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**International
Criminal
Court**

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No. ICC-01/12-01/18 OA2

Date of original: 22 February 2021

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THE 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 redacted version of

**Judgment on the appeal of Mr Al Hassan against the decision of Trial Chamber
X entitled ‘Decision on the urgent Defence request for a custodial visit on
compassionate grounds’ of 23 December 2020**

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor
Helen Brady

Counsel for the Defence

Melinda Taylor
Kirsty Sutherland

Legal Representatives of the Victims

Seydou Doumbia
Mayombo Kassongo
Fidel Nsita Luvengika

REGISTRY

Registrar

Peter Lewis

The Appeals Chamber of the International Criminal Court

In the appeal of Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud against the decision of Trial Chamber X entitled ‘Decision on the urgent Defence request for a custodial visit on compassionate grounds’ of 23 December 2020 (ICC-01/12-01/18-1227-Conf; public redacted version filed on 18 January 2021 (ICC-01/12-01/18-1227-Red)),

After deliberation,

Delivers by majority, Judge Hofmański dissenting, the following

JUDGMENT

1. The ‘Decision on the urgent Defence request for a custodial visit on compassionate grounds’ is confirmed.
2. The parties and participants are ordered to file public versions of their submissions no later than 16h00 on Thursday, 4 March 2021.

REASONS

I. INTRODUCTION

1. On 17 December 2020, counsel for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (‘Mr Al Hassan’) brought an urgent request to Trial Chamber X (the ‘Trial Chamber’) for temporary release on humanitarian grounds (the ‘Request’). The Trial Chamber rejected the Request (‘Impugned Decision’), recalling the risks inherent in Mr Al Hassan’s release from custody in The Hague and finding that those risks outweighed the exceptional circumstances raised by counsel for Mr Al Hassan. Counsel brings this appeal under article 82(1)(b) of the Statute on three grounds: i) the Trial Chamber relied on evidence that is inadmissible under the United Nations Convention against Torture (the ‘UNCAT’), ii) the Trial Chamber erred in weighing the risk factors under article 58(1) of the Statute, and iii) the Trial Chamber erred in failing to take into consideration the exceptional nature of the circumstances.

2. This judgement first addresses the admissibility of the appeal brought by counsel for Mr Al Hassan in two parts: first, as regards its legal basis, and second as regards its timeliness. As a matter of admissibility of the appeal, the Appeals Chamber first decides, by majority, that, indeed, the Trial Chamber's decision was 'a decision granting or denying release' and thus the appeal brought under article 82(1)(b) of the Statute is admissible. Also as a preliminary matter, the Appeals Chamber decides, by majority, that, although it was not filed in a timely manner, the appeal is nevertheless admissible due to circumstances surrounding the Trial Chamber's instructions on the suspension of time limits.

3. After finding the appeal to be admissible, this judgment addresses the merits of the appeal. As to the first ground, the majority of the Appeals Chamber acknowledges the gravity of the allegations of torture and the potential exclusion of evidence, but rejects counsel for Mr Al Hassan's first ground of appeal on the basis that counsel has not established that the evidence in question was relied upon in the Impugned Decision and the appeal raises evidentiary issues not put before the Trial Chamber. The Appeals Chamber rejects counsel's second ground of appeal on the basis that it was reasonable for the Trial Chamber to consider all relevant factors, including those related to the current security, political and public health situation in Mali. And finally, the Appeals Chamber rejects the third ground of appeal on the basis that the Trial Chamber fully considered Mr Al Hassan's exceptional circumstances and weighed those circumstances against the risk factors referred to in the Impugned Decision.

II. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial and Trial Chambers

4. On 20 March 2018, the Prosecutor filed a motion seeking the issuance of an arrest warrant against Mr Al Hassan.¹ On 27 March 2018, Pre-Trial Chamber I issued an arrest

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](#), 31 March 2018, ICC-01/12-01/18-1-Red (original secret version was available only to the Prosecution; confidential *ex parte* redacted version, available only to the Prosecution and the Defence, filed on 31 March 2018).

warrant under article 58 of the Statute against Mr Al Hassan for the commission of crimes against humanity and war crimes.²

5. 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.³

6. On 5 May 2020, the Trial Chamber issued its decision under article 60(2) of the Statute (the 'First Decision on Interim Release'),⁴ in which it rejected a request for Mr Al Hassan's interim release in Mali 'for the duration of the COVID-19 pandemic' or such time as it deems appropriate, subject to all conditions imposed by the Trial Chamber.⁵

7. On 17 December 2020, counsel for Mr Al Hassan filed an urgent request for the Trial Chamber to '[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.⁶ Counsel for Mr Al Hassan requested 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, either in Timbuktu or Bamako, and to thereby see his family in person, following the death of his young daughter earlier that month.⁷ Counsel for Mr Al Hassan submitted, *inter alia*, that the death of Mr Al Hassan's daughter, and his request to meet his family

² [Mandat d'arrêt à l'encontre d'Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud](#), 27 March 2018, ICC-01/12-01/18-2 (reclassified as public on 28 March 2018). A reasoned decision followed on 22 May 2018 ([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-Red2-tENG (original version available only to the Prosecution and the Registry; a confidential *ex parte* redacted version, available only to the Prosecution and the Defence, was filed simultaneously)).

³ [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.

⁴ [Decision on the Defence request for interim release](#), 29 May 2020, ICC-01/12-01/18-786-Red (original confidential version filed on 5 May 2020) (the 'First Decision on Interim Release').

⁵ [Urgent Defence request for interim release](#), 24 March 2020, ICC-01/12-01/18-680-Red2 (original confidential *ex parte* version was 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); a confidential redacted version was filed on 24 March 2020).

⁶ [Urgent Request for Custodial Visit on Compassionate Grounds](#), 23 December 2020, ICC-01/12-01/18-1212-Red, para. 20 (original confidential version with confidential *ex parte* Annex A (available only to the Registry and Defence) and confidential Annex B was filed on 17 December 2020) (the 'Request').

⁷ [Request](#), paras 1, 11, 17.

in person to mourn with them, constituted a ‘change in circumstances, and a compelling basis to order a limited release under custodial conditions’.⁸

8. On 23 December 2020, after having received the responses from the Prosecutor⁹ and the Victims,¹⁰ and the observations from the Registry,¹¹ the Trial Chamber issued the Impugned Decision rejecting the Request.¹²

B. Proceedings before the Appeals Chamber

9. On 4 January 2021, counsel for Mr Al Hassan filed a notice of appeal of the Impugned Decision (the ‘Notice of Appeal’).¹³

10. On 6 January 2021, the Appeals Chamber issued an order on the conduct of the proceedings,¹⁴ stating that ‘[i]n the specific circumstances of the present case, and also in view of the ongoing COVID-19 pandemic, the Appeals Chamber considers that it is most appropriate to proceed in this appeal by way of written submissions only’. It directed counsel for Mr Al Hassan to file an appeal brief by 14 January 2021, and the Prosecutor and the Victims to file responses to the appeal brief by 22 January 2021. The Appeals Chamber specified that in addition to the merits of the appeal, the appeal brief and the responses thereto should address the ‘admissibility of the appeal, both as concerns its timeliness and whether the impugned decision is a decision ‘granting or denying release’ in terms of article 82(1)(b) of the Statute’.

⁸ [Request](#), para. 4.

⁹ [Prosecution’s response to Defence’s “Urgent Request for Custodial Visit on Compassionate Grounds”](#), 15 January 2021, ICC-01/12-01/18-1224-Red3 (original confidential *ex parte* version was filed on 18 December 2020 and available only to the Prosecution, Victims and Witnesses Unit, and the Detention Unit; a confidential redacted version was notified simultaneously; a further confidential redacted version was notified on 22 December 2020).

¹⁰ See [Decision on the urgent Defence request for a custodial visit on compassionate grounds](#), 18 January 2021, ICC-01/12-01/18-1227-Red, footnote 14 (original confidential version was filed on 23 December 2020) (the ‘Impugned Decision’), referring to an email from the Victims, 22 December 2020, at 14:30.

¹¹ [Registry Observations on Defence’s “Urgent Request for Custodial Visit on Compassionate Grounds”](#), 15 January 2021, ICC-01/12-01/18-1225-Red (original confidential version was filed on 22 December 2020).

¹² [Impugned Decision](#), paras 12-14.

¹³ Defence Notice of Appeal of ‘Decision on the urgent Defence request for a custodial visit on compassionate grounds’, 4 January 2021, ICC-01/12-01/18-1236-Conf, with confidential annex (ICC-01/12-01/18-1236-Conf-Anx).

¹⁴ Order on the conduct of the appeal proceedings, 6 January 2021, ICC-01/12-01/18-1242-Conf, p. 3.

11. On 14 January 2021, counsel for Mr Al Hassan filed the appeal brief,¹⁵ and on 22 January 2021, the Prosecutor and the Victims filed their respective responses.¹⁶

III. CONFIDENTIALITY OF THE APPEALS CHAMBER'S JUDGMENT

12. All of the documents filed in this appeal are currently classified as 'confidential' or 'confidential, *ex parte*', based on the fact that the Impugned Decision was originally filed as 'confidential'. The Appeals Chamber notes that a public version of the Impugned Decision was subsequently filed on 18 January 2021. In the interest of the publicity of the proceedings, the parties and participants are ordered to file, not later than 16h00 on Thursday, 4 March 2021, public versions of their submissions with redactions where necessary.

13. Pursuant to rule 158(2) of the Rules, read with article 83(4) of the Statute, judgments of the Appeals Chamber 'shall be delivered in open court'. As the proceedings in the present appeal are confidential, the Appeals Chamber delivers this judgment by way of notification to the parties and participants (regulations 31 and 32 of the Regulations of the Court). A further, public version of this judgment will be filed in due course.

IV. ADMISSIBILITY OF THE APPEAL

14. Before turning to the merits of the appeal, the Appeals Chamber will address two issues concerning its admissibility, namely (1) whether the Impugned Decision was a 'decision granting or denying release' in terms of article 82(1)(b) of the Statute and therefore may be appealed under that provision; and (2) whether the notice of appeal was filed in time.

¹⁵ Defence Appeal of the Trial Chamber's "Decision on the urgent Defence request for a custodial visit on compassionate grounds", 14 January 2021, ICC-01/12-01/18-1249-Conf-Exp-Corr (the 'Appeal Brief'). The following day, Mr Al Hassan filed a confidential redacted version 'Confidential redacted version of 'Defence Appeal of the Trial Chamber's "Decision on the urgent Defence request for a custodial visit on compassionate grounds"', ICC-01/12-01/18-1249-Conf-Red-Corr.

¹⁶ 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 (the 'Prosecutor's Response'); Réponse au mémoire d'appel de la Défense relatif à la « Decision on the urgent Defence request for a custodial visit on compassionate grounds », 22 January 2021, ICC-01/12-01/18-1263-Conf (the 'Victims' Response').

A. Was the Impugned Decision a decision granting or denying release pursuant to article 82(1)(b) of the Statute?

1. Relevant procedural history and part of the Impugned Decision

15. As recalled above,¹⁷ counsel for Mr Al Hassan requested that the Trial Chamber, ‘[f]or exceptional compassionate grounds, [...] 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.’¹⁸ She did not seek an order ‘to release him from a custodial environment, or to modify or relax the conditions of his detention, [...]’.¹⁹ She stated that Mr Al Hassan ‘is willing to be detained by Malian authorities or by MINUSMA, in a secure custodial facility in either Bamako [...] or Timbuktu for the duration of the visit [...]’.²⁰

16. The Trial Chamber noted that other pre-trial and trial chambers of the Court have considered that an accused may be transferred temporarily out of the detention centre in ‘exceptional humanitarian circumstances’, although it 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)’.²¹ The Trial Chamber decided, ‘for the purpose of this [D]ecision’, to ‘follow the approach of other pre-trial and trial chambers of this Court’, which considered that an accused may be transferred temporarily out of the detention centre in ‘exceptional humanitarian circumstances’.²²

2. Submissions of the parties and participants

(a) Counsel for Mr Al Hassan’s Submissions

17. Counsel for Mr Al Hassan submits that article 82(1)(b) of the Statute should be interpreted ‘through the lens of Statutory provisions’, which distinguish between

¹⁷ See *supra*, para. 7.

¹⁸ [Request](#), para. 1.

¹⁹ [Request](#), para. 17; see also para. 19.

²⁰ [Request](#), para. 17. In the relief sought, counsel for Mr Al Hassan requested the Trial Chamber to grant Mr Al Hassan ‘a custodial visit’ to either Bamako or Timbuktu; and to instruct the Registry to make the necessary arrangements with the relevant national authorities ‘to ensure Mr. Al Hassan’s detention for the duration of this visit [...]’. [Request](#), p. 10.

²¹ [Impugned Decision](#), para. 8.

²² [Impugned Decision](#), para. 8.

detention in the territory and custody of national authorities, which are invested through article 59(3) of the Statute with the power to grant interim release pending surrender, and detention at the seat of the Court, after the suspect is transferred to the seat of the Court, where the Court retains the exclusive authority for adjudicating issues pertaining to the detention and release of the defendant, pursuant to article 60 of the Statute.²³ It follows, according to counsel for Mr Al Hassan, that ‘transferring Mr Al Hassan to a physical location outside the seat of the Court would effectively “release” him from the Court’s custody, even if the arrest warrant otherwise remains operative, and [...] the Court continues to exercise exclusive authority for determining the terms and conditions of his release’.²⁴

18. Counsel for Mr Al Hassan further argues that the Trial Chamber adjudicated the Request by reference to the criteria applying to interim release under article 60(3) of the Statute, and ultimately concluded that the grounds justifying ongoing detention at the seat of the Court remained fulfilled,²⁵ and that it considered there was no ‘significant difference’ between a request for a custodial visit to Mali, as compared to a request for interim release, requiring the defendant to reside at a particular residence, and abide by additional restrictions.²⁶ It would be inconsistent with rule 119(1)(e) of the Rules, which envisages the possibility of house arrest as a form of conditional release, to conclude that the ‘custodial nature’ of the Request takes it outside the scope of article 60 of the Statute.²⁷

²³ Appeal Brief, para. 4.

²⁴ Appeal Brief, para. 4.

²⁵ Appeal Brief, para. 5.

²⁶ Appeal Brief, para. 6. In particular, the Trial Chamber found that there was not ‘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]’.

[Impugned Decision](#), para. 13.

²⁷ Appeal Brief, para. 6.

19. In support of his view, counsel for Mr Al Hassan further referred to relevant jurisprudence of the Appeals Chamber of the Court,²⁸ and of the International Criminal Tribunal for the Former Yugoslavia.²⁹

(b) Prosecutor's Submissions

20. The Prosecutor submits that the appeal is inadmissible because the Impugned Decision is not '[a] decision granting or denying release' under article 82(1)(b) of the Statute, and, as such, it could not be appealed under rule 154(1) of the Rules. The appeal should have been filed in accordance with rule 155 of the Rules.³⁰

21. The Prosecutor refers to the Appeals Chamber holding 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', and argues that for article 82(1)(b) of the Statute to apply, the Trial Chamber should have issued a decision on release or detention under article 60(3) of the Statute.³¹

22. In this case, Mr Al Hassan did not request that he be conditionally released under rule 119 of the Rules. Instead, he requested only to be 'released from custodial environment [*sic*]' and indicated that he 'is willing to be detained by Malian authorities or by MINUSMA, in a secure custodial facility'.³²

23. The Prosecutor submits that the Impugned Decision is not a decision on interim release under article 60(3) of the Statute.³³ She further argues that the Trial Chamber did not review the First Decision on Interim Release, issued pursuant to article 60(2) of

²⁸ Appeal Brief, para. 6, referring to Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled "Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118\(2\) of the Rules of Procedure and Evidence"](#), 19 November 2010, ICC-01/05-01/08-1019 (OA4), para. 92; Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [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.

²⁹ See *Prosecutor v. Popović*, [22 July 2011 Decision on Vinko Pandurević's Motion for Temporary Alteration of the Conditions of his Detention](#), 9 November 2011, p. 3; *Prosecutor v. Borovčanin*, [Decision On Appeal From Decision On Ljubomir Borovčanin's Request For Provisional Release](#), 1 March 2011, para. 9.

³⁰ Prosecutor's Response, para. 5.

³¹ Prosecutor's Response, para. 6.

³² Prosecutor's Response, para. 7, referring to [Request](#), para. 17.

³³ Prosecutor's Response, para. 8, referring to [Impugned Decision](#), para. 8.

the Statute, in particular, it did not assess whether Mr Al Hassan's detention remained justified under article 58(1)(a) and (b) of the Statute.³⁴ Rather, 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 a confined custodial visit of Mr Al Hassan to Mali could be conducted in a way that would mitigate the risks found in the First Decision on Interim Release, and whether humanitarian reasons outweighed those overall risks. 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.³⁵

24. As a result of the above, the Prosecutor submits that article 82(1)(b) of the Statute, allowing for direct appeal of a 'decision granting or denying release', does not apply in this case. No direct appeal against the Impugned Decision was therefore available to counsel for Mr Al Hassan. Accordingly, the appeal should be rejected as inadmissible.³⁶

(c) The Victims' Submissions

25. The Victims recall at the outset that, in the Request, counsel for Mr Al Hassan clearly indicated that Mr Al Hassan did not request the Trial Chamber to release him or to modify the conditions of his detention, and that the Request is distinguishable from the First Decision on Interim Release.³⁷

26. The Victims argue that counsel for Mr Al Hassan presents a radical change in her position in relation to the nature of the urgent request on humanitarian grounds, which results in reasoning filled with contradictions, consisting in saying that although Mr Al Hassan would remain in detention as a consequence of the initial arrest warrant, he would actually be released if the Request was granted.³⁸

27. The Victims submit that the Request does not seek conditional release, but merely a change of the place of detention. On the basis of the nature of the request, the only issue to be determined would be whether the requested change is feasible and an

³⁴ Prosecutor's Response, para. 9.

³⁵ Prosecutor's Response, para. 10.

³⁶ Prosecutor's Response, para. 11.

³⁷ Victims' Response, paras 19-20, referring to [Request](#), paras 17, 19.

³⁸ Victims' Response, para. 24.

analysis of the criteria set forth in article 58(1)(b) of the Statute would not be necessary. The appeal under article 82(1)(b) of the Statute against the Impugned Decision would not be allowed, since it is not a decision granting or denying release.³⁹

28. The Victims ultimately argue that it is for the Appeals Chamber to decide whether the Impugned Decision is a decision granting or denying release, since the Request was not seeking any form of release, or whether, by addressing the criteria set out in article 58(1)(b) of the Statute, the Trial Chamber treated the Request under the regime of article 60 of the Statute, which would render the Impugned Decision a decision that can be appealed under article 82(1)(b) of the Statute.⁴⁰

3. *Determination by the Appeals Chamber*

29. In order to resolve the admissibility issue, the Appeals Chamber first has to determine whether the Impugned Decision is a ‘decision granting or denying release’ in terms of article 82(1)(b) of the Statute and may therefore be directly appealed. The Appeals Chamber notes that decisions falling under article 82(1)(b) of the Statute typically are based on article 60(2) or (3) of the Statute, which provide for the detained person’s right to apply for interim release, with or without conditions, and the periodic review of decisions concerning detention or release. According to the jurisprudence of the Appeals Chamber, even if a chamber has found that there was a ground to detain under article 58(1)(b)(i)-(iii) of the Statute because one or more of the risks listed under this provision are present, the chamber nevertheless enjoys discretion to consider whether these risks can be mitigated through the imposition of conditions, and, on that basis, order conditional release.⁴¹ This discretion needs to be exercised judiciously.⁴² In the view of the Appeals Chamber, the resulting decision is a decision that falls under the terms of article 82(1)(b) of the Statute.

³⁹ Victims’ Response, para. 25.

⁴⁰ Victims’ Response, para. 26.

⁴¹ Appeals Chamber, *The Prosecutor v. Laurent Koudou Gbagbo*, [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 Défense demandant la mise en liberté provisoire du président Gbagbo’”](#), 26 October 2012, ICC-02/11-01/11-278-Red (OA) (‘Gbagbo OA Judgment’), paras 76-79; Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [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. 55.

⁴² [Gbagbo OA Judgment](#), para. 79.

30. The Appeals Chamber recalls that a pre-trial or trial chamber:

in assessing whether the conditions under article 58 (1) continue to be met may, pursuant to article 60(3), second sentence, modify its ruling if it is satisfied that changed circumstances so require. The requirement of “changed circumstances” imports either a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary’.⁴³

In the present case, counsel for Mr Al Hassan submitted 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’.⁴⁴ The new fact brought by counsel for Mr Al Hassan (the death of Mr Al Hassan’s daughter) did not relate to any of the circumstances that were the basis for detaining Mr Al Hassan, namely the risks listed in article 58(1)(b)(i) and (iii) of the Statute. Therefore, it did not amount to ‘a change in some or all of the facts underlying a previous decision on detention’, as described above. Nevertheless, it was open to the Trial Chamber to consider, on the basis of the Request and the new fact that was brought to the Trial Chamber’s attention, whether some form of conditional release from the Court’s detention would be possible. This is because, as noted above, even when a chamber has found that there are grounds to detain the person, the chamber has discretion to consider whether conditional release is possible.

31. The Trial Chamber, after indicating it had followed the approach of other pre-trial and trial chambers of this Court, which considered that an accused may be transferred temporarily out of the detention centre in ‘exceptional humanitarian circumstances’,⁴⁵ considered Mr Al Hassan’s ‘request to be transferred to Mali to be

⁴³ See e.g. Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [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), paras 1 and 60.

⁴⁴ Request, para. 4.

⁴⁵ [Impugned Decision](#), para. 8, referring to Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [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 confidential version notified on 3 July 2009), 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](#), 12 January 2011, ICC-01/05-01/08-1099-Red (original confidential version notified on 7 January 2011), para. 13; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, [Decision on the urgent request of the Defence for Mr](#)

able to see his family in person following the recent death of his young daughter to constitute an exceptional humanitarian circumstance'.⁴⁶ Although the Request proposed that Mr Al Hassan remain in detention at all times, it nevertheless requested that Mr Al Hassan be permitted to leave the Court's detention centre so that he could be handed over to domestic authorities. Had the Request been granted, it would have amounted to a very strict form of conditional release from detention at the Court, taken under article 60(3) of the Statute.

32. Thus, the majority of the Appeals Chamber considers that the Impugned Decision was a decision taken under article 60(3) of the Statute and could therefore be appealed under article 82(1)(b) of the Statute. As stated above, in its review of the reasons for detention, it was open to the Trial Chamber to consider, on the basis of the Request and the new fact that was brought to the Trial Chamber's attention, whether some form of conditional release from the Court's detention may be possible.

33. Judge Ibáñez disagrees with the majority's view that the Impugned Decision was taken under article 60(3) of the Statute. She notes that the Impugned Decision did not directly rely on article 60(3) of the Statute. After referring to articles 64 and 68(1) of the Statute,⁴⁷ the Trial Chamber decided to 'follow the approach of other pre-trial and trial chambers of this Court', which considered that an accused may be transferred temporarily out of the detention centre in 'exceptional humanitarian circumstances'.⁴⁸ These decisions were issued on the basis of the Chamber's 'inherent powers' (the relevant trial chambers making reference to article 64 of the Statute).⁴⁹ Therefore, in

[Gbagbo to attend his mother's funeral](#), 29 October 2014, ICC-02/11-01/11-711-Red (confidential version notified on the same day), para. 25.

⁴⁶ Impugned Decision, para. 8.

⁴⁷ Impugned Decision, p. 3.

⁴⁸ Impugned Decision, para. 8, referring to Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [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 confidential version notified on 3 July 2009), 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](#), 12 January 2011, ICC-01/05-01/08-1099-Red (original confidential version notified on 7 January 2011), para. 13; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, [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 (confidential version notified on the same day), para. 25.

⁴⁹ Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [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 and 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](#), 12

Judge Ibáñez's view, the Impugned Decision was a discretionary decision taken under article 64 of the Statute. Nevertheless, she agrees with the majority of the Appeals Chamber that the appeal is admissible as filed under article 82(1)(b) of the Statute, because had the Request been granted, Mr Al Hassan would have been released from the Court's detention centre and the Court would have continued to monitor the conditions imposed. Thus, the Impugned Decision is a decision denying release in terms of article 82(1)(b) of the Statute.

34. Judge Hofmański disagrees with the majority that the appeal is admissible under article 82(1)(b) of the Statute, as filed. In his view, the Impugned Decision does not concern the release of a person from detention but, rather, the temporary transfer of the person to another custodial location.⁵⁰ Accordingly, he would find that the appeal is inadmissible as it was incorrectly filed under article 82(1)(b) of the Statute, which relates only to decisions granting or denying release from custody.

B. Was the appeal filed in a timely manner?

1. Submissions of the parties and participants

(a) Counsel for Mr Al Hassan's Submissions

35. Counsel for Mr Al Hassan submits that the Trial Chamber has the power, pursuant to Regulation 31(2) of the Regulations of the Court to suspend the date of effective notification of its decisions, for the purpose of calculating deadlines arising from the issuance of such decisions.⁵¹ She refers to various examples where Trial Chambers have 'effectively suspended the notification date for decisions that trigger either an automatic right of appeal before the Appeals Chamber, or a deadline set out in the [Rules], which cannot be varied pursuant to Regulation 35 of the [Regulations of the Court]'.⁵² Counsel for Mr Al Hassan further refers to cases where the Appeals Chamber considered appeals, submitted pursuant to such delayed notifications, to be 'receivable'.⁵³ Counsel for Mr Al Hassan argues that she was entitled to assume that the notification of the

January 2011, ICC-01/05-01/08-1099-Red, para. 13; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, [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, para. 25.

⁵⁰ See Prosecutor's Response, para. 7; Victims' Response, para. 25.

⁵¹ Appeal Brief, para. 2.

⁵² Appeal Brief, para. 2.

⁵³ Appeal Brief, para. 2.

Impugned Decision had been postponed under regulation 31(2) of the Regulations of the Court because the decision under regulation 19(2) *bis* of the Regulations of the Court ‘resulted in a presumption of suspension for all time limits, unless expressly provided otherwise’, and because ‘[i]n the Decision, the Trial Chamber did not vary the terms of the suspension as concerns the start of the time period for filing a notice of appeal’.⁵⁴

(b) Prosecutor’s Submissions

36. The Prosecutor submits that even assuming that the appeal fell within the scope of article 82(1)(b) of the Statute, it is still inadmissible because it was filed out of time.⁵⁵ She recalls that pursuant to rule 154(1) of the Rules, an appeal under article 82(1)(b) of the Statute may be filed not later than five days from the date upon which the party filing the appeal is notified of the decision. Since the Impugned Decision was notified to Mr Al Hassan on 23 December 2020, the Prosecutor notes that counsel for Mr Al Hassan was required to file his notice of appeal not later than 29 December 2020. Instead, the notice of appeal was filed on 4 January 2021.⁵⁶

(c) The Victims’ Submissions

37. The Victims submit that the appeal was filed out of time. They note, in particular, that the Appeal Brief was not filed in accordance with rule 154 of the Rules as it was filed on 4 January 2021, while the Impugned Decision was notified on 23 December 2020.⁵⁷ The Victims argue that it cannot be concluded, from the formulation of the Trial Chamber’s decision to suspend the time limits and the lack of a similar measure on the part of the Appeals Chamber, that the deadline to file a notice of appeal was suspended.⁵⁸ The Victims further challenge the relevance of the case law referred to by counsel for Mr Al Hassan.⁵⁹

2. Determination by the Appeals Chamber

38. Pursuant to rule 154(1) of the Rules, in appeals under article 82(1)(b) of the Statute, the appellant has to file an appeal within five days of notification of the decision

⁵⁴ Appeal Brief, para. 3.

⁵⁵ Prosecutor’s Response, para. 12.

⁵⁶ Prosecutor’s Response, para. 12.

⁵⁷ Victims’ Response, para. 13.

⁵⁸ Victims’ Response, para. 15.

⁵⁹ Victims’ Response, para. 16.

appealed. The Impugned Decision was issued on 23 December 2020 and the Notice of Appeal on 4 January 2021, ostensibly outside said time limit. Nevertheless, for the reasons that follow, the Appeals Chamber considers that the appeal should not be rejected for that reason.

39. The Appeals Chamber first notes that the Trial Chamber, following a request of the parties and participants in that regard, and ‘[i]n accordance with article 64(2) of the Statute and regulation 19(2)*bis* of the Regulations of the Court, [...] decide[d] that the time limits falling between the 11 of December 2020 and the 10 January 2021 are suspended’, with the exception of three specific cases listed in the same decision.⁶⁰

40. In the Appeals Chamber’s view, the Trial Chamber limited itself to suspending time limits in relation to proceedings before it, during the said period. Contrary to what is argued by counsel for Mr Al Hassan, there is no indication in the Trial Chamber’s decision to suspend time limits that the Trial Chamber postponed the notification of its decisions, and in particular of the Impugned Decision, under regulation 31(2) of the Regulations of the Court.⁶¹ Had the Trial Chamber intended to postpone the notification of its decisions it would have stated so. The examples referred to by counsel for Mr Al Hassan relate to situations where chambers postponed the notification of certain decisions, and as such are not to be considered relevant to the present situation.⁶²

41. In any event, 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 Court could not affect the deadline to file a notice of appeal before the Appeals Chamber under rule 154(1) of the Rules. The Trial Chamber cannot vary deadlines relating to proceedings before the Appeals Chamber; this power falls within the exclusive competence of the Appeals Chamber.

⁶⁰ Notice of Appeal, ‘Confidential Annex’ (ICC-01/12-01/18-1236-Conf-Anx).

⁶¹ This regulation 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.’

⁶² In the *Lubanga* case, the Trial Chamber determined that in order to preserve the rights of the Defence, in the event of a conviction, the judgment would not be deemed notified until the defendant had received a French translation of the judgment. [Decision on the translation of the Article 74 Decision and related procedural issues](#), 15 December 2011, ICC-01/04-01/06-2834, paras 6, 23-24. In the *Gbagbo and Blé Goudé* case, the Trial Chamber determined that an article 74 judgment would not be deemed notified until the Chamber issued its written reasons. [Transcript of hearing](#), 15 January 2019, ICC-02/11-01/15-T-232-ENG, pp. 3-4.

42. The majority of the Appeals Chamber finds that the Notice of Appeal was therefore filed out of time.⁶³

43. The Appeals Chamber, however, notes the explanations provided by counsel for Mr Al Hassan, in particular that she was entitled to assume that the notification of the Impugned Decision had been postponed because the decision under regulation 19(2) *bis* of the Regulations of the Court ‘resulted in a presumption of suspension for all time limits, unless expressly provided otherwise’. The Appeals Chamber, while noting that counsel should have been more careful, accepts that she may have been confused about the impact of the Trial Chamber’s decision to suspend time limits. The Appeals Chamber considers that such a confusion cannot prejudice Mr Al Hassan, in the specific circumstances of this case, where the decision appealed concerns a request for conditional release following the death of his young daughter. In the circumstances, the majority of the Appeals Chamber considers it appropriate to exceptionally consider the appeal admissible and proceed to review the merits.

V. MERITS

44. The following is the determination of the majority of the Appeals Chamber. In Judge Hofmański’s view, there is no need to consider the merits of the appeal brought by counsel for Mr Al Hassan for the reasons expressed in section IV above.

A. Relevant part of the Impugned Decision

45. The Trial Chamber noted that other pre-trial and trial chambers of the Court have considered that an accused may be transferred temporarily out of the detention centre in ‘exceptional humanitarian circumstances’, although it 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)’’.⁶⁴ The Trial Chamber decided, ‘for the purpose of this [D]ecision’, to ‘follow the approach of other pre-trial and trial chambers of this Court’, which considered that an accused may be transferred temporarily out of the detention centre in ‘exceptional humanitarian circumstances’.⁶⁵

⁶³ Judge Hofmański considers that there is no need to consider whether the appeal was filed in a timely manner because the appeal is, in any event, inadmissible for the reasons expressed in paragraph 34 above.

⁶⁴ [Impugned Decision](#), para. 8.

⁶⁵ [Impugned Decision](#), para. 8.

46. The Trial Chamber took 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 [...]’.⁶⁶ The Trial Chamber further took into consideration, *inter alia*, Mr Al Hassan’s submission that he has not seen his wife and at least three of his other children since his arrest in April 2017, and that unless he travels to Mali, he will not be able to see his family during their mourning process, or in the coming months.⁶⁷

47. The Trial Chamber recalled that in its First Decision on Interim Release,⁶⁸ it found, *inter alia*, that (i) Mr Al Hassan’s continued detention appeared necessary to ensure his appearance at trial under article 58(1)(b)(i) of the Statute and to prevent him from continuing to commit crimes within the Court’s jurisdiction under article 58(1)(b)(iii) of the Statute, and that (ii) the serious risks established under article 58(1)(b)(i) and (iii) of the Statute could not be adequately mitigated at that time by conditions on a release to Mali.⁶⁹ The Trial Chamber noted, in particular, 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.⁷⁰ It further noted that security information indicated persistent insecurity and lack of State authority in certain areas in the North of Mali. The Trial Chamber also did not consider that those risks could be mitigated by ‘strong family ties’.⁷¹

48. The Trial Chamber held that ‘[o]n balance and in the circumstances, [it was] not convinced that, at this time, specific conditions can sufficiently mitigate the risks found in the Chamber’s [First] Decision on Interim Release’.⁷² In this respect, the Trial Chamber noted that since the First Decision on Interim Release was issued, information indicates that the current security situation in Mali has not improved.⁷³ In particular, in

⁶⁶ [Impugned Decision](#), para. 9.

⁶⁷ [Impugned Decision](#), para. 10.

⁶⁸ [First Decision on Interim Release](#).

⁶⁹ [Impugned Decision](#), para. 11.

⁷⁰ [Impugned Decision](#), para. 11.

⁷¹ [Impugned Decision](#), para. 11.

⁷² [Impugned Decision](#), para. 12.

⁷³ [Impugned Decision](#), para. 12.

relation to Bamako, it noted the updated security information from the Registry that ‘the environment remains characterised by the threat of terrorism and civil unrest which is still assessed as high’; in relation to Timbuktu, it noted that ‘the threat levels of terrorism and criminality are assessed as extreme alongside a substantial threat of civil unrest’.⁷⁴ The Trial Chamber, furthermore, noted that a military coup took place in August 2020 and that Mali is currently hit by the second wave of the COVID-19 pandemic.⁷⁵ Finally, the Trial Chamber noted the Registry’s submission that ‘should the Chamber grant the Request, [REDACTED]’.⁷⁶

49. The Trial Chamber further held that, in its view, there was no significant difference between the proposal that Mr Al Hassan be detained in a lawful custodial facility by the Malian authorities or MINUSMA and the proposal considered in its First Decision on Interim Release, which was that Mr Al Hassan remain in supervised confinement or house arrest [REDACTED].⁷⁷ The Trial Chamber, moreover, considered the logistical difficulties highlighted by the Registry in relation to this matter, including its preliminary assessment that: (i) [REDACTED]; and that (ii) [REDACTED].⁷⁸

50. Also, in light of these considerations, the Trial Chamber could not accept counsel for Mr Al Hassan’s submission that the exceptional humanitarian grounds for the Request outweigh the potential risks.⁷⁹

51. Finally, as additional alternative measures, the Trial Chamber instructed the Registry to further explore 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.⁸⁰

⁷⁴ [Impugned Decision](#), para. 12.

⁷⁵ [Impugned Decision](#), para. 12.

⁷⁶ [Impugned Decision](#), para. 12.

⁷⁷ [Impugned Decision](#), para. 13.

⁷⁸ [Impugned Decision](#), para. 13.

⁷⁹ [Impugned Decision](#), para. 14.

⁸⁰ [Impugned Decision](#), para. 16.

B. First ground of appeal

1. Submissions of the parties and participants

(a) Counsel for Mr Al Hassan's Submissions

52. In the first ground of appeal, counsel for Mr Al Hassan argues that the Trial Chamber erred in law by relying on evidence and previous evidential findings that fall under the exclusionary rule set out in article 15 of the UNCAT.⁸¹

53. Counsel for Mr Al Hassan submits that '[a]rticle 15 of the UNCAT obliges State Parties to ensure that any statement established to have been made as a result of torture shall not be invoked as evidence in proceedings', and that '[t]he legal status of the ICC as an organisation or court does not exempt it from the duty to ensure compliance with this obligation'.⁸² In her view, the exclusionary rule set out in article 15 of the UNCAT applies to decisions on detention and release, as it 'embrac[es] the judicial process in its entirety', and 'the use of improperly collected evidence in the context of investigations and pre-trial proceedings taints the process as a whole'.⁸³

54. Counsel for Mr Al Hassan notes the Appeals Chamber's previous indication that it did 'not consider that substantive consideration 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*'.⁸⁴ According to her, 'torture tainted evidence is a particular category of *male fides* evidence', and thus 'the ambit of [a]rticle 15 extends beyond issues of admissibility at trial, as it forbids such evidence being invoked in "any proceedings"'.⁸⁵ She argues that the Defence has established 'the existence of a *prima facie* case or, at the very least, "real risk", that evidence and statements obtained from Mr Al Hassan [REDACTED], while held at the [*Direction générale de la sécurité d'Etat*] ('the DGSE evidence'), was contaminated by torture or [cruel, inhuman and degrading treatment]' ('CIDT').⁸⁶ In her view, article 15 of the UNCAT is 'triggered if

⁸¹ Appeal Brief, paras 8-27.

⁸² Appeal Brief, paras 12-13.

⁸³ Appeal Brief, para. 14.

⁸⁴ Appeal Brief, para. 14; *See also* Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo 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.

⁸⁵ Appeal Brief, para. 14.

⁸⁶ Appeal Brief, para. 16.

there is a “real risk” that the evidence was obtained through torture or CIDT’, and thus, the exclusionary rule applies to the interview records and statements while Mr Al Hassan was being subjected to psychological torture and CIDT.⁸⁷

55. Counsel for Mr Al Hassan submits that ‘[t]he Trial Chamber’s endorsement of the risks set out in the [First Decision on Interim Release] presupposes that the Trial Chamber satisfied itself that the evidence cited in support of these risks in the [First Decision on Interim Release] could be relied upon at the time the [Impugned] Decision was issued’.⁸⁸ She argues that the Impugned Decision ‘hinged on the risks identified in its [First Decision on Interim Release], which were [...] founded on DGSE evidence’.⁸⁹

56. She notes that the Trial Chamber determined it appropriate to invite submissions on the application of article 69(7) of the Statute, on grounds related to article 15 of the UNCAT, after the Prosecutor applied to submit the underlying statements into evidence.⁹⁰ She argues that ‘an [a]rticle 69(7) decision cannot be a pre-requisite for excluding tainted evidence; otherwise, the Defence would have no effective means to contest its use before the Prosecutor first submits it into evidence during the trial process’.⁹¹

57. Counsel for Mr Al Hassan further asserts that ‘[t]he Defence has consistently and persistently argued that the DGSE evidence should not be relied upon in any judicial determinations’, and that ‘[t]his triggered an obligation on the part of the Chamber to promptly investigate these allegations’.⁹² In her view, ‘irrespective of the weight or probative value given to the DGSE evidence, the Chamber’s ongoing reliance on factual findings based on this evidence ruptured the fairness of the adjudicative process as a whole, and thereby vitiated the outcome of the Decision’.⁹³

⁸⁷ Appeal Brief, paras 17, 19.

⁸⁸ Appeal Brief, para. 11.

⁸⁹ Appeal Brief, para. 24.

⁹⁰ Appeal Brief, para. 21.

⁹¹ Appeal Brief, para. 25.

⁹² Appeal Brief, para. 25 (emphasis in original).

⁹³ Appeal Brief, para. 27.

(b) Prosecutor's Submissions

58. The Prosecutor submits that Mr Al-Hassan's first ground of appeal should be dismissed for the following four reasons.

59. First, the Prosecutor submits that counsel for Mr Al Hassan is seeking to appeal the Trial Chamber's First Decision on Interim Release through the Impugned Decision. The Prosecutor argues that while the First Decision on Interim Release contains three discrete references to Mr Al Hassan's prior recorded statements [REDACTED],⁹⁴ Mr Al Hassan did not appeal this decision nor did he dispute, in his Request, the Chamber's findings in the First Decision on Interim Release.⁹⁵ In her view, 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'.⁹⁶ She therefore argues that since 'the Chamber's findings in the [First Decision on Interim Release] cannot be challenged through an appeal against the Impugned Decision, the first ground should be rejected'.⁹⁷

60. Second, the Prosecutor submits that counsel for Mr Al Hassan did not raise this argument before the Trial Chamber when filing the Request and is raising it for the first time on appeal. She argues that 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.⁹⁸ She further notes that the Trial Chamber ordered the Prosecution to file its request for the introduction of the relevant evidence allegedly obtained through torture and CIDT by 31 December 2020, and according to the same order, counsel for Mr Al Hassan will then be entitled to file a motion on article 69(7) in respect of the Prosecution's request.⁹⁹ The Prosecutor therefore argues that in the absence of proper litigation of the matter, counsel for Mr Al Hassan 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 by means of torture or CIDT.¹⁰⁰

⁹⁴ See Prosecutor's Response, para. 19 (citing the [First Decision on Interim Release](#), fn. 135, 142, 143).

⁹⁵ Prosecutor's Response, paras 19-20.

⁹⁶ Prosecutor's Response, para. 21.

⁹⁷ Prosecutor's Response, para. 23.

⁹⁸ Prosecutor's Response, para. 24.

⁹⁹ Prosecutor's Response, para. 28.

¹⁰⁰ Prosecutor's Response, para. 29.

61. Third, the Prosecutor argues that substantive considerations on the exclusion of evidence under article 69(7) of the Statute did not need to be addressed as part of the Impugned Decision. She submits that Mr Al Hassan's argument must be rejected because the Trial Chamber had no obligation to assess whether evidence relied upon in the First Decision on Interim Release (allegedly obtained through torture or CIDT) should have been excluded for the purpose of the Impugned Decision.¹⁰¹ By reference to the Appeals Chamber's decision in the *Bemba et al.* case,¹⁰² noting that substantive consideration on admissibility of evidence cannot be appropriately addressed in an interim release decision in the absence of 'obvious *male fides*', the Prosecutor argues that the same logic applies to this case 'where the Defence merely requested a temporary modification of his location of detention'.¹⁰³ She argues that counsel for Mr Al Hassan's contention that this is a situation of 'obvious *male fide*' is 'unsupported', and that her argument that article 69(7) of the Statute is not an essential prerequisite for the Trial Chamber to exclude evidence for the purpose of the decision is 'misplaced'.¹⁰⁴ In her view, while a formal determination under article 69(7) of the Statute is not a legal pre-requisite for excluding evidence of a procedural motion, the Trial Chamber had no obligation to engage in any substantive considerations on the admissibility or the exclusion of evidence as part of its Impugned Decision.¹⁰⁵

62. Finally, the Prosecutor submits that counsel for Mr Al Hassan failed to show that the alleged error materially affected the Impugned Decision. The Prosecutor argues that counsel for Mr Al Hassan does not show how the Trial Chamber's reliance on the alleged statements impacted on the Impugned Decision; in her view, the Trial Chamber 'does not rely at all on Mr Al Hassan's prior recorded statements', and therefore 'none of the findings in the Decision, nor the Decision as a whole, was materially affected by evidence allegedly tainted by torture or CIDT'.¹⁰⁶ She also argues that, 'even if [...] the Defence were to be permitted to challenge the [First Decision on Interim Release]

¹⁰¹ Prosecutor's Response, para. 30.

¹⁰² See Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo 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.

¹⁰³ Prosecutor's Response, paras 31-32.

¹⁰⁴ Prosecutor's Response, paras 33-34.

¹⁰⁵ Prosecutor's Response, para. 34.

¹⁰⁶ Prosecutor's Response, para. 38.

through an appeal against the Impugned Decision, it equally fails to show that an error in the [First Decision on Interim Release] would materially impact on the Impugned Decision’.¹⁰⁷

(c) The Victims’ Submissions

63. The Victims submit that the periodic review undertaken under article 60(3) of the Statute does not require the Trial Chamber to assess the detention *ab initio*.¹⁰⁸ In their view, the Trial Chamber must not rule anew on circumstances on which it has already taken a decision, nor need the Trial Chamber address arguments which the Defence has already advanced and on which the Trial Chamber has already decided.¹⁰⁹

64. According to the Victims, the Trial Chamber has already decided, in its First Decision on Interim Release, that ‘the [Trial] 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 [...]’, and therefore it does not need to rule again on this point.¹¹⁰

65. The Victims further argue that the counsel for Mr Al Hassan’s argument that article 15 of the UNCAT applies beyond issues of admissibility at trial is not cogent, and above all, is not relevant.¹¹¹ In the Victims’ view, it does not address the fact that the First Decision on Interim Release (to which the Impugned Decision refers), in any event, rests on a series of considerations which are wholly extraneous to the evidence which counsel for Mr Al Hassan seeks to have excluded.¹¹² They contend that, by arguing that the trial is made unfair by the sole fact that the Trial Chamber gave consideration to evidence allegedly obtained by the means of torture, counsel for Mr Al Hassan shifts the discussion away from consideration of its request, failing to show an error of law in the Impugned Decision.¹¹³

¹⁰⁷ Prosecutor’s Response, para. 39.

¹⁰⁸ Victims’ Response, para. 31.

¹⁰⁹ Victims’ Response, para. 31.

¹¹⁰ Victims’ Response, para. 32.

¹¹¹ Victims’ Response, para. 33.

¹¹² Victims’ Response, para. 33.

¹¹³ Victims’ Response, para. 33.

2. *Determination by the Appeals Chamber*

66. Under the first ground of appeal, counsel for Mr Al Hassan presents extensive submissions on the impact of the prohibition of torture on the admissibility of evidence, including in relation to decisions relating to detention matters. The Appeals Chamber acknowledges the serious subject matter of these arguments, and notes that the Trial Chamber has indicated that it will address the possible exclusion of evidence allegedly tainted by torture after receiving written submissions from the parties under article 69(7) of the Statute.¹¹⁴ However, here, the Appeals Chamber considers that these arguments are beyond the purview of what the Trial Chamber was asked to decide in the Impugned Decision. Counsel for Mr Al Hassan brought the Request for a discrete purpose. That is, counsel brought an ‘urgent request’ to the Trial Chamber, seeking modifications to Mr Al Hassan’s custodial arrangements so that he could see his family on a temporary basis.¹¹⁵ Counsel referred only to a ‘change in circumstances’ on the basis of compassionate grounds related to the death of Mr Al Hassan’s daughter. She did not seek to exclude evidence on the basis of the UNCAT.

67. Thus, the Trial Chamber, appropriately, decided the Request on the basis of its urgent nature and the submissions made therein. In doing so, the Trial Chamber recalled its earlier findings about the risk factors under article 58(1) of the Statute for the purpose of balancing them against the compelling and exceptional humanitarian circumstances presented in the Request. Notably, the Trial Chamber did not address the admissibility of evidence allegedly tainted by torture, and the Appeals Chamber finds it unreasonable that, as suggested by counsel for Mr Al Hassan,¹¹⁶ the Trial Chamber could have, in this context, performed such an analysis given the circumstances.

¹¹⁴ Decision on Prosecution and Defence procedural requests related to Article 69(7) of the Statute, 17 February 2021, ICC-01/12-01/18-1304-Conf, para. 32; [Decision on request for leave to submit *amicus curiae* observations](#), 2 December 2020, ICC-01/12-01/18-1177, para. 2; [Decision on Prosecution request for variation of Decision on matters related to Defence challenges under Article 69\(7\) of the Statute](#), 24 November 2020, ICC-01/12-01/18-1160, para 10; [Decision on matters related to Defence challenges under Article 69\(7\) of the Statute](#), 6 November 2020, ICC-01/12-01/18-1150.

¹¹⁵ [Request](#), para. 20.

¹¹⁶ Appeal Brief, para. 11, arguing that ‘the Chamber made no reference to the fact that, at the time the Decision was issued, the Chamber had received a substantial body of evidence and argumentation concerning the existence of a real risk that this evidence was obtained in circumstances that amount to torture or cruel, inhuman and degrading treatment [...]’.

68. Moreover, the Appeals Chamber observes that counsel for Mr Al Hassan has not demonstrated that the Trial Chamber considered the evidence in question when ruling on Mr Al Hassan's request. Counsel for Mr Al Hassan argues that the Impugned Decision 'hinged on the risks identified in its [First Decision on Interim Release], which were in turn founded on DGSE evidence'.¹¹⁷ According to counsel for Mr Al Hassan, the evidence in question was the basis for the Trial Chamber's findings in paragraph 60 of the First Decision on Interim Release.¹¹⁸

69. Indeed, the Appeals Chamber notes that the Impugned Decision recalls that it had found, in the First Decision on Interim Release, that 'continued detention appeared necessary to ensure [Mr Al Hassan's] appearance at trial under Article 58(1)(b)(i)'.¹¹⁹ This conclusion had been reached on the basis of dozens of items of evidence. The Appeals Chamber observes that counsel for Mr Al Hassan now calls into question only some of these items of evidence. The Appeals Chamber notes, however, that counsel for Mr Al Hassan fails to explain why the other evidence relied upon by the Trial Chamber in the First Decision on Interim Release would have been insufficient to support a determination under article 58(1)(b)(i) of the Statute. In addition, counsel has not demonstrated that the impugned evidence in any way relates to the Trial Chamber's findings under article 58(1)(a) or (b)(iii) of the Statute which, together, would themselves justify a finding that continued detention is necessary.

70. For the foregoing reasons, Mr Al Hassan's first ground of appeal is rejected.

C. Second ground of appeal

1. Submissions of the parties and participants

(a) Counsel for Mr Al Hassan's Submissions

71. Under the second ground of appeal, counsel for Mr Al Hassan argues that '[t]he Trial Chamber erred in law, and/or abused its discretion by placing significant weight

¹¹⁷ Appeal Brief, para. 24.

¹¹⁸ Appeal Brief, para. 24, fn. 84, which reads '[Impugned] Decision, paras 11-12, citing Interim Release Decision, paras 57-68, 71-79. Paragraph 60, which links Mr Al Hassan to the ongoing activities of armed groups, relies exclusively on DGSE evidence'; para. 24, fn. 85, which reads 'Interim Release decision, para. 60, fn. 136, citing the contents of MLI-OTP-0066-0455; [Impugned] Decision, para. 11, fn.28, citing Interim Release decision, para. 60'.

¹¹⁹ [Impugned Decision](#), para.11, fn.28 (citing paragraphs 57-68 of the [First Decision on Interim Release](#)).

on risks that were not related to the criteria set out in article 58(1) of the Statute, or which were otherwise inconsistent with its duty to apply article 58(1) in a manner which is consistent with internationally recognized human rights law'.¹²⁰

72. Counsel for Mr Al Hassan submits that decisions on release or detention 'must be tailored to the personal circumstances of the defendant and the case at hand'.¹²¹ In her view, '[e]ven if the risk is not linked to the conduct of the defendant, it is necessary to demonstrate that it will impact on the likelihood that the defendant will constitute a flight risk, engage in witness intimidation, or engage in continuing criminal activity'.¹²² She argues that the assessment of risks 'cannot be based on speculation', and that 'the reasons justifying detention cannot be based on "stereo-typed formulae" or "general and abstract" grounds that have no connection to the concrete circumstances of the case at hand'.¹²³

73. Counsel for Mr Al Hassan avers that the risks enumerated in paragraphs 11 and 12 of the Impugned Decision 'reveal no such nexus to Mr Al Hassan, or the proposed modalities of release'.¹²⁴ She also argues that the Trial Chamber's 'heavy reliance on such risks fails to place sufficient weight on the humanitarian purpose of the Request, which was to have a family reunion during their mourning process, and its temporally limited nature'.¹²⁵

74. Counsel for Mr Al Hassan further argues that, while paragraph 12 of the Impugned Decision represents the Trial Chamber's assessment of the ongoing validity of these risks in light of current developments in Mali, it 'fails to enunciate the nexus between such developments and Mr Al Hassan'.¹²⁶ She observes that the Trial Chamber cited 'general threats concerning [REDACTED]', without enumerating the groups involved, the link to this case, or the specific Article 58(1)(b) criterion concerned'.¹²⁷ Counsel for Mr Al Hassan argues that the Trial Chamber's 'failure to identify evidence

¹²⁰ Appeal Brief, p. 16.

¹²¹ Appeal Brief, para. 28.

¹²² Appeal Brief, para. 28.

¹²³ Appeal Brief, para. 28.

¹²⁴ Appeal Brief, para. 29.

¹²⁵ Appeal Brief, para. 29.

¹²⁶ Appeal Brief, para. 30.

¹²⁷ Appeal Brief, para. 30.

relied upon to establish such factors, or to articulate the nexus between them and the criteria set forth in Article 58(1)(b) of the Statute, constitutes a reversible error of law'.¹²⁸ In her view, the Trial Chamber's 'reliance on such generic factors, [REDACTED], also raises the spectre that Mr. Al Hassan's rights to liberty and to return to his own country have been subjected to the whims of public opinion, and extraneous risks'.¹²⁹ Counsel for Mr Al Hassan contends that '[h]is status as a detainee does not justify the restriction of these rights, nor, does public opinion, general security considerations, or risks arising from COVID-19'.¹³⁰

75. Furthermore, counsel for Mr Al Hassan submits that it was unfair that the Trial Chamber based its determination on 'speculation concerning [REDACTED], without hearing from Mali, or affording the Defence the right to respond'.¹³¹

76. Accordingly, she argues that these errors 'vitiating the outcome of the [Impugned] Decision, by causing the Chamber to place too much weight on the risks of release, and insufficient weight on the extent to which the humanitarian nature and proposed modalities of the Request outweighed these risks'.¹³²

(b) Prosecutor's Submissions

77. The Prosecutor submits that Mr Al Hassan's second ground of appeal should be rejected because (i) it is 'based on a fundamental misunderstanding' of the Impugned Decision, and (ii) the Trial 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'.¹³³

78. As to the first point, the Prosecutor argues, *inter alia*, that the Trial Chamber 'made no findings on the risks under article 58(1)(b)'.¹³⁴ She avers that the Trial Chamber assessed whether the Request may be granted 'outside the framework of article 60(3)', and examined whether a custodial visit of Mr Al Hassan to Mali could

¹²⁸ Appeal Brief, para. 31.

¹²⁹ Appeal Brief, para. 31.

¹³⁰ Appeal Brief, para. 31.

¹³¹ Appeal Brief, para. 32.

¹³² Appeal Brief, para. 33.

¹³³ Prosecutor's Response, para. 43.

¹³⁴ Prosecutor's Response, para. 45.

be conducted in a way that would mitigate the risks previously found in the First Decision on Interim Release while taking into account information regarding the current situation in Mali.¹³⁵ According to the Prosecutor, the Impugned Decision does not rely on the factors under article 58(1)(b) of the Statute, and therefore the Defence's arguments to the contrary fail to establish an error in the Impugned Decision.¹³⁶

79. As to the second point, the Prosecutor submits that the Trial Chamber considered 'relevant factors when assessing whether Mr Al Hassan's temporary custodial transfer to Mali could be executed in a way to sufficiently mitigate the previously established risks'.¹³⁷ In her view, it was reasonable for the Trial Chamber to consider 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 groups'.¹³⁸ She further argues that the Trial Chamber also correctly considered the logistical difficulties which may be experienced [REDACTED].

80. The Prosecutor notes that the Appeals Chamber indicated 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'.¹³⁹ She further contends that, contrary to the Defence's argument, 'the Trial Chamber did not have a duty to seek the views of the Malian authorities before issuing the [Impugned] Decision',¹⁴⁰ as it 'already had sufficient information before it to make an informed decision'.¹⁴¹

(c) The Victims' Submissions

81. The Victims submit that the Trial Chamber provided ample support, in both the Impugned Decision and the First Decision on Interim Release, for the extent to which the assessment of security factors is directly connected to Mr Al Hassan's situation vis-à-vis the criteria under article 58(1)(b) of the Statute.¹⁴²

¹³⁵ Prosecutor's Response, para. 45.

¹³⁶ Prosecutor's Response, para. 46.

¹³⁷ Prosecutor's Response, para. 47.

¹³⁸ Prosecutor's Response, para. 44.

¹³⁹ Prosecutor's Response, para. 49.

¹⁴⁰ Prosecutor's Response, para. 49.

¹⁴¹ Prosecutor's Response, para. 49.

¹⁴² Victims' Response, para. 35.

82. The Victims argue that, in essence, counsel for Mr Al Hassan is disputing the Trial Chamber's assessment of the bearing that security concerns have on the criteria under article 58 of the Statute and the Trial Chamber's conclusions that the risks of non-appearance and continued commission of the crimes are increased by the many security considerations of which it is aware.¹⁴³ In the Victims' view, counsel for Mr Al Hassan makes no showing of error of law, but disputes how the Trial Chamber assessed a series of factors and weighed them against the criteria under article 58(1)(b) of the Statute.¹⁴⁴

83. Furthermore, as to the matter of whether the Trial Chamber should have heard the views of Mali, the Victims argue that since, in view of its analysis on the basis of article 60 of the Statute, it was going to dismiss the Request, it was not in any way duty-bound to inquire as to Mali's position.¹⁴⁵

2. *Determination by the Appeals Chamber*

84. The Appeals Chamber notes that counsel for Mr Al Hassan's argument under the second ground of appeal is two-fold: (i) the Trial Chamber failed to identify a nexus between the risks enumerated, *inter alia*, at paragraphs 11 and 12 of the Impugned Decision and Mr Al Hassan or the criteria set out in article 58(1)(b) of the Statute, and (ii) the Trial Chamber, by placing too much weight on such risks, failed to place sufficient weight on the humanitarian purpose of the Request. Since the latter set of arguments overlap with counsel for Mr Al Hassan's arguments in her third ground of appeal, the Appeals Chamber will address them in that section.

85. The Appeals Chamber notes that the Trial Chamber, after considering that the Request constituted an exceptional humanitarian circumstance,¹⁴⁶ recalled its First Decision on Interim Release, finding that Mr Al Hassan's continued detention appeared necessary under articles 58(1)(b)(i) and (iii) of the Statute and that serious risks established thereunder could not be adequately mitigated by the imposition of conditions on a release.¹⁴⁷ It further took into consideration various factors, including:

¹⁴³ Victims' Response, para. 36.

¹⁴⁴ Victims' Response, para. 37.

¹⁴⁵ Victims' Response, para. 38.

¹⁴⁶ [Impugned Decision](#), para. 8.

¹⁴⁷ [Impugned Decision](#), para. 11.

(i) the current security, political and Covid-19 pandemic situations in Mali, (ii) the alleged exchange of 180 prisoners for hostage between the Malian authorities and armed groups, and (iii) the possibility of [REDACTED], should the Chamber grant the Request.¹⁴⁸ It also took into account the logistical difficulties highlighted by the Registry that, [REDACTED].¹⁴⁹ In light of the foregoing considerations, the Trial Chamber concluded that the exceptional humanitarian grounds for the Request did not outweigh the potential risks.¹⁵⁰

86. The Appeals Chamber recalls that in the Impugned Decision, the Trial Chamber did not consider whether Mr Al Hassan's detention continued to be necessary for any or all of the grounds enumerated in article 58(1)(b)(i) of the Statute. Rather, it considered whether, despite the existence of such grounds, Mr Al Hassan's request to be temporarily transferred to Mali could be granted. As noted above, this was a discretionary decision.

87. Given the nature of the Impugned Decision, the Appeals Chamber is of the view that, in order to decide whether specific conditions could sufficiently mitigate the risks found in the First Decision on Interim Release, it was reasonable and within the discretion of the Trial Chamber to consider *all* relevant factors, including those related to the current security, political and public health situation in Mali, for which Mr Al Hassan bore no responsibility.

88. Accordingly, the Appeals Chamber finds no error or abuse of discretion on this matter, and therefore rejects the second ground of appeal.

D. Third ground of appeal

1. Submissions of the parties and participants

(a) Counsel for Mr Al Hassan's Submissions

89. Under the third ground of appeal, counsel for Mr Al Hassan submits that 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

¹⁴⁸ [Impugned Decision](#), para. 12.

¹⁴⁹ [Impugned Decision](#), para. 13.

¹⁵⁰ [Impugned Decision](#), para. 14.

failing to afford sufficient weight to the humanitarian importance of ensuring the compatibility of detention with his right to family life.

90. Counsel for Mr Al Hassan submits, in particular, that the necessity of detention, circumstances of the defendant, and ‘reasonableness’ of the length of detention, must be assessed in a manner which is consistent with internationally recognized human rights.¹⁵¹

91. Counsel for Mr Al Hassan contends that the Trial Chamber erred in law by failing to consider whether rejecting the Request, and thereby further prolonging the length of time between family visits, would undermine the reasonableness of the length of detention and trigger mental suffering that was ‘incompatible with the legitimate purposes of pre-conviction detention’.¹⁵² She further argues that the Trial Chamber abused its discretion by failing to appropriately weigh the ‘heightened right to family life during bereavement’, when balancing the risks of release, in particular, through the lens of Mr Al Hassan’s family, who are, in her view, ‘rights holders with specific needs that must be known and considered’ by the Court.¹⁵³

92. Counsel for Mr Al Hassan recalls the Presidency’s view that the right to family life entails a ‘right to regular, in person contacts’,¹⁵⁴ and that telephone or video contacts are not an adequate substitute.¹⁵⁵

93. Counsel for Mr Al Hassan further submits that in order for Mr Al Hassan’s right to family visits to be effective, and given the unique circumstances of indigent defendants detained abroad, the ICC has a corollary duty to take steps to ensure that this right can be respected and implemented.¹⁵⁶ She further contends that the right to family life is of increased importance during times of bereavement.¹⁵⁷ Counsel for Mr Al Hassan acknowledges that there is no absolute right to release for this reason; nonetheless, she contends that the grounds for rejecting release in these circumstances

¹⁵¹ Appeal Brief, para. 34.

¹⁵² Appeal Brief, paras 34-35.

¹⁵³ Appeal Brief, para. 35.

¹⁵⁴ Appeal Brief, para. 36.

¹⁵⁵ Appeal Brief, para. 36.

¹⁵⁶ Appeal Brief, para. 37.

¹⁵⁷ Appeal Brief, para. 37.

‘must be construed more narrowly’.¹⁵⁸ In her view, in these circumstances there is also ‘a heightened obligation to consider whether the modalities of release could mitigate these risks’.¹⁵⁹

94. Counsel for Mr Al Hassan argues that although the Trial Chamber acknowledged that the death of Mr Al Hassan’s daughter constituted an ‘exceptional humanitarian circumstance’, there was no indication that the Trial Chamber weighed, or sufficiently weighed, the exceptional nature of this circumstance in its assessment of the right to liberty versus the identified risks, nor is there any indication that the Trial Chamber sufficiently weighed the overall length of family separation, when balancing the related risks of release.¹⁶⁰ She further argues that ‘[i]t is telling that the Chamber found its assessment of the level of risk to be unchanged from the [First Decision on Interim Release], where no humanitarian circumstances were identified’.¹⁶¹ In her view, this circumstance stands at odds with the fact that in accordance with human rights law, humanitarian circumstances should be considered to lessen the risks of release.¹⁶²

95. Counsel for Mr Al Hassan submits, finally, that the Trial Chamber failed to consider whether this exceptional humanitarian circumstance, when considered in connection with his circumstances as a whole, including his mental health, had given rise to a degree of suffering that was incompatible with the legitimate object and purposes of pre-trial detention.¹⁶³

(b) Prosecutor’s Submissions

96. The Prosecutor submits that the Trial Chamber’s conclusion that the exceptional humanitarian circumstances advanced by Mr Al Hassan do not outweigh the potential risks of his temporary transfer to Mali is ‘reasonable and legally sound’.¹⁶⁴ She further submits that, contrary to what is argued by counsel for Mr Al Hassan, the Trial Chamber properly weighed all relevant factors in rendering the Impugned Decision.¹⁶⁵ In the

¹⁵⁸ Appeal Brief, para. 37.

¹⁵⁹ Appeal Brief, para. 37.

¹⁶⁰ Appeal Brief, para. 37.

¹⁶¹ Appeal Brief, para. 37.

¹⁶² Appeal Brief, para. 37.

¹⁶³ Appeal Brief, para. 38.

¹⁶⁴ Prosecutor’s Response, para. 52.

¹⁶⁵ Prosecutor’s Response, paras 52-57.

Prosecutor's view, in light of this thorough review, the Trial Chamber reasonably concluded that the existing exceptional humanitarian grounds do not outweigh the potential risks posed by Mr Al Hassan's visit in Mali.¹⁶⁶

(c) The Victims' Submissions

97. The Victims submit that the exceptional humanitarian circumstances addressed by Mr Al Hassan under his third ground of appeal have been considered by the Trial Chamber in its proposal for alternative measures.¹⁶⁷

98. The Victims further submit that these considerations cannot be challenged under article 82(1)(b) of the Statute, to the extent that they do not relate to a decision on release or detention under article 60 of the Statute.¹⁶⁸ The Victims concluded that otherwise parties could significantly expand their possibility to appeal a decision without having to seek leave to appeal by adding such issues to their requests on release and subsequently raising the matter on appeal under article 82(1)(b) of the Statute.¹⁶⁹

2. Determination by the Appeals Chamber

99. Under this ground of appeal, counsel for Mr Al Hassan contends that 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 ensuring the compatibility of detention with Mr Al Hassan's right to family life.

100. The Appeals Chamber, for the reasons that follow, does not find any error on the part of the Trial Chamber, nor does it find that the Trial Chamber abused its discretion.

101. First, the Appeals Chamber notes that the Trial Chamber considered that Mr Al Hassan's request to be temporarily transferred to Mali in order to be able to see his family in person following the death of his young daughter did constitute an

¹⁶⁶ Prosecutor's Response, para. 58.

¹⁶⁷ Victims' Response, para. 40.

¹⁶⁸ Victims' Response, para. 41.

¹⁶⁹ Victims' Response, para. 41, referring to Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled "Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118\(2\) of the Rules of Procedure and Evidence"](#), 19 November 2010, ICC-01/05-01/08-1019 (OA4), para. 70.

‘exceptional humanitarian circumstance’, and expressed its sympathy for Mr Al Hassan.¹⁷⁰ The Trial Chamber also noted that Mr Al Hassan has not been able to see his wife (the mother of his deceased daughter) and at least three of his other children since his arrest in April 2017, and that 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.¹⁷¹

102. The Appeals Chamber further recalls that the Trial Chamber, after noting the proposed conditions for Mr Al Hassan’s custodial transfer to Mali,¹⁷² recalled its findings in the First Decision on Interim Release that Mr Al Hassan’s continued detention appeared necessary to ensure his appearance at trial under article 58(1)(b)(i) of the Statute and to prevent him from continuing to commit crimes within the Court’s jurisdiction under article 58(1)(b)(iii) of the Statute, and considered that those risks could not be adequately mitigated at that time by conditions on a release to Mali.¹⁷³ After considering several other factors,¹⁷⁴ the Trial Chamber held that ‘[o]n balance and in the circumstances, the Chamber is not convinced that, at this time, specific conditions can sufficiently mitigate the risks found in the [First Decision on Interim Release]’.¹⁷⁵

103. Contrary to the arguments advanced by counsel for Mr Al Hassan, the Appeals Chamber considers that the Trial Chamber sufficiently weighed the exceptional nature of Mr Al Hassan’s circumstances as a whole, as well as the reasonableness of the length of time between family visits and the impact on his mental health. After assessing and weighing all relevant factors and circumstances, it concluded that the exceptional humanitarian grounds advanced by counsel for Mr Al Hassan in the Request did not outweigh the potential risks of Mr Al Hassan’s temporary transfer to Mali. The Appeals Chamber does not find merit in counsel for Mr Al Hassan’s argument that ‘there is no indication that the [Trial] Chamber weighed, or sufficiently weighed’ the exceptional humanitarian circumstance of the death of Mr Al Hassan’s daughter.¹⁷⁶ It is clear that the Trial Chamber took these circumstances fully into account. Counsel for Mr Al Hassan merely disagrees with the Trial Chamber’s assessment and weighing of the

¹⁷⁰ [Impugned Decision](#), para. 8.

¹⁷¹ [Impugned Decision](#), para. 10.

¹⁷² [Impugned Decision](#), para. 9.

¹⁷³ [Impugned Decision](#), para. 11.

¹⁷⁴ See *supra*, para. 85.

¹⁷⁵ [Impugned Decision](#), para. 12.

¹⁷⁶ Appeal Brief, para. 37.

relevant factors. This is insufficient to demonstrate an abuse of the Trial Chamber's discretion.

104. The Appeals Chamber, finally, notes that in the Impugned Decision the Trial Chamber, in order to enable Mr Al Hassan to have increased contact with his family, extended until [REDACTED] the temporary amendment to the restrictions applicable to Mr Al Hassan's contacts in the Court's detention centre authorised on 16 December 2020 'in light of the exceptional circumstances currently facing Mr Al Hassan'.¹⁷⁷ In addition, the Trial Chamber instructed the Registry to further explore the possibility of facilitating a family communication via video link.¹⁷⁸

105. In light of the above, the Appeals Chamber finds that counsel for Mr Al Hassan has failed to substantiate an error on the part of the Trial Chamber. The Appeals Chamber, therefore, rejects the third ground of appeal.

106. The Appeals Chamber expresses its sympathy for Mr Al Hassan. It also encourages the Registry to further explore alternative possibilities to facilitate communication between Mr Al Hassan and his family, in these special circumstances.

¹⁷⁷ [Impugned Decision](#), para. 15.

¹⁷⁸ [Impugned Decision](#), para. 16.

VI. APPROPRIATE RELIEF

107. In an appeal pursuant to article 82(1)(b) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed. In the present case, the majority of the Appeals Chamber, Judge Hofmański dissenting, finds it appropriate to confirm the Impugned Decision.

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



Judge Luz del Carmen Ibáñez Carranza
Presiding

Dated this 22nd day of February 2021

At The Hague, The Netherlands