



Original: English

No. ICC-01/12-01/18
Date of original: 13 July 2020
Date: 2 September 2020

TRIAL CHAMBER X

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

SITUATION IN THE REPUBLIC OF MALI

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

Public redacted version of

Decision on the Defence notice on Mr Al Hassan's unfitness to stand trial

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

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Other

TRIAL CHAMBER X of the International Criminal Court, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, having regard to Articles 64(2) and 67(1) of the Rome Statute (the ‘Statute’), Rule 135 of the Rules of Procedure and Evidence (the ‘Rules’), and Regulation 103 of the Regulations of the Court (the ‘Regulations’), issues the following ‘Decision on the Defence notice on Mr Al Hassan’s unfitness to stand trial’.

I. Procedural history

1. On 6 January 2020, the Chamber set the date for the commencement of trial at 14 July 2020, with the presentation of evidence to begin on 25 August 2020, and adopted a calendar leading up to this date.¹
2. On 30 June 2020, the Chamber convened a Single Judge status conference to deal with issues raised under Rule 134 of the Rules and other matters related to the commencement of the trial.²
3. On 8 July 2020, the Chamber issued the ‘Decision on Defence Adjournment Request’, rejecting the Defence request to adjourn the proceedings, and thereby confirming that the trial will commence on 14 July 2020.³
4. On 9 July 2020, the Defence filed the ‘Defence notice of its intention to raise unfitness to stand trial and request for a status conference’ (the ‘Defence Notice’), in which it ‘[f]iles formal notice of its intention to raise the defence that Mr. Al Hassan is not fit to stand trial’. Additionally it requests a status conference to be convened before the commencement of trial to discuss this issue.⁴

¹ [Decision Setting the Commencement Date of the Trial](#), ICC-01/12-01/18-548.

² Transcript of hearing, ICC-01/12-01/18-T-015-CONF-ENG.

³ Decision on Defence Adjournment Request, ICC-01/12-01/18-940-Conf.

⁴ Defence notice of its intention to raise unfitness to stand trial and request for a status conference, ICC-01/12-01/18-942-Conf.

5. On 10 July 2020, the Office of the Prosecutor (the ‘Prosecution’) filed its response (the ‘Response’)⁵ and the Registry filed its observations on the Defence Notice (the ‘Registry Report’).⁶
6. On that same date, with the leave of the Chamber,⁷ the Defence submitted a reply (the ‘Defence Reply’) on one discrete issue.⁸

II. Analysis

7. The Chamber observes that the Defence does not seek a particular relief in light of the accused’s alleged unfitness. Rather, it merely provides ‘notice’ of its intention to file a request to that effect. The Chamber also notes that although the Defence is not seeking to adjourn the trial, it requests a status conference on an urgent basis. Alternatively, the Defence notifies its intention to consult with the Prosecution on an *inter partes* basis, with a view to jointly instructing a medical expert.⁹
8. Having regard to the timing of the present Request, only two working days before the trial commencement, the Chamber finds it inevitable to analyse the timeliness of the present Defence Notice and its impact on trial commencement. Moreover, the appropriateness of filing such a ‘notice of intention’ rather than a formal motion, particularly considering the stage of the proceedings, must also be analysed.

⁵ Prosecution’s response to “Defence notice of its intention to raise unfitness to stand trial and request for a status conference”, ICC-01/12-01/18-943-Conf. On 9 July 2020, the Chamber shortened deadlines for responses. *See* Email from the Chamber to the parties and participants, 9 July 2020, at 16:19; Email from the Registry to the Chamber, 9 July 2020, at 18:14; Email from the Chamber to the Registry, 9 July 2020, at 20:44.

⁶ Registry’s Observations on the “Defence notice of its intention to raise unfitness to stand trial and request for a status conference” (ICC-01/12-01/18-942-Conf), ICC-01/12-01/18-945-Conf-Exp (confidential *ex parte*, available only to the Registry and the Defence; a confidential redacted version was filed simultaneously, ICC-01/12-01/18-945-Conf-Red).

⁷ Email from the Chamber to the Defence, 10 July 2020, at 15:46 (e-mail granting the Defence leave to reply).

⁸ Email from the Defence to the Chamber, 10 July 2020, at 19:11. *See also* Defence request for leave to reply to the “Registry’s Observations on the “Defence notice of its intention to raise unfitness to stand trial and request for a status conference” (ICC-01/12-01/18-942-Conf)” - ICC-01/12-01/18-945-Conf-Exp, ICC-01/12-01/18-946-Conf-Exp. On 12 July 2020, the Defence sought leave to submit additional information supplementing its reply (Email from the Defence to the Chamber, 12 July 2020, at 15:48). Considering that, at this point, it will not be assisted by further submissions on this issue, the Chamber rejects the request.

⁹ Request, ICC-01/12-01/18-942-Conf, paras 16-17.

9. Further, the Chamber takes note of the Defence argument that, even if the Chamber finds that the Defence failed to act with sufficient diligence, this should have no impact on Mr Al Hassan's ability to effectively follow the proceedings.¹⁰
10. The Chamber will therefore assess whether: (a) the Defence Notice was filed in a timely manner and in an appropriate form; (b) the Chamber has received sufficient information supporting Mr Al Hassan's unfitness of trial ; and (c) in light of the Chamber's conclusion regarding points (a) and (b), a status conference or a medical examination pursuant to Rule 135 of the Rules is warranted.
11. The Chamber also notes the Registry's submission that, thus far, neither the Defence consultant nor the Defence have provided the medical officer of the detention centre (the 'MO') with the reports from her medical evaluations of Mr Al Hassan.¹¹ The Defence submits that as regards prior medical reports from the Defence consultant, it has either placed them on the record of the case or had directly provided them to the Registry in a timely manner, and that it has been within the Registry's purview to share these reports with the MO.¹² The Chamber observes that the disagreement between the Registry and the Defence seem to stem from mere misunderstandings on the particular facts surrounding the issue, in particular, whether the medical records can be provided to the MO by the Registry without further action on the Defence's part. Noting the Defence's renewed clarification that it does not object to the provision of medical reports, the Chamber is of the view that no judicial intervention is warranted at this time.

¹⁰ Request, ICC-01/12-01/18-942-Conf, para. 15.

¹¹ Registry Report, ICC-01/12-01/18-945-Conf-Red, para. 10.

¹² Defence Reply, Email from the Defence, 10 July 2020, at 19:11. *See also* Annex A to the Defence Reply.

A. Timeliness of the Defence Notice and the use of ‘notices’

1. Submissions

12. The Defence submits that prior to meeting with Mr Al Hassan in person on 8 July 2020, the Defence was unable to receive instructions on key, fundamental and crucial points of the accused’s defence that could have permitted the Defence to credibly expand the scope of fitness pleadings, beyond what had been discussed with Mr Al Hassan and evaluated in person, prior to the outbreak of the COVID-19 pandemic.¹³ It is the position of the Defence that it was not in a place to assess whether Mr Al Hassan’s current circumstances were such that the issue of fitness to stand trial had to be raised.¹⁴
13. Following the Defence meeting with Mr Al Hassan on 8 July 2020, during which the latter ‘expressed clear indicia of depression and hopelessness’, the Defence requested its consultant, Dr Kate Porterfield, to conduct an interview over telephone, which the Defence submits ‘outlines several indicators that give rise to the genuinely founded demand for a complete and qualified assessment of his fitness to stand trial, at this time’.¹⁵
14. The Prosecution notes that there are several indications that the Defence could have acted at an earlier point and that therefore the present Defence Notice, which was filed ‘at the eve of trial commencement’, should be rejected as being untimely.¹⁶ The Prosecution also submits that the Defence should have raised the issue of fitness via a filing rather than a notice, and that the Defence Notice should be dismissed on this basis as well.¹⁷

2. The Chamber’s determination

15. The Defence has raised the issue of Mr Al Hassan’s fitness by way of a ‘notice of intention’ rather than a motion. The Chamber acknowledges that under the

¹³ Request, ICC-01/12-01/18-942-Conf, para. 8.

¹⁴ Request, ICC-01/12-01/18-942-Conf, paras 8-9.

¹⁵ Request, ICC-01/12-01/18-942-Conf, paras 10, 12-13. See also Annex A to Request, ICC-01/12-01/18-942-Conf-AnxA, p. 3.

¹⁶ Response, ICC-01/12-01/18-943-Conf, paras 7-8.

¹⁷ Response, ICC-01/12-01/18-943-Conf, para. 6.

statutory framework, parties are required to provide prior notice for certain legal arguments they seek to eventually rely upon including with respect to grounds for excluding criminal responsibility¹⁸ However, as rightly noted by the Prosecution, lack of fitness to stand trial is not a positive defence excluding criminal responsibility.¹⁹

16. Moreover, the Appeals Chamber has repeatedly emphasised that ‘parties must *submit* motions that have repercussions on the conduct of the trial in a timely manner’²⁰ or, in a different context, that parties are required to ‘*make the request* promptly within a reasonable time’.²¹ The Chamber is indeed of the view that a party’s duty to *submit* motions in a timely manner cannot be substituted by providing a mere ‘notice’ that it eventually intends to do so.
17. Furthermore, the Chamber recalls that in relation to the specific issue at hand, it has previously indicated that ‘any issue related to the accused’s fitness to stand trial and/or to enter a plea, *must be raised clearly and unequivocally*’.²²
18. In light of these factors, the Chamber finds that the Defence failed to act diligently by submitting a notification in lieu of a formal motion raising the issue of Mr Al Hassan’s unfitness to stand trial or requesting a medical examination under Rule 135 of the Rules.
19. The Chamber further recalls that under Article 64(2) of the Statute, Trial Chambers are ascribed the overall role to guarantee that the trial is fair and expeditious, and that the rights of the accused are fully respected.²³

¹⁸ See for example Rules 79 and 80 of the Rules.

¹⁹ It is for this reason that even where proceedings are adjourned as a consequence of the accused’s unfitness to stand trial, proceedings may be reinstated should the accused’s mental condition improve. See for example ICTY, Trial Chamber I, *The Prosecutor v. Vladimir Kovačević*, [Public Version of the Decision on the Accused’s Fitness to Enter a Plea and Stand Trial](#), 12 April 2006, IT-01-42/2-I; ICTY, Appeals Chamber, *The Prosecutor v. Dražen Erdemović*, [Judgement](#), 7 October 1997, para. 5.

²⁰ [Katanga OA 10 Judgment](#), para. 54 [emphasis added].

²¹ Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Order scheduling a hearing before the Appeals Chamber and setting a time limit for any request for leave to reply](#), 20 March 2020, ICC-02/11-01/15-1318, para. 5 [emphasis added].

²² Decision on Defence Adjournment Request, 8 July 2020, ICC-01/12-01/18-940-Conf, para. 36.

²³ See Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54\(3\)\(e\) agreements and the application to stay](#)

Expeditionness is also an independent and important value in the Statute to ensure the proper administration of justice.²⁴ It is for this reason that under Article 64(2) of the Statute, Trial Chambers have the power to regulate the conduct of the parties and participants so as to ensure, *inter alia*, that such conduct does not cause undue delay to the proceedings.²⁵

20. Accordingly, the Chamber observes that, as confirmed by the Appeals Chamber, parties must act within a reasonable time and submit motions that have repercussions on the conduct of the trial in a timely manner.²⁶
21. The Chamber considers that placing such a requirement on the parties and participants is fully compatible with the statutory framework and the rights of the accused. As was decided by the Appeals Chamber in *Ongwen*, procedural rules that require parties to raise certain issues at a given point in time are not *per se* incompatible with the rights of the accused.²⁷ However, sufficient flexibility should be left so that these procedural rules do not entirely foreclose late challenges, and in exceptional circumstances where the Defence could not reasonably be expected to raise the matter at an earlier point, Trial Chambers retain discretion to accept late submissions.²⁸
22. In relation to the accused's fitness to stand trial, while the statutory framework does not contain a specific deadline for the filing of such motions, the Chamber considers that it falls within the Chamber's Article 64(2) discretion to determine the timeliness to raise such issues.²⁹

[the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008](#)", 21 October 2008, ICC-01/04-01/06-1486, para. 46.

²⁴ Appeals Chamber, *The Prosecutor v. Germain Katanga*, [Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings"](#), 12 July 2010, ICC-01/04-01/07-2259 (hereinafter: '*Katanga* OA 10 Judgment'), paras 46-47.

²⁵ Appeals Chamber, *The Prosecutor v. Dominic Ongwen*, [Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX's 'Decision on Defence Motions Alleging Defects in the Confirmation Decision'](#), 17 July 2019, ICC-02/04-01/15-1562 (hereinafter: '*Ongwen* OA 4 Judgment'), para. 137; [Katanga OA 10 Judgment](#), para. 53.

²⁶ [Katanga OA 10 Judgment](#), para. 54.

²⁷ [Ongwen OA 4 Judgment](#), para. 135.

²⁸ [Ongwen OA 4 Judgment](#), para. 139; [Katanga OA 10 Judgment](#), para. 48.

²⁹ See Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, [Transcript of hearing, 6 December 2016](#), ICC-02/04-01/15-T-26-ENG, p.4, lines 5-9.

23. As regards the case at hand, the Chamber recalls that in the Decision on the conduct of proceedings, the Chamber set a deadline of 1 June 2020 for motions requiring resolution prior to the commencement of trial and any objections or observations within the meaning of Rule 134(2).³⁰ At the request of the Defence, the deadline for a specific pre-trial motion and Rule 134(2) observations were extended until 16 June 2020 and 10 June 2020 respectively.³¹
24. The Defence's 'notice' to challenge Mr Al Hassan's fitness to stand trial has been filed after the passing of the aforementioned deadlines, and only two working days before the trial commencement date. Further, as the Defence Notice is filed as a mere 'notice of intention', the exact extent of the remedy it seeks is unknown at the moment. The Chamber considers that submitting a 'notice' that has such repercussions on the conduct of the trial at the eve of trial commencement, and after the pre-set deadlines have passed cannot be considered as being timely.
25. Notwithstanding the apparent untimeliness of raising the issue of Mr Al Hassan's unfitness to stand trial, the Chamber must also be satisfied that there are no exceptional circumstances where the Defence could not reasonably be expected to raise the matter at an earlier point, in accordance with the aforementioned appellate jurisprudence.
26. While the Defence submits that it was unable to file a request prior to meeting with Mr Al Hassan in person, the Chamber disagrees and fails to see why it could not act at an earlier point. In this regard, the Chamber notes that the interview between the Defence consultant and Mr Al Hassan on 8 July 2020, which forms the very basis of the Defence Notice, was conducted over the phone, and on short notice.³² The Chamber is not convinced that, even considering the measures in place in connection with the COVID-19 pandemic, the Defence could not have engaged the Defence consultant at an earlier point. Indeed, and as cited by the Prosecution, the Defence claims to have been aware

³⁰ [Directions on the conduct of proceedings](#), 6 May 2020, ICC-01/12-01/18-789-AnxA, para. 1.

³¹ [Decision on the Defence request for extension of the time limit and page limit for the filing of pre-trial motions](#), 29 May 2020, ICC-01/12-01/18-833.

³² Request, ICC-01/12-01/18-942-Conf, para. 12.

of the fact that ‘Mr Al Hassan is not okay’,³³ but yet, fails to support its claim that it ‘did not have the means to assess the full extent and implications of his current position’.³⁴ Moreover, already on 6 April 2020, the Defence consultant had stated in a letter to the Defence that she believed ‘Mr Al Hassan’s condition was worsening, in that he was experiencing increased emotional distress, including worsening symptoms of PTSD’.³⁵

27. The Chamber also does not accept the Defence’s argument that ‘while there may be “issues that counsel can deal with and receive instructions upon, despite the inability to physically meet with Mr. Al Hassan,” this was not one such issue’.³⁶ While the Defence was indeed unable to physically meet with Mr Al Hassan in person until 8 July 2020, alternative measures were put in place by the Registry and notably, the Defence had the ability to communicate with Mr Al Hassan over the phone and recently via video conferencing.³⁷ In fact, as previously noted by the Chamber, and as detailed below in section (b), the case record contains numerous examples attesting to the fact that the Defence counsel could receive specific instructions on a broad range of topics, including those touching upon medical issues.³⁸
28. The Defence also attempts to justify the delay by relying on The Defence consultant’s report and argues that the delay was caused as Mr Al Hassan refused to discuss specific experiences with medical professionals.³⁹ As correctly identified by the Prosecution, the Defence consultant’s report mentions more specifically that Mr Al Hassan hesitated to discuss [REDACTED].⁴⁰ The Chamber fails to see why this prevented the Defence from having Mr Al Hassan’s current conditions evaluated. In fact, the Chamber notes that the Prosecution further submits that even on issues pertaining to

³³ Transcript of hearing, 30 June 2020, ICC-01/12-01/18-T-015-CONF-ENG, p. 39, line 4 *cited in* Request, ICC-01/12-01/18-942-Conf, para. 9.

³⁴ Request, ICC-01/12-01/18-942-Conf, para. 9.

³⁵ Request, ICC-01/12-01/18-942-Conf-AnxA, p. 2.

³⁶ Request, ICC-01/12-01/18-942-Conf, para. 9 *citing* Transcript of hearing, 30 June 2020, ICC-01/12-01/18-T-015-CONF-ENG, p. 11, lines 5-8.

³⁷ Transcript of hearing, 30 June 2020, ICC-01/12-01/18-T-015-CONF-ENG, p. 35, lines 11-18.

³⁸ See Decision on Defence Adjournment Request, ICC-01/12-01/18-940-Conf, para. 14.

³⁹ Request, ICC-01/12-01/18-942-Conf, para. 9.

⁴⁰ MLI-D28-0002-0535 at 0607.

[REDACTED], the Defence consultant ‘did succeed to speak to the Accused on six occasions for one hour each from April 2020 to May 2020’.⁴¹

29. In light of the aforementioned considerations, the Chamber finds that the Defence failed to raise the issue of Mr Al Hassan’s fitness to stand trial in a timely manner. Should the Chamber entertain the Defence request at this stage and decide to convene a status conference *before* the commencement of trial to discuss the present issue, the Defence would in effect be forcing the Chamber to postpone the commencement of trial.⁴² The Chamber reiterates in the strongest possible terms that this Chamber will not permit such tactics to be used in the present trial proceedings.⁴³

B. Whether the Chamber has received sufficient information supporting Mr Al Hassan’s unfitness to stand trial

30. While the Defence is merely providing ‘notice’ to raise the issue of Mr Al Hassan’s unfitness to attend trial and has not yet submitted a discrete motion, it also argues that even if the Chamber finds that the Defence failed to act with sufficient diligence, this should have no impact on Mr Al Hassan’s ability to effectively follow the proceedings.⁴⁴ Therefore, notwithstanding the aforementioned conclusion on the timeliness and format of the Defence Notice, and having regard to Article 64(2) of the Statute, the Chamber will assess whether it has been provided with sufficient evidence supporting Mr Al Hassan’s unfitness to stand trial.

1. Submissions

31. The Defence relies on its expert’s report, and points to the worsening physical and mental conditions of Mr Al Hassan. In particular, the expert observes that Mr Al Hassan is depressed, shows symptoms of PTSD, and is in need of

⁴¹ Response, ICC-01/12-01/18-943-Conf, para. 10.

⁴² See also Prosecution’s response to “Defence notice of its intention to raise unfitness to stand trial and request for a status conference”, 10 July 2020, ICC-01/12-01/18-943-Conf, para. 13.

⁴³ Decision on Defence Adjournment Request, ICC-01/12-01/18-940-Conf, para. 42.

⁴⁴ Request, ICC-01/12-01/18-942-Conf, para. 15.

medical care.⁴⁵ In relation to the hearings, the expert notes that Mr Al Hassan mentions that he cannot tolerate going into the courtroom.⁴⁶

32. The Prosecution refers to the previous finding of the Chamber that Mr Al Hassan is able to understand the nature of the charges against him and thus to enter a plea, and submits that unless the Registry Report points to a need for urgent adjournment, trial should commence as scheduled.⁴⁷

2. *The Chamber's determination*

33. The Chamber notes that the concept of 'fitness to stand trial', as raised by the Defence, 'must be viewed as an aspect of the broader notion of fair trial which is rooted in the idea that whenever the accused is, for reasons of ill health, unable to meaningfully exercise his or her procedural rights, the trial cannot be fair and criminal proceedings must be adjourned until the obstacle ceases to exist'.⁴⁸
34. In this regard, the Chamber considers that from the catalogue of fair trial rights contained in Article 67(1) of the Statute, a number of relevant capacities can be discerned which are necessary for the meaningful exercise of these procedural rights. These include the capacities to understand the charges and the conduct, purpose and possible consequences of the proceedings, instruct counsel and to make a statement.⁴⁹ It is not however required that these capacities must be present at their notionally highest level, or at the highest level that a particular

⁴⁵ Request, ICC-01/12-01/18-942-Conf, para. 14.

⁴⁶ Request, ICC-01/12-01/18-942-Conf, para. 14.

⁴⁷ Response, ICC-01/12-01/18-943-Conf, para. 10.

⁴⁸ Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, [Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen](#), 16 December 2016, ICC-02/04-01/15-637-Red (hereinafter: 'Ongwen Medical Examination Decision'), para. 7. See also Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, [Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court](#), 2 November 2012, ICC-02/11-01/11-286-Red (hereinafter: 'Gbagbo First Fitness Decision'), para. 43; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Decision on the fitness of Laurent Gbagbo to stand trial](#), 27 November 2015, ICC-02/11-01/15-349 (hereinafter: 'Gbagbo Second Fitness Decision'), para. 33.

⁴⁹ [Ongwen Medical Examination Decision](#), para. 8; [Gbagbo First Fitness Decision](#), para. 50. See also ICTY, Trial Chamber II, *The Prosecutor v. Pavle Strugar*, [Decision re the Defence Motion to Terminate the Proceedings](#), 26 May 2004, IT-01-42-T (hereinafter: 'Strugar Termination Decision'), para. 36; ECCC, Trial Chamber, *Co-Prosecutors v. Nuon Chea et al.*, [Decision on IENG Thirith's Fitness to Stand Trial](#), 17 November 2011, 002/19-09-2007/ECCC/TC (hereinafter: 'Case 002 Decision on Ieng Thirith's Fitness'), para. 26.

accused has ever enjoyed in respect of each capacity; the threshold is met when an accused has these capacities, viewed overall and in a reasonable manner.⁵⁰

35. Furthermore, the Chamber observes that the meaningful exercise of one's fair trial rights does not require that the person be able to exercise them as if he or she were trained as a lawyer or judicial officer.⁵¹ Indeed, 'processing the wealth of complex information inherent in international criminal proceedings is the role of defence counsel, in order to advise their clients, and the standard of fitness indicates that a defendant may sometimes require assistance to participate in the proceedings'.⁵²
36. Importantly, as clarified by Trial Chamber IX, 'the question of whether an accused is unfit to stand trial does not concern, in and of itself, whether he or she has particular medical conditions, but whether the accused is able to exercise effectively his fair trial rights in the proceedings'⁵³ and it is the Chamber's responsibility to ascertain that an accused is not unfit to stand trial.⁵⁴ In other words, the Chamber is not attempting to determine whether Mr Al Hassan is suffering from a particular medical condition, or whether the Defence consultant's evaluation of Mr Al Hassan's current conditions are accurate. Rather, the Chamber will assess whether, based on the information before itself, Mr Al Hassan cannot exercise his fair trial rights, as identified in paragraph 34 above, and therefore he is unfit to stand trial.

⁵⁰ [Strugar Termination Decision](#), para. 37 confirmed by ICTY, Appeals Chamber, *The Prosecutor v. Pavle Strugar*, [Judgment](#), 17 July 2008, IT-01-42-A (hereinafter: 'Strugar Appeals Judgment'), para. 55. See also [Gbagbo Second Fitness Decision](#), para. 36; ICTY, Trial Chamber, *The Prosecutor v. Goran Hadžić*, [Consolidated Decision on the Continuation of Proceedings](#), 26 October 2015, IT-04-75-T, para. 39.

⁵¹ [Ongwen Medical Examination Decision](#), para. 10; [Gbagbo First Fitness Decision](#), para. 52; *Case 002 Decision on Ieng Thirith's Fitness*, para. 28. Similarly see ECtHR, Fourth Section, *S.C. v. The United Kingdom*, [Judgment](#), 15 June 2004, Application no. 60958/00, para. 29.

⁵² ICTY, Appeals Chamber, *The Prosecutor v. Vujadin Popović et al*, [Public Redacted Version of 30 November 2012 Decision on Request to Terminate Appellate Proceedings in Relation to Milan Gvero](#), 16 January 2013, IT-05-88-A, para. 22.

⁵³ [Ongwen Medical Examination Decision](#), para. 13. See also [Strugar Appeals Judgment](#), para. 61 ('medical diagnoses alone, no matter how numerous, do not suffice to assess a person's competency to stand trial').

⁵⁴ [Ongwen Medical Examination Decision](#), para. 11.

37. In the Decision on Defence Adjournment Request, the Chamber has found that Mr Al Hassan has the ability to provide specific instructions to his counsel.⁵⁵ In fact, in the course of the past months, the case record contains numerous examples in which Defence counsel has received specific instructions from Mr Al Hassan. The Chamber observed *inter alia* that:

[f]or example, the Defence submission that there are some sensitive medical or personal issues it cannot discuss with the accused unless physical meetings take place seems to contradict the Defence submissions contained in the Termination Motion, which has been prepared and filed during this period and touches upon such sensitive medical and personal issues. More recently, in the context of the status conference of 30 June 2020, Defence counsel requested time to consult with her client in relation to the adjudication of the Termination Motion. [REDACTED].⁵⁶

38. During the status conference of 30 June 2020, and, in arguing that the accused should be allowed to be physically present in the courtroom during evidentiary hearings, rather than being ‘forced’ to participate via video link, the Defence counsel stated that it is ‘absolutely crucial that we have the means to obtain ongoing instructions in a discreet manner’.⁵⁷ The Defence also signalled that, unless physical visits between Mr Al Hassan and the Defence at the Detention Centre, which had been temporarily suspended following the COVID-19 pandemic, is immediately permitted, it will ‘seek instructions’ from Mr Al Hassan as to what remedy he requires.⁵⁸
39. The Chamber also recalls that in May 2020, the Defence informed the Chamber that Mr Al Hassan ‘continues to instruct the Defence that he does not wish for the trial to be delayed’.⁵⁹ The Chamber considers that all these previous submissions strongly support the conclusion that Mr Al Hassan is capable of instructing his counsel and positively engaging in the trial proceedings.
40. Also of relevance is the Defence submission that with respect to the method by which he receives documents during the COVID-19 pandemic, ‘he is concerned

⁵⁵ Decision on Defence Adjournment Request, ICC-01/12-01/18-940-Conf, para. 14.

⁵⁶ Decision on Defence Adjournment Request, ICC-01/12-01/18-940-Conf, para. 14.

⁵⁷ Transcript of hearing, ICC-01/12-01/18-T-015-CONF-ENG, p. 38, line 14.

⁵⁸ Transcript of hearing, ICC-01/12-01/18-T-015-CONF-ENG, p. 41, lines 22-25.

⁵⁹ Defence submissions pursuant to Trial Chamber X’s “Order to provide information on methods of work to minimise the impact of COVID-19 and related measures on the conduct of proceedings” - ICC-01/12-01/18-776, 20 May 2020, ICC-01/12-01/18-825-Conf-Red, para 9.

about issues of confidentiality and privilege’,⁶⁰ and that in waiving attendance for a status conference, Mr Al Hassan has weighed [REDACTED] and his ability to communicate with his Defence.⁶¹ In view of the Chamber, these factors clearly demonstrate that Mr Al Hassan has an overall understanding of the proceedings, as also supported by the fact that he has been capable of providing specific instructions, and is furthermore aware of how the trial proceedings are viewed by the public.

41. The Chamber also notes with concern that Mr Al Hassan is now alleging that ‘he cannot tolerate going to the courtroom’ or that ‘[h]e did not feel that he could accompany [his lawyers] to court and stated that he did not care what happened to him’.⁶² In fact, this is in clear contradiction with the fact that, over the past months, the Defence, based on Mr Al Hassan’s instructions, has consistently litigated the issue of Mr Al Hassan’s presence in the courtroom, for the purpose of status conferences, and more recently, for trial commencement, and argued that Mr Al Hassan considers that his physical presence in the courtroom is necessary in view of his fair trial rights.⁶³ In fact, the Chamber recalls that on 30 June 2020, the Defence counsel submitted that Mr Al Hassan ‘does wish to attend [trial] in person [...] and he should be given the full opportunity to do so’.⁶⁴
42. Based on the aforementioned considerations and relevant information before it, the Chamber concludes that at the present moment, on the basis of the Defence Notice, it has not been presented with sufficient information to conclude that Mr Al Hassan is unfit to stand trial.
43. The Chamber has also had regard to the Registry Report. In doing so, the Chamber is fully aware that pursuant to Rule 135 of the Rules, only a medical

⁶⁰ Transcript of hearing, 29 May 2020, ICC-01/12-01/18-T-014-CONF-EXP-ENG, p.7, line 8.

⁶¹ Transcript of hearing, ICC-01/12-01/18-T-014-CONF-EXP-ENG, p. 10, lines 18-23.

⁶² Annex A to Request, ICC-01/12-01/18-942-Conf-AnxA, p. 3.

⁶³ See Transcript of hearing, ICC-01/12-01/18-T-015-CONF-ENG, p. 38, lines 1-18; Defence Rule 134(1) observations, 10 June 2020, ICC-01/12-01/18-870-Conf-Red, para. 33; Defence Reply to “Registry’s Observations on the Defence Rule 134(1) Observations (ICC-01/12- 01/18-870-Conf-Exp)” - ICC-01/12-01/18-891-Conf-Exp, 25 June 2020, ICC-01/12-01/18-905-Conf, paras 13-14; Transcript of hearing, ICC-01/12-01/18-T-014-CONF-EXP-ENG, p. 13, lines 19-25.

⁶⁴ Transcript of hearing, ICC-01/12-01/18-T-015-CONF-ENG, p. 38, lines 5-6.

expert from the list of experts may perform a medical examination, and the Chamber is in no way according the Registry Report the same value as a Rule 135 medical examination.

44. The Chamber observes that the Chief Custody Officer (the ‘CCO’), who is entrusted with the responsibility to ensure the safety and humane treatment of detainees pursuant to Regulation 187 of the Registry Regulations, is of the opinion that: ‘Mr Al Hassan appears to have normal interactions with the other detained persons, the custody officers, the principal officers, and the management of the DC’; Mr Al Hassan’s ‘rhythms which can be observed on a day to day and week to week basis highlight no concerns whatsoever’; and ‘[h]is interactions with the other detained persons appear to be normal and demonstrate clear cognitive skills and a good sense of humour’.⁶⁵ While Regulation 155(3) of the Registry Regulations obligates the MO to inform the CCO whenever he considers that ‘the physical or mental health of a detained person has been adversely affected by a condition or treatment in detention’, [REDACTED].⁶⁶
45. The Chamber furthermore takes note of the Registry’s submissions that all opportunities presented to assist Mr Al Hassan to reinforce and enhance his psychosocial wellbeing have been pursued diligently.⁶⁷ The Chamber also welcomes the Registry’s assurance that ‘while the COVID-19 measures require social distancing, this does not stop custody officers from actively engaging with him on a daily basis, [REDACTED]’.⁶⁸

C. Request for a status conference and a medical examination

46. The Defence seeks that the Chamber convene an urgent status conference, and that it be conducted prior to the commencement of trial, which is currently

⁶⁵ Registry Report, ICC-01/12-01/18-945-Conf-Red, para. 7.

⁶⁶ Registry Report, ICC-01/12-01/18-945-Conf-Red, para. 9.

⁶⁷ Registry Report, ICC-01/12-01/18-945-Conf-Red, para. 7.

⁶⁸ Registry Report, ICC-01/12-01/18-945-Conf-Red, para. 8.

scheduled for Tuesday, 14 July 2020, in order to discuss the calendar for addressing the issue of Mr Al Hassan's fitness to stand trial.⁶⁹

47. In light of the Chamber's findings in sections (A) and (B) above, the Chamber considers that no status conference is warranted at this juncture.
48. The Chamber also notes that, although not explicitly sought as a relief, the Defence Notice contains reference to medical examination pursuant to Rule 135 of the Rules.⁷⁰
49. In this regard, the Chamber reiterates its position that a 'notice' is not the appropriate way to introduce the present issue before the Chamber. The Defence cannot seek particular remedies such as the conduct of a medical examination while not making a formal request. Given its finding on point B above, the Chamber will also not order such examinations at the present time. This determination is without prejudice of the Chamber ordering such a medical examination, either at the request of the parties or *proprio motu*, in order to examine Mr Al Hassan's continued fitness at a later stage of the proceedings.

⁶⁹ Request, ICC-01/12-01/18-942-Conf, para. 1.

⁷⁰ For example, at paragraph 2 of the Request, the Defence indicates that '[e]xamination pursuant to Rule 135 of the RPE, is requested in relation to this formal advancement by the Defence of an intention to advance a positive defence excluding criminal responsibility under Article 67(1) of the Statute, based on Mr. Al Hassan's lack of fitness to stand trial, at this time'. See Request, ICC-01/12-01/18-942-Conf, para. 2.

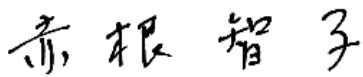
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Defence Notice.

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



Judge Antoine Kesia-Mbe Mindua
Presiding Judge



Judge Tomoko Akane



Judge Kimberly Prost

Dated this Monday, 13 July 2020

At The Hague, The Netherlands