the risk that he may continue to commit crimes under article 58(1)(b)(iii) could be appropriately mitigated if the Defence's Request for a custodial visit in Mali were to be granted. The Defence has not identified any error in those findings.

49. The Appeals Chamber has made it clear that where a Chamber has found that detention was necessary to ensure the person's appearance at trial, the Chamber has broad discretion as to whether to impose conditions on detention or release pursuant to rule 119.⁸³ Especially, where there is no proposal from a State to accept a detained person and to enforce conditions, the Chamber's discretion is unfettered.⁸⁴ Contrary to the Defence's suggestion,⁸⁵ the Chamber did not have a duty to seek the views of the Malian authorities before issuing the Decision; nor did the Defence request that the Trial Chamber seek any such observations. Because the Chamber already had sufficient information before it to make an informed decision⁸⁶—including information [REDACTED]⁸⁷—it had no duty to seek additional information from those authorities.

⁷⁹ *Contra*, [Appeal](#), paras. 30-31 referring to [Decision](#), paras. 12-13.

⁸⁰ [Decision](#), para. 12.

⁸¹ [Decision](#), paras. 11-12.

⁸² [Decision](#), para. 13.

⁸³ [ICC-01/05-01/08-1626-Red OA7](#), paras. 1, 55; [ICC-02/11-01/11-278-Red OA](#), para. 77.

⁸⁴ [ICC-02/11-01/11-278-Red OA](#), paras. 1, 79; [ICC-01/05-01/13-559 OA3](#), para. 116; [ICC-01/05-01/13-560 OA4](#), para. 128. *Contra*, see Separate concurring opinion of Judge Luz del Carmen Ibáñez Carranza in [ICC-02/05-01/20-177-Anx](#), paras. 16-29.

⁸⁵ [Appeal](#), para. 32.

⁸⁶ [ICC-01/05-01/08-1937-Red2 OA9](#), paras. 1, 35; [ICC-02/11-01/11-278-Red OA](#), para. 78.

⁸⁷ [ICC-01/05-01/08-1722 OA8](#), para. 39.

50. The Defence disagrees with the Trial Chamber’s assessment of the relevant facts, and in particular with its overall conclusion, but fails to show an error in the Decision.

(c) Conclusion on the second ground

51. For the above reasons, the Appeals Chamber should rejected the second ground of appeal.

(D) Third ground: The Chamber properly weighed Al Hassan’s exceptional humanitarian circumstances

52. The Chamber’s conclusion that the exceptional humanitarian circumstances advanced by the Defence do not outweigh the potential risks of his temporary transfer to Mali⁸⁸ is reasonable and legally sound. The Defence’s argument that there is “no indication” that the Chamber “weighed, or sufficiently weighed” the exceptional nature of Mr Al Hassan’s circumstances as well as the overall length of family separation and the impact on Al Hassan’s health when balancing the related risks of release is not accurate.⁸⁹ Al Hassan merely disagrees with the Chamber’s conclusion and fails to show any error.

(a) The Chamber properly weighed all relevant factors

53. The Chamber first considered the Defence’s submission that there was a change of circumstances and a compelling basis to order Mr Al Hassan’s custodial visit to Mali. It held that Mr Al Hassan’s request to be transferred to Mali under custodial conditions to meet his family in person following the recent death of his daughter did constitute an exceptional humanitarian circumstance.⁹⁰

54. After reviewing the proposed conditions for Mr Al Hassan custodial transfer to Mali,⁹¹ the Chamber expressly considered the consequences of rejecting the Request.⁹² It noted that Mr Hassan has not seen his wife (the mother of the daughter who passed away) and at least three of his other children for *almost* (and not *over*) 4 years and that unless he travels to Mali he would not be able to see his family during their mourning process or in the coming months.⁹³

⁸⁸ [Decision](#), para. 14.

⁸⁹ [Appeal](#), paras. 35, 37.

⁹⁰ [Decision](#), para. 8.

⁹¹ [Decision](#), para. 9.

⁹² *Contra* [Appeal](#), para. 34.

⁹³ [Decision](#), para. 10.

Contrary to the Defence's submission, the Chamber thus took into account the impact of rejecting the Request on the overall length of family separation.⁹⁴

55. The Chamber then recalled and considered its findings on article 58(1)(b)(i) and (iii) in the Interim Release Decision regarding the extremely violent working methods of the armed groups in North of Mali, the information that these group's primary targets continue to be national defence and security forces, the MINUSMA, and international forces, and the persistent insecurity and lack of State authority in certain area in the North of Mali. It also recalled its finding that such risks were not mitigated by "strong family ties".⁹⁵

56. Further, the Chamber also considered information obtained since the Interim Release Decision showing that the security situation in Mali has not improved including: that threat of terrorism and civil unrest remain high in Bamako; that a military coup took place in August 2020; that Mali is currently hit by the second wave of COVID-19 pandemic; that in October 2020 the Malian authority allegedly release 180 prisoners, some directly related or known to support threat actors with a real risk that those persons have rekindled prior relationship with threat actors; [REDACTED].⁹⁶

57. Finally, the Chamber also took into account information regarding the logistical difficulties in relation to Mr Al Hassan's transfer including:[REDACTED].⁹⁷

58. In light of this thorough review, the Chamber reasonably concluded that the existing exceptional humanitarian grounds do not outweigh the potential risks posed by the visit.⁹⁸ The Defence merely disagrees with this conclusion.

(b) The Decision is reasonable and correct

59. First, the Defence misunderstands the Decision by suggesting that the Chamber ignored the humanitarian circumstances when it found the "level of risk to be unchanged" since the Interim Release Decision.⁹⁹ As noted, the Chamber did not review its prior findings under article 60(3), but merely assessed whether the overall risks were outweighed by the

⁹⁴ [Appeal](#), paras. 34, 37, 38. However, it also noted later in its analysis that should the Chamber grant the Request, [REDACTED] ([Decision](#), para. 12).

⁹⁵ [Decision](#), para. 11.

⁹⁶ [Decision](#), para. 12.

⁹⁷ [Decision](#), para. 13.

⁹⁸ [Decision](#), para. 14.

⁹⁹ [Appeal](#), para. 37.

humanitarian circumstances. Thus, after recalling its prior findings (and identified risks) under article 58(1)(b)(i) and (iii),¹⁰⁰ considering additional information received from the Registrar¹⁰¹ and the conditions for the visit to Mali,¹⁰² the Chamber concluded that the humanitarian circumstances did not outweigh the risks.¹⁰³ The Chamber's approach is thus reasonable and correct.

60. Second, the Defence further misrepresents the Interim Release Decision by arguing that the Chamber should have expressly evaluated and weighed the humanitarian circumstances by reference to [REDACTED].¹⁰⁴ Yet the Defence did not make this argument in its Request. Moreover, in its Interim Release Decision, the Chamber did not acknowledge that.¹⁰⁵ Rather, the Chamber merely noted that it took "into consideration the reported health condition of Mr Al Hassan as described by the Defence" and concluded that it was not "necessary for the purpose of that decision to order any further medical examination".¹⁰⁶ In any event, the Chamber was aware of Mr Al Hassan's overall health condition; the Defence's speculative argument fails to show that had the Chamber expressly addressed Mr Al Hassan's health condition it would have reached a different conclusion.

61. In conclusion, and in light of the Chamber's detailed and comprehensive reasoning described above, the Defence's overall submission that there is "no indication" that the Chamber "weighed, or sufficiently weighed" the exceptional nature of Mr Al Hassan's circumstances as well as the overall length of family separation¹⁰⁷ is unfounded and should be dismissed.

(c) Conclusion on the third ground

62. For the above reasons, the Appeals Chamber should reject the third ground of appeal.

¹⁰⁰ [Decision](#), para. 11.

¹⁰¹ [Decision](#), para. 12.

¹⁰² [Decision](#), paras. 9, 13.

¹⁰³ [Decision](#), para. 14.

¹⁰⁴ [Appeal](#), para. 38.

¹⁰⁵ [Appeal](#), para 38 referring to [Interim Release Decision](#), para. 25.

¹⁰⁶ [Decision on Interim Release](#), para. 25.

¹⁰⁷ [Appeal](#), paras. 35, 37.

IV. CONCLUSION

63. Based on the foregoing, the Appeals Chamber should dismiss Mr Al Hassan's Appeal in its entirety.



Fatou Bensouda, Prosecutor

Dated this 1st day of March 2021
At The Hague, The Netherlands