



Original: **English**

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

Date: **23 February 2021**

Date of submission: **6 May 2021**

TRIAL CHAMBER X

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

SITUATION IN THE REPUBLIC OF MALI

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

Public

**Public redacted version of “Prosecution’s Observations regarding
Panel of Experts’ Report concerning the Accused’s fitness to stand trial”,
23 February 2021, ICC-01/12-01/18-1317-Conf**

Source: Office of the Prosecutor

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Introduction

1. Based on the report of the panel of three experts instructed by Trial Chamber X (“Panel”), the Chamber should conclude that the Accused remains fit to stand trial and that there are no current impairments to the Accused’s ability to effectively exercise his fair trial rights.¹
2. The Panel’s findings support the conclusion that the Accused is fit to stand trial. In particular, the Panel has found that the Accused is “fit to plead: he is able to comprehend the evidence; follow the course of the trial and instruct his lawyers”;² and there are no current impairments to the Accused’s ability to effectively exercise his fair trial rights.³
3. The Panel further finds that the Accused has no post-traumatic disorder, no depressive disorder, and no other recognised psychiatric condition.⁴ Both the Accused and the Panel consider that he does not have any mental health problem or condition that would warrant psychological support or treatment.⁵ The Accused also denies that he had any mental health problems prior to his arrest.⁶ And the Panel finds that there could be different causes for some of the potential mental health “symptoms” he describes (namely his reported sense of betrayal and despair), including the possibility that they stem from him being an alleged perpetrator, and accordingly may not be trauma-related.⁷
4. The Prosecution submits that the Chamber should conclude that the Accused, if he decides to testify, is fit to be cross-examined by the Prosecution. The Panel’s comments regarding the potential impact of any future cross-examination on the Accused, if he chooses to testify and is confronted with evidence he gave to the Prosecution, is based on the Accused’s own assertions that this evidence was extracted under torture, or constitutes a forced confession – assertions which, as the Chamber knows, the Prosecution challenges as unfounded. Additionally, the Panel’s comments that the Accused may not be able to endure cross-examination, or look directly at any of the Prosecutors in the courtroom, is based on the Accused’s contested claims that the Prosecutors in the courtroom are complicit in his alleged torture.

¹ ICC-01/12-01/18-1006-

² ICC-01/12-01/18-1197- [REDACTED] Anx, para.321.

³ ICC-01/12-01/18-1197- [REDACTED] -Anx, para.294.

⁴ ICC-01/12-01/18-1197- [REDACTED] Anx, para.322.

⁵ ICC-01/12-01/18-1197- [REDACTED] -Anx, para.160, para.328.

⁶ ICC-01/12-01/18-1197- [REDACTED] -Anx, para.71.

⁷ ICC-01/12-01/18-1197- [REDACTED] -Anx, para.231.

5. The Prosecution does not object to the Panel's proposals that: (a) the Accused be medically assessed in between appearances to determine if he requires medication or any medical support; and (b) has more frequent access to an Imam, [REDACTED]

[REDACTED]. The Prosecution defers to the Chamber's discretion regarding the Defence proposals for an alternative wrist restraint; engagement with security guards; and, use of breaks during hearings. Otherwise, the Prosecution submits that the Chamber should reject the other proposed measures, as they do not appear warranted.

Confidentiality

6. This filing is classified as confidential under regulation 23bis of the Regulations of the Court because it contains confidential information and follows confidential decisions and filings related to the same topic.

Background

7. On 9 July 2020, the Defence filed a 'formal notice of its intention to raise the defence that Mr. Al Hassan is not fit to stand trial' and requested a status conference be convened prior to trial commencement ("Defence Notice").⁸

8. On 13 July 2020 the Chamber issued the 'Decision on the Defence notice on Mr. Al Hassan's unfitness to stand trial' ("Defence Notice Decision"), in which it rejected the Defence Notice, on the basis that it was untimely, that the issue of unfitness could not be raised via a 'notice', and that after considering all available information, the Chamber was not convinced that Mr. Al Hassan was unfit to stand trial.⁹

9. On the same day, the Defence filed a request seeking reconsideration, or in the alternative, leave to appeal the Adjournment Decision.¹⁰

10. On 14 July 2020, the trial against Mr. Al Hassan commenced. The Defence verbally raised a motion at the start of the hearing arguing that the Accused was not fit to stand trial and requesting that the Chamber order a qualified examination ("Fitness Motion").¹¹ During the

⁸ ICC-01/12-01/18-942-[REDACTED].

⁹ ICC-01/12-01/18-952-[REDACTED]

¹⁰ [REDACTED]

¹¹ Transcript of hearing, ICC-01/12-01/18-T-017-Red-ENG, p.23, line 1- p.25, line 17.

hearing, the Defence referred to a written motion notified that same day (“Written Fitness Motion”).¹² The Prosecution made oral submissions opposing the Fitness Motion.¹³

11. During the same hearing, the Chamber issued an oral decision rejecting the Defence request to reconsider the Adjournment Decision and the Fitness Motion.¹⁴ Nevertheless, the Chamber pursuant to rule 135 of the Rules of Procedure and Evidence (“Rules”) instructed the Registry, in consultation with the parties, to make recommendations on medical experts by 24 July 2020 and the parties to provide observations on the Registry’s recommendations by the same date.¹⁵

12. On 27 July 2020, the Registry filed its recommendations on the medical experts (“Registry Recommendations”),¹⁶ and a shortlist of potential experts (“Expert Shortlist”).¹⁷

13. On the same day, the Prosecution¹⁸ and Defence¹⁹ submitted observations on the Registry Recommendations.

14. On 14 August 2020 the Defence filed a request for reclassification of its Written Fitness Motion.²⁰

15. On 18 August 2020, the Chamber decided to adjourn the start of the presentation of evidence until 8 September 2020 due to other, unrelated, circumstances.²¹

16. On 21 August 2020, the Chamber issued its written decision to appoint experts for the purpose of a medical examination of the Accused pursuant to rule 135 of the Rules.²² The Chamber recalled that at the beginning of trial it was not presented with sufficient information to conclude that Mr. Al Hassan was unfit to stand trial²³ and that no medical examination was

¹² Defence request regarding Mr. Al Hassan’s fitness, ICC-01/12-01/18-956-[REDACTED]

¹³ Transcript of hearing, ICC-01/12-01/18-T-017-Red-ENG, p.26, line 12-p.27, line 21.

¹⁴ Transcript of hearing, ICC-01/12-01/18-T-017-Red-ENG, p.30, line 2- p.32, line 10.

¹⁵ Transcript of hearing, ICC-01/12-01/18-T-017-Red-ENG, p.32, lines 13-18. The deadline was later extended until 27 July 2020. [REDACTED]

¹⁶ [REDACTED]

¹⁷ [REDACTED]

¹⁸ [REDACTED]

¹⁹ [REDACTED]

²⁰ ICC-01/12-01/18-997.

²¹ ICC-01/12-01/18-999.

²² ICC-01/12-01/18-1006-[REDACTED]

²³ ICC-01/12-01/18-1006-[REDACTED] para.16.

warranted to examine his fitness to stand trial at that particular point of time.²⁴

17. However, the Chamber ordered that there be a medical examination of the Accused “to assist the Chamber in assessing and addressing issues which may affect Mr. Al Hassan’s ongoing fitness to stand trial”.²⁵ The Chamber stated that it sought expert advice “to identify any medical issues which could affect his ongoing fitness to stand trial”, whether it was necessary “to adopt certain measures or make adjustments in order to address any such conditions during the trial proceedings, including practical arrangements as regards Mr. Al Hassan’s attendance and participation at trial”, and “to properly continue to assess fitness to stand trial as the proceedings continue”.²⁶

18. Accordingly, the Panel of medical experts appointed were directed to provide observations on the following issues:²⁷

) “Whether the accused suffers from any condition which might have an effect on his ability to follow and take part in the ongoing trial proceedings, notably the following of evidence on a daily basis, as well as more generally on the capacities which are necessary for the meaningful exercise of his procedural rights, as described and discussed above from paragraphs 33 to 36”; and,

) “The measures/adjustments, if any, that are recommended to address any issue above for the purpose of ongoing trial proceedings and/or for ongoing detention.”

19. The Panel was instructed to provide a report, jointly to the extent possible, by 15 October 2020.²⁸

20. Following an extension of time granted by the Chamber,²⁹ on 9 December 2020, the Registry filed on the record the Panel report (“Report”).³⁰

21. [REDACTED]

²⁴ ICC-01/12-01/18-1006-[REDACTED] para.17.

²⁵ ICC-01/12-01/18-1006-[REDACTED] para.22. *See also* para.18-20.

²⁶ ICC-01/12-01/18-1006-[REDACTED] para.21.

²⁷ ICC-01/12-01/18-1006-[REDACTED] para.37.

²⁸ ICC-01/12-01/18-1006-[REDACTED] para.38.

²⁹ [REDACTED]

³⁰ ICC-01/12-01/18-1197-[REDACTED]-Anx.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].³¹

22. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].³²

23. [REDACTED]
[REDACTED].³³
[REDACTED]
[REDACTED] [REDACTED] [REDACTED]
[REDACTED].³⁴

24. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].³⁵

25. [REDACTED]
[REDACTED]
[REDACTED].³⁶

Submissions

I. The Accused remains fit to stand trial and there is no current impairment to effective exercise of his fair trial rights

26. The Chamber requested the Panel to assess “[w]hether the accused suffers from any

³¹ [REDACTED]
³² [REDACTED]
³³ [REDACTED]
³⁴ [REDACTED]
³⁵ [REDACTED]
³⁶ [REDACTED]

condition which might have an effect on his ability to follow and take part in the ongoing trial proceedings, notably the following of evidence on a daily basis, as well as more generally on the capacities which are necessary for the meaningful exercise of his procedural rights, as described and discussed above from paragraphs 33 to 36”.³⁷

27. The Chamber referring to Court case law noted that “the question of whether the accused is unfit to stand trial does not concern, in and of itself, whether the accused has particular medical conditions, but concerns whether the accused is able to exercise effectively his fair trial rights in the proceedings against him irrespective of the existence of any such medical condition.”³⁸

28. In particular, the Chamber reiterated that the issue is whether there is a health issue that is an obstacle to the accused meaningfully exercising his procedural rights.³⁹ The Chamber confirmed that the relevant capacities necessary for a meaningful exercise of these procedural rights, include the capacity to understand the conduct, purpose, and possible consequences of the trial proceedings, to instruct counsel, and, if desired, to make a statement.⁴⁰ This threshold is met when an accused has these capacities, “viewed overall and in a reasonable manner”.⁴¹

29. The Panel’s findings support the conclusion that the Accused is fit to stand trial. Particularly, the Panel concluded that the Accused “is [f]it to [p]lead. He is able to comprehend the evidence; follow the course of the trial and instruct his lawyers”.⁴² The Panel further “found no current impairment in his ability to exercise fair trial rights.”⁴³

30. In passing, the Prosecution observes that the Panel appears to go beyond the Chamber’s instructions by questioning the parameters of the legal test for fitness,⁴⁴ but the Chamber was clear as to what legal test for fitness the Panel was bound to apply.

II. The Panel’s comments regarding the potential impact of future cross-examination and visual contact with the Prosecution are based solely on the Accused’s

³⁷ ICC-01/12-01/18-1006-[REDACTED] para.37.

³⁸ ICC-01/12-01/18-1006-[REDACTED] para.28. See also ICC-01/12-01/18-1197-[REDACTED] Anx, para.7. Referring to Email from the Chamber, 30 October 2020.

³⁹ ICC-01/12-01/18-1006-[REDACTED] para.33.

⁴⁰ ICC-01/12-01/18-1006-[REDACTED] para.34.

⁴¹ ICC-01/12-01/18-1006-[REDACTED] para.35.

⁴² ICC-01/12-01/18-1197-[REDACTED] Anx, para.321.

⁴³ ICC-01/12-01/18-1197-[REDACTED] Anx, para.294.

⁴⁴ ICC-01/12-01/18-1006-[REDACTED] para.286. See also para 290, 291.

unfounded assertions

31. The Prosecution recalls that it is ultimately for the Chamber to decide if the Accused is fit to stand trial and whether there is any health-related impediment to his ability to meaningfully exercise his fair trial rights.⁴⁵ The Chamber stated that where a medical examination is ordered under rule 135 of the Rules, it remains “the exclusive responsibility of the Chamber to determine the fitness of the accused, in view of its obligations under article 64(2)”. The parties and appointed medical experts assist the Chamber in the exercise of this obligation.⁴⁶

32. Accordingly, it is *the Chamber* who decides whether the Accused is able to meaningfully make a statement, including to be cross-examined if he decides to make a statement under oath.

33. However, the Panel’s comments regarding the potential impact on the Accused of any future cross-examination of the Accused by the Prosecution, if he decides to testify, are based solely on the Accused’s contested assertions that the evidence elicited by the OTP was extracted from forced confessions or torture, and that the OTP was complicit in torture allegedly carried out by the Malian authorities.

(a) The Panel’s comments on cross-examination are based on the Accused’s assertions that the evidence elicited by the OTP was extracted from forced confessions or torture

34. The Panel stated that the Accused’s “psychological wellbeing and hence his fitness is liable to change particularly in *circumstances in which he is placed under increased stress*”,⁴⁷ and that cross-examination may be a “particularly high risk time for him, *given his experiences of interrogation under torture*”.⁴⁸ The Panel further stated: “[...] *on the assumption that AH was a victim of torture*, significant obstacles were identified that could impair AH’s ability to give evidence in his own defence and exercise his fair trial rights. [...]”.⁴⁹ The Panel then speculates by suggesting that the Prosecution would cross-examine the Accused in a manner that “might resemble interrogations he faced”⁵⁰ during his torture.

35. Critically, the Panel’s comments regarding the risks of cross-examination appear to be

⁴⁵ ICC-01/12-01/18-1006-[REDACTED] para.22. See also para.17, 28-30.

⁴⁶ ICC-01/12-01/18-1006-[REDACTED] para.36.

⁴⁷ ICC-01/12-01/18-1197-[REDACTED] -Anx, para.321.

⁴⁸ ICC-01/12-01/18-1197-[REDACTED] -Anx, para.282.

⁴⁹ ICC-01/12-01/18-1197-[REDACTED] -Anx, p.4.

⁵⁰ ICC-01/12-01/18-1197-[REDACTED] -Anx, para.292.

based on the contested assertions coming from the Accused – namely, that the OTP statements made by the Accused (part of the evidence to which the Accused is liable to be confronted during any cross-examination,⁵¹ if the Accused decides to testify), was itself evidence obtained under force or extracted by torture.

36. The Panel makes these comments about the OTP evidence being obtained under force or extracted by torture, even though it notes that it believes the Accused was referring to the Malian authorities, and not the ICC, as carrying out the torture.⁵²

37. In particular, the Panel stated:

) “AH has the intellectual capacity to plead his case. We found no current impairment in his ability to exercise fair trial rights. However, this may be compromised if he continues to believe that the basis of that case against him is in part built on evidence extracted under torture”.⁵³

) The Panel stated that “if some evidence... was obtained under forced confession, every confrontation with the evidence presented in Court would serve as a trauma trigger.”⁵⁴

) The Panel observed that the Accused’s “fixation on the OTP’s alleged complicity in his torture could result in severe decompensation if cross examined by the prosecutor on matters related to his torture or on those aspects of his statement that he alleges were extracted under torture.”⁵⁵

) Similarly, the Panel said that “[i]f some evidence (even less than 90% suggested by AH) was obtained under forced confession, every confrontation with the evidence presented in Court would serve as a trauma trigger”.⁵⁶

(b) The Panel’s information about the torture allegations come from the Accused

38. The Panel’s understanding of the torture allegations are based solely on the Accused’s

⁵¹ Subject to the Chamber’s anticipated decision under article 69(7).

⁵² ICC-01/12-01/18-1197-[REDACTED]-Anx, para.46.

⁵³ ICC-01/12-01/18-1197-[REDACTED]-Anx, para.294.

⁵⁴ ICC-01/12-01/18-1197-[REDACTED]-Anx, para.293.

⁵⁵ ICC-01/12-01/18-1197-[REDACTED]-Anx, para.303.

⁵⁶ ICC-01/12-01/18-1197-[REDACTED]-Anx, para.293.

own assertions, which are incorrect and self-serving.⁵⁷ Indeed, the Panel acknowledges the following:

- J The Panel had little information about the alleged torture and had not seen any independent assessment of the issue.⁵⁸
- J The Accused's current mental symptoms could be unrelated to trauma, but instead arise from him being an alleged perpetrator;⁵⁹ and,
- J The Accused's claims of torture do not fall "within [the Panel's] expertise, as medical experts to comment further on the allegations, or steps to deal with this."⁶⁰ .

39. The Prosecution submits that the Accused's interview process with the OTP was voluntary and free from duress.⁶¹ The Prosecution further submits that there was no evidence that any alleged torture by the Malian or French authorities is attributable to the OTP.⁶²

(c) The Panel's comments about cross-examination and proposals about positioning of the Accused in the courtroom are also based on the Accused's assertions that the Prosecution was complicit in torture

40. Second, the Panel's comments that the Accused "may find himself in the invidious position of being cross-examined by an individual who he claims was complicit in his torture"⁶³; and "seeing the Prosecutor is a serious issue for him" (although listening to him is possible)⁶⁴ - also appears to be based solely on the Accused's own claims regarding the alleged torture and that he considers the Prosecution team in the courtroom as complicit in his torture.

41. Similarly, the Panel's comments that the Accused "experiences distress in relation to

⁵⁷ The Panel received information regarding the Accused's assertions directly, and/or through Defence expert reports that also recorded the Accused's assertions.

⁵⁸ ICC-01/12-01/18-1197-[REDACTED]-Anx, para.231. See also ICC-01/12-01/18-1197-[REDACTED]-Anx, para.322. The Panel noted that the Accused "was exposed to multiple adverse childhood experiences that suggest a more complex trauma picture than would be typically associated with a PTSD diagnosis". See also para. 70: The Accused "went to great lengths to explain what he experienced, characteristic of ACE [Adverse Childhood Experiences] and relevant to him as they shaped his sense of justice, protection and betrayal. See also para. 301: The Panel also observed: "the defence and prosecution witnesses have reached opposite findings with regards to AH's allegations of torture".

⁵⁹ ICC-01/12-01/18-1197-[REDACTED]-Anx, para.231, 322.

⁶⁰ ICC-01/12-01/18-1197-[REDACTED]-Anx, para.301.

⁶¹ ICC-01/12-01/18-982-[REDACTED]-Corr, section C (1) and section D.

⁶² ICC-01/12-01/18-982-[REDACTED]-Corr, section B.

⁶³ ICC-01/12-01/18-1197-[REDACTED]-Anx, para.281. See also para.261-265.

⁶⁴ ICC-01/12-01/18-1197-[REDACTED]-Anx, para.280. See also para.288-291; para.303-304.

reminders of the alleged torture, such as the handcuffing...’’ and his “general sense of betrayal and dehumanisation is triggered by certain cues in the courtroom, such as the presence of the prosecutor’’,⁶⁵ are also based on these unilateral and contested assertions regarding the alleged torture.

42. Not only are these contested claims - they are also new to the Prosecution. Indeed, the Prosecution is not aware of any previous claim made by the Defence that the Accused attributes blame to member(s) of the Prosecution team in the courtroom for his alleged ill-treatment, and had previously requested that the Chamber remove them from the Court.⁶⁶ Any such request was not notified to the Prosecution.

43. Additionally, the Accused’s claims regarding the Prosecution’s alleged complicity in torture are not credible and based on factually incorrect assertions:

) It is not correct, as claimed by the Accused, that the Prosecution “knew he was being tortured in the prison in Mali and yet failed to do anything about it so they are responsible for his torture as the people who actually did it...[T]hey knew and they did nothing...[T]hey were happy to keep me under torture’’.⁶⁷ The Prosecution refers to its prior submissions on this point.⁶⁸

) It is not credible for the Accused to state that he “understood from the questions that they were asking that they (prosecutors) were only interested in the statement that had been taken from [him] first by the French and the Malian authorities’’.⁶⁹ Indeed, the Malian DGSE notes were only provided to the Prosecution well after the interview - , after the Accused’s transfer to the Court -, and, the Prosecution never obtained interview notes from the French authorities.⁷⁰

) Contrary to the Accused’s claim that he “felt that they kept on pushing me to accept what is in the report’’,⁷¹ no questions were asked – or indeed, could be asked - about

⁶⁵ ICC-01/12-01/18-1197-[REDACTED]-Anx, para.288.

⁶⁶ ICC-01/12-01/18-1197-[REDACTED]-Anx, para.265.

⁶⁷ ICC-01/12-01/18-1197-[REDACTED]-Anx, para.261.

⁶⁸ See ICC-01/12-01/18-982-[REDACTED]-Corr, para.71-75.

⁶⁹ ICC-01/12-01/18-1197-[REDACTED]-Anx, para.43. See also para.42, 44-45.

⁷⁰ See ICC-01/12-01/18-982-[REDACTED]-Corr, para.23-24.

⁷¹ ICC-01/12-01/18-1197-[REDACTED]-Anx, para.45.

these documents, as they were not in the Prosecution's possession at the time.⁷²

44. In any event, as the Panel acknowledges, "the conclusions of the [Panel] on [the Accused's] fitness to plead and his ability to exercise his fair trial rights refer to medical findings rather than matters of fact, which are for the Chamber to determine".⁷³ It remains the role of the Chamber, and not of the Panel, to make any determinations as to the veracity of the Accused's various allegations regarding torture.

45. Further, the Panel's suggestion that the Accused may experience "increasing stress" if cross-examined,⁷⁴ is not a reasonable basis for implying that he cannot be cross-examined by members of the Prosecution team. Indeed, as the Chamber instructed, the threshold as to whether the Accused can meaningfully exercise his fair trial rights is met when an accused has the necessary capacities, "*viewed overall and in a reasonable manner*".⁷⁵

III. The Panel finds that the Accused is not suffering from any recognised psychiatric condition and his mental "symptoms" could stem from being an alleged perpetrator

46. The Prosecution recalls that the Chamber instructed the Panel that: "the question of whether the accused is unfit to stand trial *does not concern, in and of itself, whether the accused has particular medical conditions*, but concerns whether the accused is able to exercise effectively his fair trial rights in the proceedings against him irrespective of the existence of any such medical condition."⁷⁶

47. As such, the relevant consideration is not whether the Accused has any particular medical condition, or the basis for that, but whether any medical condition impedes upon his ability to effectively exercise his fair trial rights.

48. Nevertheless, the Prosecution observes that the Panel concluded that the Accused "is not currently suffering from Post-traumatic Stress Disorder, Depressive Disorder, or any other recognised psychiatric condition".⁷⁷

⁷² See ICC-01/12-01/18-982-[REDACTED]-Corr, section D.

⁷³ ICC-01/12-01/18-1197-[REDACTED]-Anx, para.11.

⁷⁴ ICC-01/12-01/18-1197-[REDACTED]-Anx, para.282.

⁷⁵ ICC-01/12-01/18-1006-[REDACTED] para.35.

⁷⁶ ICC-01/12-01/18-1006-[REDACTED] para.28.

⁷⁷ ICC-01/12-01/18-1197-[REDACTED]-Anx, para.322.

49. Tellingly, the Panel reports that the Accused: (a) denied any history of mental health problems prior to his arrest;⁷⁸ (b) does not consider he has any mental health problems at present;⁷⁹ (c) is not currently receiving any psychiatric or psychological treatment.⁸⁰ In addition, both the Accused⁸¹ and Panel⁸² consider that he does not need any psychological treatment or support. Indeed, the Panel concluded it had no specific recommendation for treatment at present.⁸³ The Panel described some disagreement amongst the Panel members regarding the Accused's "subclinical" state and the significance of the Accused's complaints of symptoms in relation to alleged torture.⁸⁴ There were also comments made that: (a) "the manifestation of PTSD symptoms from an individual and cultural perspective must be considered in order to adequately capture [the Accused's] mental health status and its consequences for the court proceedings";⁸⁵ and (b) a diagnostic concept of PTSD "does not entirely describe the full range of serious psychological effects that can result from different forms of traumatic experience and in people from different cultural backgrounds".⁸⁶

50. In any event, none of these comments changed the Panel's conclusions that the Accused had no recognised psychiatric condition, was in no need of treatment currently, and – more importantly - is fit to stand trial.

51. The Prosecution observes that the Panel considered it possible that, as regards the Accused's mental state, his feelings of 'betrayal and despair', may not be trauma-related and could potentially be due, *inter alia*, to his status as an alleged perpetrator. The Panel explicitly said that it took a different view regarding the Accused's status as a victim and the issue of alleged torture, from that given by Drs Porterfield and Cohen.⁸⁷ In particular, the Panel considered:

J The Accused's "sense of betrayal and despair could be the result of realising the consequences of an alleged involvement in criminal acts, without being trauma-related. Likewise, they could be linked to facing the consequences but at the same time

⁷⁸ ICC-01/12-01/18-1197-[REDACTED]-Anx, para.71.

⁷⁹ ICC-01/12-01/18-1197-[REDACTED]-Anx, para.160.

⁸⁰ ICC-01/12-01/18-1197-[REDACTED]-Anx, para.236.

⁸¹ ICC-01/12-01/18-1197-[REDACTED]-Anx, para.160.

⁸² ICC-01/12-01/18-1197-[REDACTED]-Anx, para. 328.

⁸³ ICC-01/12-01/18-1197-[REDACTED]-Anx, para. 327.

⁸⁴ ICC-01/12-01/18-1197-[REDACTED]-Anx, p.4. See also, para.235. See also para.324. The Panel described sub-clinical symptoms such as headaches and intermittent sleep disturbance.

⁸⁵ ICC-01/12-01/18-1197-[REDACTED]-Anx, para.321.

⁸⁶ ICC-01/12-01/18-1197-[REDACTED]-Anx, para.321.

⁸⁷ ICC-01/12-01/18-1197-[REDACTED]-Anx, para.230.

also linked to traumatic experiences prior to his arrest, as well as individual and cultural factors, and arising from betrayal trauma discussed in this report. They could also be linked to traumatic experiences stemming from the alleged torture, without necessarily implying the presence or absence of a former, a current or a future mental disorder”.⁸⁸

J Whilst the Panel stated that it had little information about the alleged torture and had not seen any independent assessment of the issue, it observed that: “[i]f AH was not subject to torture, the symptoms outlined above could either be a misinterpretation of his current mental status, or a reflection of problems he faces due to his role as an alleged perpetrator, or could be the consequences of certain experiences that are neither directly linked to his arrest and the court proceedings nor the case itself, but manifest as a consequence of generally heightened levels of stress”.⁸⁹

J The Panel reported that the Accused said that: “whilst he had been held in the state prison, and particularly when he had been tortured, he had been in ‘constant fear’. The fear only stopped when he arrived in The Hague. However, he reported that his initial relief was short lived when he began to fully comprehend what were the charges he was facing and that statements taken from him in Mali were being relied on”.⁹⁰ This rather supports the contention that certain symptoms might instead relate to his status as an alleged perpetrator.

IV. **The Panel’s proposed measures or adjustments**

52. The Chamber observed that the Court’s case law on unfitness to stand trial also relates to “whether special measures or adjustments are necessary to address any medical condition of the accused during the trial proceedings, to the extent that such conditions may affect the accused’s fitness to stand trial.”⁹¹

⁸⁸ ICC-01/12-01/18-1197-[REDACTED] Anx, para.231.

⁸⁹ ICC-01/12-01/18-1197-[REDACTED] Anx, para.231. See also para.289, the Panel noted that the clinical picture of AH reflects “marked suffering that is coherent with AH’s upbringing, his individual and transcultural background, and his subjective processing of the trial and the Court proceedings”. See also para.322. The Panel noted that the Accused “was exposed to multiple adverse childhood experiences that suggest a more complex trauma picture than would be typically associated with a PTSD diagnosis”. See also para. 70: The Accused “went to great lengths to explain what he experienced, characteristic of ACE [Adverse Childhood Experiences] and relevant to him as they shaped his sense of justice, protection and betrayal. See also para. 69.

⁹⁰ ICC-01/12-01/18-1197-[REDACTED] Anx, para.71.

⁹¹ ICC-01/12-01/18-1006-[REDACTED] para.28.

53. Accordingly, the Panel were asked to provide their observations as to: “[t]he measures/adjustments, if any, that are recommended to address any issue above for the purpose of ongoing trial proceedings and/or for ongoing detention.”⁹²

(i) *Different type of restraint*

54. First, the Panel recommends using a different type of restraint because the Accused claims that some forms of restraint trigger “traumatic memories and associations”, although confirming that they are not experts as to the procedural rules regarding the use of restraints.⁹³ It is unclear to what “traumatic” memories these relate or how they impede the Accused’s ability to meaningfully exercise his fair trial rights. Accordingly, this measure does not appear to be well-founded. However, the Prosecution has no objection to a different type of restraint being used if the Detention Centre and the Chamber consider it is appropriate, and possible to do so.

(ii) *Review of trauma care and treatment options*

55. Second, the Panel recommends “a review of the treatment options available” to the Accused and that any mental health options should be coordinated with the Imam.⁹⁴ It is unclear to what “treatment options” the Panel refers, bearing in mind that both the Panel and the Accused considered that he does not currently require any psychological support or treatment,⁹⁵ and the Accused stated that he does not currently have any mental health problems.⁹⁶

56. The Panel’s recommendations on this point appear in part based on assumptions of the need to manage trauma or “provide trauma-informed care”.⁹⁷ However the Prosecution observes that: (a) this is inconsistent with the Panel’s own findings that the Accused’s “symptoms” may be unrelated to any trauma, and may potentially stem from being an alleged perpetrator;⁹⁸ (b) it is unclear from the Report as to how any alleged issues with treatment options impact on the Accused’s ability to meaningfully exercise of his fair trial rights, upon which the Panel was asked to report.

⁹² ICC-01/12-01/18-1006- [REDACTED] para.37.

⁹³ ICC-01/12-01/18-1197- [REDACTED] Anx, para.299.

⁹⁴ ICC-01/12-01/18-1197- [REDACTED] Anx, para.313.

⁹⁵ ICC-01/12-01/18-1197- [REDACTED] Anx, para.160, 236.

⁹⁶ ICC-01/12-01/18-1197- [REDACTED] Anx, para.160.

⁹⁷ ICC-01/12-01/18-1197- [REDACTED] Anx, para.297-298.

⁹⁸ ICC-01/12-01/18-1197- [REDACTED] Anx, para.231.

(iii) Measures in the Detention Centre

57. Third, the Panel recommends a number of measures related to the Accused, in the Detention Centre.

) The Prosecution has no observations on the recommendation that “his continued positive engagement with the detention facility guards should be encouraged”.⁹⁹

) The Panel’s recommendation that the Chamber review “the access and communication strategy” for family contact¹⁰⁰ is not linked to any specific mental condition that impedes the Accused’s ability to meaningfully exercise his fair trial rights, but instead it is identified more generally as a “chronic stressor”. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED].¹⁰¹ The Prosecution obviously has no objection to the suggestion that “some direct contact with family members” be allowed “as soon as this can be safely facilitated”.¹⁰²

(iv) Measures during, or in between, court proceedings

58. Fourth, the Panel has made various recommendations regarding potential measures during court proceedings.

) The Prosecution has no objection to the request for additional assessments by medical staff to consider the need for medication;¹⁰³ or provision of medical support in between appearances.¹⁰⁴ Although, the Prosecution observes that according to the Panel, the Accused reports that whilst he “feels distressed in Court”, that he is “able to recover in the intervals between hearings, i.e. when the Chamber does not sit. Therefore any

⁹⁹ ICC-01/12-01/18-1197-[REDACTED] Exp-Anx, para.314, 317.

¹⁰⁰ ICC-01/12-01/18-1197-[REDACTED] Anx, para.315-316.

¹⁰¹ See [REDACTED]. See also [REDACTED]. See also [REDACTED].
[REDACTED]; See also [REDACTED].
[REDACTED]. See also [REDACTED].

¹⁰² ICC-01/12-01/18-1197-[REDACTED] Anx, para.326.

¹⁰³ ICC-01/12-01/18-1197-[REDACTED] Anx, para.318.

¹⁰⁴ ICC-01/12-01/18-1197-[REDACTED] Anx, para.318.

(v) **Periodic review**

59. Finally, the Panel recommends “periodic review of the impact of ongoing proceedings” on the Accused’s mental state, including evaluation of his requirement to attend the hearing in person or be allowed to engage remotely, “to address his complaint against the OTP”, on matters related to alleged torture.¹¹² As stated above, the Panel’s comments regarding torture, including allegations that the Accused may be confronted with evidence that was “extracted under torture”,¹¹³ is flawed and unfounded. It is clear from the Panel Report that the Accused does not currently suffer from any medical condition that impacts on his ability to effectively exercise his fair trial rights. Accordingly, any future review should only be necessary if the Accused’s medical condition substantially alters.

60. Nevertheless, if the Chamber is minded to order a periodic review, the Prosecution submits, the following:

-) any future review should be strictly confined to the Accused’s fitness to stand trial, and not be a more general review of “the impact of ongoing proceedings” on his mental state - because the relevant question is whether he has any medical condition that impacts on his meaningful exercise of his fair trial rights, and not the existence or not of any particular medical condition *per se*;
-) the Panel should be instructed to strictly follow the Chamber’s instructions to apply the relevant legal tests regarding fitness to stand trial, and not go beyond those parameters;
-) the Panel should be instructed to refer only to any potential measures or recommendations strictly relevant or necessary to mitigate the impact (if any) of a medical condition on the Accused’s ability to exercise his fair trial rights, as opposed to general recommendations related to “trauma-care” (in particular where no recommendation is made that the Accused requires any medical treatment; and, it is possible that certain symptoms are unrelated to trauma); and,
-) if the same members of the Panel are instructed by the Chamber, that Panel, should be reminded that at all times they must be neutral, when interacting with the Accused,

¹¹² ICC-01/12-01/18-1197-[REDACTED] Anx, para.303-304..

¹¹³ ICC-01/12-01/18-1197-[REDACTED] Anx, para.303.

including in relation to the legal tests they are instructed to apply.

61. Contrary to the Defence's assertions: (a) the Panel has already made recommendations relevant to breaks during hearings and family visits;¹¹⁴ and (b) the issue of the impact of Ramadan on the court schedule¹¹⁵ is not relevant to the question of his fitness to stand trial, and therefore is not a matter for the Panel, but an issue that can be appropriately addressed by the Chamber. Nevertheless, as regards the impact of Ramadan, the Prosecution agrees that certain modifications to the normal court hearing schedule would be appropriate during Ramadan, not only for the sake of the Accused, but also for Prosecution witnesses similarly fasting each day. In particular, the Prosecution proposes that the Chamber consider shorter court hearing days on a case-by-case basis during this time period.

V. Conclusion

62. For all the above-stated reasons, the Prosecution requests that the Chamber find that:

-) the Accused remains fit to stand trial,
-) there is currently no impairment to his effective exercise of his fair trial rights; and,
-) if he decides to testify, the Accused may be subject to cross-examination by the Prosecution.

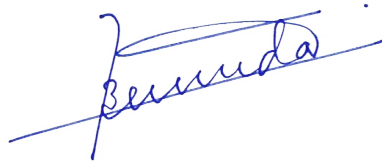
63. As regards the Panel's proposed measures, the Prosecution does not object to the suggestion that the Accused be medically assessed in between Court appearances to determine if he requires medication or medical support. The Prosecution also does not object to the Accused having more frequent access to an Imam [REDACTED]. The Prosecution defers to the Chamber's discretion regarding the requests for an alternative restraint; continued engagement with security guards; and, the issue of frequency and length of any necessary breaks during hearings.

64. Otherwise, the Prosecution submits that there is no substantiated need for the other proposed measures, namely:

¹¹⁴ [REDACTED]

¹¹⁵ [REDACTED]

-) to review the access or communication strategy in family contacts;
-) to re-position the Accused in the courtroom, so he does not need to look directly at the Prosecution team; or
-) a periodic review to assess “the impact of ongoing proceedings” on the Accused’s health. Any review should only be undertaken if deemed necessary because of a significant change to the Accused’s medical condition. If deemed necessary, any review should instead be focussed to assess if there is any medical condition that impacts on the Accused’s fitness to stand trial. The existing Panel, if reappointed by the Chamber to undertake such a review, should be reminded to adhere strictly to the Chamber’s instructions.



Fatou Bensouda, Prosecutor

Dated this 23 February 2021

At The Hague, The Netherlands