

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **4 January 2021**

Date of submission: 05
March 2021

THE APPEALS CHAMBER

Before: Judge Chile Eboe-Osuji, Presiding
Judge Howard Morrison
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
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 "Defence Notice of Appeal of 'Decision on the urgent
Defence request for a custodial visit on compassionate grounds'
(ICC-01/12-01/18-1227-Conf)"**

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:

The Office of the Prosecutor

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

1. Pursuant to Article 82(1)(b) of the Statute and Regulation 64(5) of the Regulations of the Court, the Defence for Mr. Al Hassan files its notice and grounds of appeal against the ‘Decision on the urgent Defence request for a custodial visit on compassionate grounds’ (the Decision), dated 23 December 2020.¹ The Defence requests the Appeals Chamber to quash the Decision in its entirety, and order the Trial Chamber to grant the requested custodial visit.
2. This notice has been filed in a timely manner. On 4 December 2020, the Trial Chamber suspended all deadlines during the judicial recess (up until 11 January 2021), including as concerns deadlines triggered by judicial decisions and orders.² The Defence is thus entitled to rely on this decision as having the effect of suspending the official date of notification for deadline purposes. This notice is therefore filed in a timely manner since the deadline is 13 January 2021.
3. The Notice has been filed confidentially due to the fact that it cites in detail to the contents of the Decision. The Defence will file a public version as soon as possible.
4. The grounds for appeal are as follows:

Ground one

5. The Trial Chamber erred in law, and acted in a manner that was inconsistent with its obligation to adjudicate the request in a fair and impartial manner by affirming its ongoing reliance on factual findings that were based on evidence that falls under the exclusionary rule set out in Article 15 of the Convention against Torture.
6. The Trial Chamber’s ongoing affirmation that it considers Mr. Al Hassan to be linked to risks associated with extremist groups and terrorists in Mali is predicated on evidence that was obtained by the Malian authorities. The Defence has adduced an evidential foundation to conclude that these methods amount to torture, or at the very least, cruel, inhumane and degrading treatment. Article 15 of the Convention against Torture sets out a *jus cogens* prohibition concerning the use of such evidence for any purpose (except against a person accused of committing such torture as evidence the statement was made). The Trial Chamber’s reliance on such evidence was inconsistent with its *jus cogens* obligations and undermined the

¹ ICC-01/12-01/18-1227-Conf.

² Email, subject ‘Decision on the Request for suspension of deadlines’, sent 4 December 2020 at 17h20. *See* Confidential Annex.

fairness and impartiality of the decision-making process. It also resulted in the Trial Chamber relying on risk factors that have no reliable link to Mr. Al Hassan, or affording too much weight to such factors.

Ground Two:

7. The Trial Chamber erred in law, and/or abused its discretion by placing significant weight upon 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 consistent with internationally recognized human rights law.
8. This included finding that risks associated with Mr. Al Hassan's mere presence in Mali (including in a custodial setting) were a legitimate factor for consideration. As a result, the Trial Chamber erroneously concluded that there was no difference between the risk associated with interim release as compared to the present request for a custodial visit, and, consequently, that the humanitarian imperative of family reunification did not outweigh the risks of a custodial visit.
9. Whereas Article 58 of the Statute permits the Trial Chamber to take into consideration possible flight risks, or, the possibility that the defendant might engage in conduct that obstructs the proceedings or constitutes a continuing crime, these bases for detention and restrictions do not extend to risks engendered [REDACTED] [REDACTED],³ or the defendant's mere presence in Mali. The Chamber conversely failed to consider Mr Al Hassan's countervailing right, as a Malian citizen, to be present on Malian territory. The Court also has an obligation to conduct its operations in a manner which respects and ensures fundamental rights, including Mr. Al Hassan's right to be treated in a manner that fully respects the presumption of innocence, and the presumption of liberty. The approach of the Chamber suggests both that such rights should be subjugated to [REDACTED] [REDACTED] are inconsistent with the presence of a defendant in their home country.
10. Finally, even if such factors could have a potential linkage to the criteria set out in Article 58, the Trial Chamber erred in law by failing to provide sufficient reasons as concerns the nature of such a linkage.

³ Decision, para. 12.

11. As a result of these errors, the Trial Chamber erroneously concluded that the humanitarian objective of the visit was outweighed by the risks that it had identified. These errors therefore invalidated the outcome of the Decision.

Ground Three:

12. The Trial Chamber erred in law and procedure by failing to take into consideration the reasonableness of the length of time between family visits, and abused its discretion by failing to afford sufficient weight to the humanitarian importance of taking steps to ensure that the Mr. Al Hassan's ongoing detention did not interfere with his right to have meaningful interactions with his family at this particular point in time. Although pre-trial deprivation of liberty necessarily occasions a degree of pain and hardship, there is a positive obligation to ensure that the level of suffering is not disproportionate, or inconsistent with the internationally recognized human rights of both the defendant, and family members impacted by the detention. It is therefore necessary to give due consideration to the mental stress caused by prolonged separation from family members. As a result of the Trial Chamber's failure to do so, the Trial Chamber erroneously and unreasonably concluded that the humanitarian objective of the visit was outweighed by the risks that it had identified. These errors therefore invalidated the outcome of the Decision.



Melinda Taylor
Counsel for Mr Al Hassan

Dated this 4th Day of January 2021
At The Hague, The Netherlands