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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

With confidential Annexes A, B, D, F, and L confidential *ex parte* Annex C [Defence, Prosecution and Registry only] and confidential *ex parte* Annexes E, G, H, I, J and K [Defence and Registry only]

Public redacted version of 'Defence Observations on Report of Panel of Experts'

Source: **Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud**

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

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I. Introduction[1]

1. The Report of the Panel of Experts ('Report')[2] supports the finding that Mr. Al Hassan is currently unfit to stand trial. The linkage between evidence [REDACTED] in this case and his experiences in the DGSE have undermined his ability to meaningfully review evidence, instruct his Defence, actively follow the proceedings, and testify in his Defence. Without prejudice to this position, the Report further necessitates the immediate adoption of specific modifications to the modalities of trial hearings, and aspects of Mr. Al Hassan's detention that impact on his participation at trial hearings.

II. Submissions

The relevance and propriety of Dr. Chisholm's observations

2. The Defence has instructed Dr. Brock Chisholm in relation to the Report, and has appended his opinion.[3] Dr. Chisholm's observations concerning the Report are relevant and appropriate in all the circumstances given:

- *first*, the Registry confirmed that Dr. Chisholm is an expert with competence to assess fitness, and proposed him as an expert on the PoE;[4]
- *second*, in the Chamber's decision appointing the experts, the Chamber stated that it 'does not consider that the mere fact that an individual has professional ties with an expert appointed by a party in the present case is cause for exclusion';[5]
- *third*, Dr. Chisholm has himself confirmed that he does not consider that his work with Dr. Crosby in the past is any impediment to his providing his opinion;[6] and
- *fourth*, the Defence is not seeking to use Dr. Chisholm's expertise to replace the PoE's role or their findings, but since the Defence did not have the opportunity to discuss matters directly with the PoE, it sought Dr. Chisholm's assistance to interpret the PoE's findings, and to apply those findings to recent developments not before the PoE (including the death of Mr. Al Hassan's daughter in December 2020) and certain procedural modalities not otherwise covered in the Report.[7]

[1] Pursuant to Regulation 23*bis*(2) of the Regulations of the Court, this response has been filed confidentially as it responds to filings of the same classification.
[2] ICC-01/12-01/18-1197-Conf-Anx ('Report').
[3] Annex B ('Chisholm Report'). The instructions provided to Dr. Chisholm for this Report, and an annex of documents provided to him for this purpose, are contained at Annex A.
[4] Annex C, p. 1 (under 'Option 3'). See also Annex L concerning his admission to the List of Experts.
[5] ICC-01/12-01/18-1006, para 26.
[6] Annex B, Chisholm Report, paras 63-70.
[7] The ECHR has found that the right to a fair trial may require the Defence to be allowed to adduce expert opinions in order to understand or challenge admitted expert opinions: *Khodorkovsky & Lebedev v. Russia*, 11082/06, para. 731. See also *Prosecutor v. Kovacevic*, Decision on fitness, para. 7-8, concerning the ability of the Defence to file expert reports, subsequent to the reception of the Chamber's expert reports on fitness.

Given that the PoE applied an overly narrow definition of 'fitness', and made factual errors detrimental to Mr. Al Hassan, the findings constitute the minimum degree of incapacity

3. In its decision appointing the Panel of Experts ('PoE'), the Chamber noted that:[8]

> the concept of 'fitness to stand trial' 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. A number of relevant capacities can be discerned which are necessary for the meaningful exercise of these procedural rights. These include, inter alia, capacities to understand the conduct, purpose and possible consequences of the trial proceedings, instruct counsel and, if desired, to make a statement.

4. The Chamber further specified that these principles should guide the PoE's determination as to whether any medical issues impacted on Mr. Al Hassan's ability to exercise his procedural rights before the Court.[9] Nonetheless, rather than applying the definition elucidated by the Chamber, the PoE applied the 'Pritchard' definition of fitness, defined as the ability to comprehend the course of proceedings on the trial; know that they might challenge any jurors to whom they may object; comprehend the evidence; or give proper instructions to their legal representatives. [10] Whereas the PoE set out the above four criteria, the Pritchard test is usually described as encompassing the following six aspects: "i. Understanding the charges; ii. Deciding whether to plead guilty or not; iii. Instructing solicitors and counsel; iv. Exercising his right to challenge a juror; v. Following the course of proceedings; vi. Giving evidence in his own defence."[11] In contrast, the PoE utilised a passive formulation of "following the course of the proceedings", and further omitted Mr. Al Hassan's ability to give evidence in his defence, as part of its assessment of fitness. This is reflected by the PoE's acknowledgment that this issue fell outside the "narrow definition of fitness-to-plead".[12] The PoE therefore excluded critical findings concerning Mr. Al Hassan's ability to give evidence and his ability to meaningfully participate in the proceedings in connection with [REDACTED] evidence linked to his experience at the DGSE, from its overall conclusion concerning fitness to stand trial, although they did, conversely, acknowledge the relevance of such factors to a global assessment of Mr. Al

[8] ICC-01/12-01/18-1006-Conf, paras 33-34.
[9] ICC-01/12-01/18-1006-Conf, para 37.
[10] Report, para 237.
[11] Justice, 'Mental Health and Fair Trial', 2017, para 5.5.
[12] Report, para 292.

Hassan's capacities.[13] This error derives from the PoE's failure to apply the Pritchard test in its entirety, or in a manner fully encapsulating the matters set out by the Chamber for the PoE's assessment.

5. The Pritchard test pre-dates legal developments concerning the ability of vulnerable defendants to meaningfully exercise fair trial rights. For this reason, the UK Law Commission has described the Pritchard test as inadequate, and expressed its concern that its application can lead to conclusions as to fitness that are incompatible with fundamental fair trial rights.[14] The Law Commission thus articulated the appropriate standard as including consideration as to whether the person is unable to: understand the information relevant to the decisions that (s)he will have to make in the course of the trial; retain that information; use or weigh that information as part of the decision-making process; or communicate his/her decisions.[15] This formulation of the fitness test, which focuses on the ability of the defendant to actively participate in the trial process and considers passive cognition insufficient, is more consistent with the Chamber's focus on the meaningful exercise of procedural rights. The Chamber's standards, as derived from *Gbagbo*,[16] centred on the ability of the defendant to meaningfully exercise fundamental fair trial rights, by reference to internationally recognized human rights principles,[17] including, but not limited to, specific rights deriving from Article 67(1) of the Statute.[18] The Chamber also underlined that "special procedural guarantees may be necessary to protect the interests of accused persons, who, by reason of mental disabilities, are not fully capable of acting for themselves".[19]

6. The Report also contains a number of factual inaccuracies,[20] including the claim that the PoE were not provided access to detention unit medical records. These errors appear to

[13] As noted by Dr. Chisholm, "According to their own report on the CAPS, more than sufficient number of symptoms were met to satisfy the strict criteria of the PTSD diagnosis as described in DSM5. It definitely satisfies the PTSD criteria in the WHO ICD-11 (which I think is a far better taxonomy) (…) Based on their own observations, report and assessment Mr Al Hassan does meet criteria for PTSD in the conventional and specific sense": Annex B, paras 27-29.
[14] UK Law Commission, Consultation Paper No 197, Unfitness to Plead, para 2.101.
[15] UK Law Commission, Consultation Paper No 197, Unfitness to Plead, para 3.13.
[16] ICC-01/12-01/18-1006-Conf, paras 33-35, citing ICC-01/12-01/18-952-Conf, paras 34-35, which in turn, cites the Ongwen Medical Examination Decision, para 8; Gbagbo First Fitness Decision, para 50. The Ongwen decision adopted the standards set out in the Gbagbo decision.
[17] ICC-02/11-01/11-286-Red, paras 44-48.
[18] "the capacities: (i) to understand in detail the nature, cause and content of the charges; (ii) to understand the conduct of the proceedings; (iii) to instruct counsel; (iv) to understand the consequences of the proceedings; and (v) to make a statement": ICC-02/11-01/11-286-Red, para 50.
[19] ICC-02/11-01/11-286-Red, para 48.
[20] Annex D.

have caused the PoE to reach conclusions that ignored or minimised the conditions experienced by Mr. Al Hassan.[21] Their findings must therefore be viewed as representing the minimum degree of the incapacities experienced by Mr. Al Hassan.[22]

The PoE found that Mr. Al Hassan is unable to exercise critical fair trial rights

7. The PoE were instructed to make findings as concerns:[23]

> 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;

8. The PoE were not, therefore, required or empowered to make ultimate conclusions as concerns whether, in light of its findings concerning the above, Mr. Al Hassan should be considered fit or unfit to stand trial. The Chamber should therefore disregard the Panel's conclusions on this point, and instead, reach its own determination based on the Panel's findings concerning *first*, whether Mr. Al Hassan suffers from conditions, and *second*, the impact of these conditions on Mr. Al Hassan's ability to exercise the fair trial rights described at paragraphs 33 to 36 of the Chamber's decision.

The PoE found that Mr. Al Hassan experiences chronic trauma, and fulfils multiple criteria supporting the existence of a severe psychological condition

9. In order to satisfy the PTSD Scale for DSM-5, it is necessary for the individual to fulfil one symptom of criteria A, B and C and at least two symptoms from criteria D and E, and for these symptoms to be experienced for a period longer than a month.[24] The PoE's findings satisfy this threshold, and further reflect that Mr. Al Hassan is experiencing "marked suffering"[25] and that "the symptoms he currently experiences would represent a manifestation of PTSD, which is coherent with the reports and notes of other experts".[26]

10. With respect to Criteria A, the PoE stated that an assessment as to whether Mr. Al Hassan had experienced a traumatic event (i.e. through exposure to torture or CIDT in detention in

[21] Annex D.
[22] See also Annex B, Chisholm Report, paras 3-41.
[23] ICC-01/12-01/18-1006-Conf, para. 37.
[24] DSM-5 Diagnostic Criteria for PTSD.
[25] Report, para. 289.
[26] Report, para. 235.

Mali) fell outside their remit, and as such, they were unable to make a finding as concerns Criteria 'A'.[27] It is nonetheless instructive that the PoE found that:

- *first*, Mr. Al Hassan "did not appear to be prone to exaggeration of distress or fabrication of symptoms", and further, that he did not use the opportunities presented to him "for feigning distress or malingering";[28]
- *second,* "the account given in the expert reports to be credible and consistent with observations made during the POE's assessment of Mr. Al-Hassan",[29] and the PoE "have no reason not to believe Mr Al Hassan's account of [torture], which has been fairly consistent over time";[30] and
- *third*, "Dr Porterfield's findings [concerning PTSD] appear to be broadly consistent with the findings of the detention facility."[31]

11. There is, therefore, no basis not to rely on Mr. Al Hassan's self-report concerning his exposure to traumatic experiences, while detained in Mali.[32]

12. The PoE also found that Mr. Al Hassan fulfilled five separate symptoms of Criteria B,[33] two separate symptoms of Criteria C,[34] four separate symptoms of Criteria D,[35] four separate symptoms of Criteria E,[36] and the existence of aspects of derealization when memories of torture surfaced.[37] The PoE further found that in light of the duration of these symptoms, "the current state of AH's symptoms can be described as chronic".[38]

13. Notably, the reason for not reaching a positive conclusion for many other criteria was not due to the absence of symptoms, but the inability of the PoE to adequately assess the existence of symptoms due to the limitations of the examination process.[39] This suggests that the PoE's findings represent the minimum number of symptoms exhibited by Mr. Al Hassan. The PoE also went to great lengths to avoid triggering Mr. Al Hassan, for example, by structuring the discussions in a manner designed to avoid stress, and changing the topic

[27] Report, paras 170-171.
[28] Report, para 129.
[29] Report, fn 2.
[30] Report, para 302. Mr. Al Hassan reported consistent accounts of his experiences in Mali to detention unit medical officers from 2018 onwards (MLI-D28-0003-1376; MLI-D28-0003-1375; MLI-D28-0003-1390; MLI-D28-0003-1391; MLI-D28-0003-1392).
[31] Report, para 205.
[32] See also Chisholm Report, Annex B, para. 15: "The evidence in the POE report, medical records and Dr Porterfield's report are consistent with PTSD in response to torture in Mali."
[33] Criteria B.1, B.2, B. 3, B. 4, and B.5: Report, paras 174-181.
[34] Criteria C.1, and C.2: Report, paras 182-183.
[35] Criteria D.2, D.3, D.4, D.6: Report, paras 184-190.
[36] Criteria E.1, E.3, E.5, E.6: Report, paras 191-196.
[37] Report, para 201: "it was apparent to MK and RWP that AH lost contact to the here and now in situations where he started to remember elements from the alleged torture."
[38] Report, para 197.
[39] See for example, Criteria D.1, E.4, G.

of discussion whenever triggering topics were encountered.[40] Avoidance is not, however, a viable option where the triggering materials are of central relevance to Defence preparation. Mr. Al Hassan is thus likely to be experiencing more intense feelings of trauma and distress in circumstances where his environment is not deliberately constructed by trauma experts to avoid such triggers.

14. The PoE's reluctance to classify Mr. Al Hassan's condition as PTSD appears to be linked to their concern that this label would not fully capture Mr. Al Hassan's symptoms or treatment needs.[41] Whereas traditional assessments focus on the risk of suicide, "[t]he prophetic traditions explicitly and in unequivocal terms not only proscribe suicide but condemn the perpetrator of such an act to eternal retribution in the form of incessant repetitions of the act and the anguish of the mode of suicide."[42] For this reason, Mr. Al Hassan's statement that "[i]f suicide was accepted in Islam then I would have killed myself long ago" is highly significant, since "the mere contemplation of suicide (wishing for death), if understood within a cultural frame, is in itself prohibited and would be an indicator in AH's case of acute mental anguish."[43] The Report also underscores that even if the Chamber ultimately finds that Mr. Al Hassan is not a victim of torture, mental health issues could still persist and require attention.[44] In any case, for the purposes of evaluating the implications for fitness to stand trial, the particular *cause* or *label* for Mr. Al Hassan's symptoms are irrelevant: a defendant is not unfit to stand trial because he has PTSD, he is unfit to stand trial because his individual circumstances affect and undermine his ability to exercise critical fair trial rights. What matters is that the PoE made several significant findings on Mr. Al Hassan's individual circumstances, and their impact on his ability to exercise certain capacities, including:

a. Learned helplessness and fear of retaliation,[45] which affects Mr. Al Hassan's ability independently to assert and exercise his procedural rights;

[40] Report, paras 39-54.
[41] Report, paras 202-203.
[42] Report, para 312.
[43] Report, para 312.
[44] Report, para 295: "If an independent investigation dismissed the accusation of torture, no trauma-related impairments would be expected. In this case, overwhelming negative emotions and deterioration of AH's mental state would be expected that in turn can also affect his fitness to plead and his ability to exercise his fair trial rights, could still occur as a consequence of being confronted with the consequences of alleged criminal acts. This would constantly have to be evaluated."
[45] Report, fn.1, paras 24, 40, 137-138.

b. Avoidance,[46] which affects Mr. Al Hassan's ability to participate in, and actively follow proceedings, and instruct his Counsel in relation to evidence, filings [REDACTED] that has a link to Mr. Al Hassan's experiences in Mali;
c. Derealization, such that he loses contact with the 'here and now',[47] which impairs his ability to follow the proceedings and instruct his Counsel; and
d. Trauma and distress,[48] triggered by certain procedures (handcuffing, interrogation patterns), evidential content, or visual cues (the presence of the Prosecution), which undermines his ability to formulate rational responses and choices, in connection with instructions [REDACTED], and generates 'marked suffering' in connection with his presence at trial.

The PoE's findings support the conclusion that Mr. Al Hassan's ability to exercise critical fair trial rights is severely impaired

15. Although the PoE focused in particular on the consequences of providing testimony, and the use of hand restraints,[49] their description of procedural impairments was far broader, and encompassed his ability to: effectively participate in the proceedings and instruct his Defence in relation to evidence and [REDACTED]; follow and instruct his Defence in relation to judicial decisions and orders based on such evidence and information; be present in the courtroom; instruct his Defence virtually; and be detained in The Hague (and thus necessarily separated from his family).

16. As concerns the first aspect concerning the implications of receiving or hearing tainted evidence, the PoE found that: "[i]f some evidence (even less than the 90% suggested by AH) was obtained under forced confession every confrontation with the evidence presented in Court would serve as a trauma trigger. The Court proceedings per se would then provide

[46] Report, paras 176, 182-183.
[47] Report, paras 40, 125, 179, 183, 195, 201, 292.
[48] Report, paras 125, 176-178, 180, 183, 223, 288-289, 304.
[49] Report, para 304, summary p 4: "**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**. These also include potential trauma triggers, such as being handcuffed or facing the Prosecutor in Court." See also paras 281-283: "AH may be fit to plead to those aspects of his case that do not relate to torture evidence. However, if as the trial proceeds, the issue of torture and torture evidence becomes increasingly relevant to his defence or to the case of the OTP, AH may find himself in the invidious position of being cross examined by an individual who he claims was complicit in his torture. The potential impact of testifying on the health and wellbeing of AH and his ability to give evidence effectively on his own behalf could be considerable. **Having satisfied the Pritchard criteria with regards to fitness to plead he may become unfit to give evidence on his own behalf at the point of cross examination. AH's psychological wellbeing and hence his fitness is liable to change particularly in circumstances in which he is placed under increasing stress**. Cross examination may be a particularly high risk time for him, given his experiences of interrogation under torture and could trigger episodes of agitation, hyperarousal and paranoia. The manifestation of PTSD symptoms from an individual and cultural perspective must be considered in order to adequately capture AH's mental health status and its consequences for the court proceedings. AH's experience of torture would constitute a condition that may impact his ability to give testimony and his defence would be unduly disadvantaged as a result. **To defend himself AH must have the capacity to be cross examined which speaks to his ongoing ability to exercise his fair trial rights**" (emphasis added).

a high risk for serious deterioration of AH's mental health, as they would indeed objectively confirm his suspicion of not being respected and treated as a human being."[50] This finding has implications which go beyond the admission of Mr. Al Hassan's statement, and his related ability to testify. [REDACTED]. It is impossible for Mr. Al Hassan to review [REDACTED] without reliving his own experiences there. As a result, "AH reported that some of the files are a potential trigger for him too. He has therefore not read some of the Court documents that have been disclosed to him."[51] The Defence will thus be denied access to crucial instructions by virtue of Mr. Al Hassan's avoidance reactions. [REDACTED], the Defence will also be entitled and indeed duty bound to raise such matters, [REDACTED]. This will trigger severe degree of trauma for [REDACTED] Mr. Al Hassan: " [REDACTED], then there is the strong potential that that will provoke dissociative flashbacks and he will not be able to focus on present stimuli. It is likely to provoke a strong emotional response. He would not be able to."[52]

17. It would occasion suffering to Mr. Al Hassan to require him to review [REDACTED] the evidence, but it would also undermine his right to fair trial to proceed without the benefit of instructions concerning potential investigations [REDACTED]. These fair trial consequences are triggered irrespective as to the Chamber's position as concerns whether this [REDACTED] evidence is 'tainted' within the meaning of Article 69(7) of the Statute or Article 15 of CAT since, as underlined by the PoE, "traumatization primarily depends on the individual's subjective processing of potential trauma cues. Thus, the sense of betrayal and dehumanization is real to AH, irrespective of any objective involvement of the Prosecutor in the alleged torture."[53] The PoE's finding on this point also supports the conclusion that the Chamber's ongoing reliance on information or evidence related to Mr. Al Hassan's experiences at the DGSE would trigger "a serious deterioration of AH's mental health".[54] This consequence is incompatible with the Chamber's positive duty to protect the physical and psychological well-being and dignity of the persons appearing

[50] Report, para 293. See also para 294: "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 that case against him is in part built on evidence extracted under torture."
[51] Report, para 135.
[52] Chisholm Report, Annex B, para 39.
[53] Report, para 289.
[54] Report, para 293.

before the Chamber (which necessarily includes the accused).[55] While participation in criminal proceedings necessarily entails some degree of humiliation and discomfort, a trial process should not be oppressive[56] or otherwise give rise to a degree of suffering or hardship that is unnecessary, unreasonable, or incompatible with respect for Mr. Al Hassan's inherent dignity.[57] It follows that Mr. Al Hassan cannot be deemed 'fit' to stand trial, if the act of standing trial would—as predicted by the PoE—subject him to psychological harm and injury.[58]

18. In terms of Mr. Al Hassan's presence in the courtroom, Article 67(1)(d) establishes a right, not just an obligation, to be physically present in the courtroom. The PoE have nonetheless identified two impediments as concerns Mr. Al Hassan's ability to exercise this right. The first is that his presence is secured through the use of physical restraints (handcuffs) in transit. The PoE observed that the use of such restraints occasions acute distress.[59] This exceeds the degree of suffering inherent in lawful sanctions, and triggers traumatic memories and associations. These memories intrude on his ability to effectively follow the proceedings, and further impair his ability to make choices that are in the objective best interests of his Defence. Concretely, the associated distress and trauma of attending hearings means that when faced with the option of seeking a prolongation in testimony, Mr. Al Hassan will oppose this option if it means that he will be required to attend additional hearings at the seat of the Court.

19. The second impediment concerns Mr. Al Hassan's difficulty in being in the physical presence of the Prosecution, in light of the stance taken by the Prosecution towards his detention and interrogations at the DGSE.[60] This includes the Prosecution's reliance on DGSE cooperation and content of DGSE interrogation records, and persistent opposition to any recognition that Mr. Al Hassan's experience at the DGSE could be characterized as

[55] Article 68(1) of the Statute. See also ICC-01/04-01/07-521, paras 1, 33-34, where the Appeals Chamber affirmed that the Chamber's protective duties extends beyond victims and witnesses, to persons whose security or well-being might be placed at risk on account of the activities of the Court.
[56] See ICC-01/04-01/06-772, para 29, and ICC-02/05-03/09-410, paras 97, 121, concerning the application of the abuse of process doctrine to "oppressive" proceedings.
[57] *Kudła v. Poland*, 30210/96, paras 92, 94.
[58] Report, p. 4: "However, the POE have identified areas of concern that place AH at risk and should be taken into account during the proceedings. Failure to do so in the opinion of the POE could: A) Impair his capacity to exercise his fair trial rights, and B) Cause suffering and significant damage to his mental health over the course of the Court Proceedings and beyond."
[59] Report, p. 4: "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. These also include potential trauma triggers, such as being handcuffed or facing the Prosecutor in Court"; para. 125.
[60] Report, paras 131-132, 176, 261, 265, 268, 274-275, 280, 288, 292.

torture or CIDT. Although Mr. Al Hassan has adopted measures to help him cope, as underlined by the PoE, "the absence of apparent signs of fear during the Court hearings is not an indicator for the actual threat AH experiences ('this is too painful')."[61] It is well-recognised that the act of appearing in court and testifying as a torture victim can occasion acute distress and anxiety, irrespective of the actual guilt of the defendant.[62] Accordingly, in the same way that special measures for such witnesses are not *per se* incompatible with the presumption of innocence, Mr. Al Hassan's distress is relevant to his ability to participate effectively in court proceedings, irrespective of the Chamber's position concerning the Prosecution's knowledge or involvement in matters concerning Mr. Al Hassan's detention and interrogation at the DGSE.

20. The PoE has suggested that these two issues could be mitigated through remote participation. This would indeed constitute an improvement, and would, to some extent, ameliorate the trauma Mr. Al Hassan experiences during transit to the Court and inside the courtroom. It does, however, require Mr. Al Hassan to renounce a key right—the right to be physically present in court—and to accept conditions of participation which allow reduced and less effective communication with his Defence.[63] This solution also does not address the "considerable" issues of concern that would arise if Mr. Al Hassan were to testify in his Defence, including the likelihood of generating "episodes of agitation, hyperarousal and paranoia".[64] The effects would touch not only on Mr. Al Hassan's level of stress, but also impair "necessary cognitive functions and a loss of contact to the here and now". [65] As described by the PoE, the trauma in such an event arises not only from

[61] Report, para 134. See also para 274: ""I do what I can. I have found ways to cope because I have to, because the judge ordered it. I can listen to his (prosecutor's) voice but I cannot see him. I do not know how much longer this can go on." It felt as if he was alluding to the fact that he would just shut down and that matters would be taken out of his hand".
[62] See for example, J. Ciorciari, A. Heindel, 'Trauma in the Courtroom', Cambodia's Hidden Scars March 2011, pp. 125-147, at pp. 125-127. See also Inter-American Institute of Human Rights, 'Comprehensive Attention to Victims of Torture in Cases under Litigation: Pyschosocial Contributions', 2009, pp. 65.
[63] The Defence has no mechanism to communicate with Mr. Al Hassan during the hearing itself, and as it was necessary for him to leave the video-conference area for food, tea, or to refresh himself, the telephone line established for contact prove ineffective, and contact was instead established by calling the external detention line, and speaking to Mr. Al Hassan as and when he returned to his room.
[64] Report, paras 282-283.
[65] Report, para 292: "the re-enactment of the alleged torture during court proceedings especially triggered by the presence of the Prosecutor or a cross-examination that might resemble interrogations he had faced, would likely cause strong negative feelings, an impairment of necessary cognitive functions, and a loss of his contact to the here and now. This was evident during the interviews. This would lead to a negative impairment of his ability to give evidence in his own defence and consequently has to be acknowledged, even if a very conservative and narrow definition of fitness-to-plead might overlook this crucial point"; para 321 "Cross-examination may be a particularly high risk time for him, given his experiences of interrogation under torture and could trigger episodes of agitation, hyperarousal and paranoia."

facing the Prosecution, but also from being subjected to the same interrogation patterns and questions that were put to him by both the DGSE and the Prosecution, while detained in the DGSE.[66] Triggers could be physical, emotional, cognitive, situational, or relational,[67] and arise from a variety of trauma reminders, including "being interrogated by being asked the same questions over and over again, not being allowed to refuse to answer, not having breaks during an interview, feeling disrespected as a human being (also in relation to disrespecting his Islamic religion), wearing masks, not knowing the individuals who were interviewing him and their roles, not knowing what was going to happen in a situation, being refused drink".[68]

21. In addition, the PoE noted that Mr. Al Hassan exhibited a learned conviction not to reveal personal details, and a deep fear of retaliation.[69] In practice, this would impact on his ability to disclose information that could, in his belief, trigger retaliation from authority figures. The PoE further characterized the intensity of impairment as being of a level that would undermine his capacity to effectively exercise this right, and thus his fitness to stand trial.[70] This factor should be given particular weight in light of the significant extent to which the Prosecution has relied on Mr. Al Hassan's statements to substantiate the arrest warrant, the charges, monitoring conditions, and further investigations with [REDACTED] experts.[71]

[66] Report, para 282: "Cross examination may be a particularly high risk time for him, given his experiences of interrogation under torture"; para 292: "the re-enactment of the alleged torture during court proceedings especially triggered by the presence of the Prosecutor or a cross-examination that might resemble interrogations he had faced, would likely cause strong negative feelings, an impairment of necessary cognitive functions, and a loss of his contact to the here and now. This was evident during the interviews. This would lead to a negative impairment of his ability to give evidence in his own defence and consequently has to be acknowledged, even if a very conservative and narrow definition of fitness-to-plead might overlook this crucial point". See also para. 321 "Cross-examination may be a particularly high risk time for him, given his experiences of interrogation under torture and could trigger episodes of agitation, hyperarousal and paranoia."

[67] Report, para 37: "Torture in general uses mechanisms such as taking away the individual's sense of control, dignity, or individualism (…). General measures have to be taken to treat a torture survivor in a way that is different to the initial and potentially traumatizing torture setting, in order to prevent the individual from re-experiencing a pattern of adverse past trauma cues in the here and now (…). This includes the following triggers: physical (e.g. sitting in an uncomfortable position as during the time when the torture happened), emotional (e.g. feeling dehumanized), cognitive (e.g. having thoughts about the current situation that resemble the thoughts an individual had during the torture session), situational (e.g. facing the same seating arrangement in a room), or relational (e.g. being reminded of the torturer by the way the interviewer acts, speaks, or treats the individual)."

[68] Report, para 38.

[69] Report, paras 278-279.

[70] Report, para 282: "The potential impact of testifying on the health and wellbeing of AH and his ability to give evidence effectively on his own behalf could be considerable. Having satisfied the Pritchard criteria with regards to fitness to plead he may become unfit to give evidence on his own behalf at the point of cross examination"; See also paras 292 and 311: "There is a risk based on the factors set out in this report that AH will begin to decompensate at some point during the trial."

[71] ICC-01/12-01/18-885-Conf-Exp-Corr, fns. 289-291; ICC-01/12-01/18-885-Conf-Exp-AnxE; ICC-01/12-01/18-885-Conf-Exp-AnxF; ICC-01/12-01/18-885-Conf-AnxG; ICC-01/12-01/18-885-Conf-AnxH; ICC-01/12-01/18-885-Conf-AnxI; ICC-01/12-01/18-885-Conf-Exp-AnxJ.

The impairment to Mr. Al Hassan's ability to testify thus impacts and undermines the ability of the Defence to challenge the entirety of the charges, and the specific procedural regime applied to his detention at this Court. The specific sequelae referred to in the context of cross-examination also apply equally to examination and attempts by the Defence to elicit instructions on areas that were canvassed by the DGSE or Prosecution during DGSE interrogations. This is consistent with the PoE's findings concerning aspects of their interviews with Mr. Al Hassan that caused him to re-experience his memories of torture.[72] The PoE's response, which was to change the topic in order to reorient him,[73] is not a viable option during examination or cross-examination. The triggered cognitive impairments would mean not only that Mr. Al Hassan would be unwilling to address certain issues, but that he would be unable to do so, in a manner that is consistent with his right to effective legal representation.

22. A further impediment to the exercise of Mr. Al Hassan's fair trial rights arises in connection with the PoE's finding that "[v]isual stimuli or being recorded in particular seem to serve as trauma triggers for him."[74] Throughout these proceedings, the Defence has consistently indicated that the use of video-conferencing triggers Mr. Al Hassan's memories of particular DGSE interrogations,[75] and yet his concerns have been persistently disregarded. In particular, rather than facilitating in person visits from the Defence or Mr. Al Hassan's family members, the Registry has posited that Mr. Al Hassan should use video-conferencing.[76] The Detention Unit Medical Officer has further insisted that video-conferencing should be used in connection with both psychiatric evaluation and potential treatment.[77] This gives rise to a "double-bind"[78] in the sense that not only is Mr. Al Hassan being presented with options that are illusory in reality (since he is cognitively unable to exercise them), but the fact that there continues to be an expectation that he should use them reinforces his concern that his experiences of torture have either been disbelieved or ignored by authority figures. As underlined by the PoE, procedural or judicial actions

[72] Report, paras 125, 179, 191.
[73] Report, para 179.
[74] Report, para 280. See also Report, para 37 concerning the POE's opinion that torture triggers "can be situational (e.g. facing the same seating arrangement in a room), or relational (e.g. being reminded of the torturer by the way the interviewer acts, speaks, or treats the individual)."
[75] Annex E, pp 1-2; see also ICC-01/12-01/18-1249-Conf-Exp-Corr, para 36; ICC-01/12-01/18-870-Conf-Red, paras 33, 37, 44, 45 and 49.
[76] Annex E, pp 1, 3-4.
[77] Annex G, p 1, para 2.
[78] A double-bind is "a psychological predicament in which a person receives from a single source conflicting messages that allow no appropriate response to be made".

which negate his experiences "objectively confirm his suspicion of not being respected and treated as a human being", and therefore "provide a high risk for serious deterioration of AH's mental health'.[79] In such circumstances, the repeated suggestion that Mr. Al Hassan should avail himself of video-conferencing not only fails to assist him, it harms him, insofar as it implies that his responses are not real or valid. This is further exacerbated by the fact that religious concerns expressed by Mr. Al Hassan concerning the impact of visually monitoring interactions with his family (which would necessarily occur in video-conferencing) have not been addressed.[80]

23. The above factor must also be viewed in connection with the specific and complex implications of 'betrayal trauma', and the potential implications as concerns Mr. Al Hassan's ability to make "healthy decisions about whom to trust", and to seek or depend on assistance from institutional authorities.[81] There is thus a clear distinction between what may appear objectively reasonable to the Defence and Registry as concerns potential communication options, and what Mr. Al Hassan is himself capable of believing and agreeing to, in light of the profound fear, subjugation and deception, he experienced while detained at the DGSE.82 Accordingly, in line with the ICTY Appeals Chamber's approach in the *Stanišić* case, the question is not whether it is technically feasible to facilitate communications between Mr. Al Hassan and his Defence or family by video link, but whether it would be consistent with his mental health to use this specific technology.[83] This aspect of 'betrayal trauma' also creates residual and ongoing difficulties for the Defence. The process of obtaining instructions is tantamount to walking in a field strewn with landmines. The standard and strict approach to procedural deadlines does not, in this sense, account for the delays and secondary trauma occasioned from dealing with a traumatized client, who cannot, for reasons cognitively beyond his control, make "healthy decisions" as concerns trial activity.[84]

[79] Report, para 293.
[80] See Report, para. 38 concerning religious disrespect as a trauma trigger. See ICC-01/12-01/18-791-Conf-Red, paras 51-56 concerning the expression of such religious concerns, and Annex E, p 2.
[81] Report, paras 166-167.
[82] This includes being told that his family had [REDACTED] killed: MLI-D28-0002-0535 at 0551-0552, 0553, 0564-0565.
[83] *Prosecutor v. Stanišić*, 'Decision on the Defence Appeal of the Decision on the Future Course of the Proceedings', 16 May 2008, para 20.
[84] See also Chisholm Report, Annex B, paras 60-62.

24. The above factors cannot be disaggregated and considered in isolation. The direct link between fitness to stand trial, and the right to a fair trial, requires the Chamber to ensure that the cumulative impact of these impairments of Mr. Al Hassan's capacities do not undermine his right to a fair trial and the principle of equality of arms.[85] It is not enough to conclude that Mr. Al Hassan is *able* to stand trial, the Chamber must also conclude that Mr. Al Hassan is able to do so, in a manner that is consistent with his overall right to a fair and impartial trial, and which does not place the Defence at a procedural disadvantage when compared to the Prosecution, due to Mr. Al Hassan's mental health issues.[86] The principle of equality of arms, at the international level, must also be applied in a manner that takes into account the actions of third parties, and factors beyond the control of the Court.[87] In the event that a defendant is unable to exercise key procedural rights due to factors that cannot be remedied by the Chamber, then the question arises as to whether the Court should stay the proceedings, and release the defendant, rather than countenance a less than fully fair trial.[88] As underlined by the Trial Chamber, "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".[89] If certain COVID-related impediments[90] identified by the PoE cannot be removed, the trial cannot continue. When viewed through these considerations, it is clear the PoE's findings support a conclusion that the current structure of this trial does not allow for Mr. Al Hassan to exercise necessary and key fair trial rights, in a manner which is effective and consistent with his right to mental health.

25. Finally, the PoE Report was based on an evaluation that occurred before the death of Mr. Al Hassan's daughter. As noted by Dr. Chisholm, "the death of his 7 year old daughter, which occurred while he is in prison and unable to be there, carries the strong potential of exacerbating symptoms of PTSD as well as the difficulties associated with bereavement such as avolition and concentration, which affect a fitness to plead."[91] As a result of the

[85] 'Access to Justice of Persons with Disabilities', December 2019, pp. 23-24.
[86] Article 13 of the UN Convention on the Rights of People with Disabilities sets out the positive obligation to "ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages."
[87] *Prosecutor v. Tadić*, Appeals Judgment, para 52.
[88] ICC-01/04-01/06-1486, para 82.
[89] ICC-01/12-01/18-1006-Conf, para 32. See also ICC-02/11-01/11-286-Red, para 43. See also ICC-02/11-01/11-286-Red, para.43.
[90] See Report, paras 220-229.
[91] Annex B, Chisholm Report, para 32.

fact that Mr. Al Hassan was unable to be with his family at this critical point, he has been unable to process and recover from this tragedy. This operates as a multiplier factor as concerns the residual pain and distress that were built into his system due to what was affectively an enforced disappearance from them, during his detention at the DGSE. His latest loss is part of a continuum of trauma that speaks to the unfairness and impossibility of requiring him to participate in proceedings that continue to be ineliminably tied to his experiences in the DGSE.

The Report supports the need for treatment and adjustments to the modalities of the trial

26. According to the findings in the Report, there is an irresolvable tension between the use of DGSE evidence in this case, and Mr. Al Hassan's fitness to stand trial. He cannot effectively review, instruct his lawyers or participate in proceedings concerning such evidence. The Court's reliance on such evidence would also occasion further mental harm, by disrespecting and disavowing his experiences as a torture survivor. The potential exclusion of this evidence would not, however, fully cure or address Mr. Al Hassan's ongoing treatment and rehabilitation needs as a torture survivor/vulnerable defendant with mental health issues standing trial. The PoE therefore recommended that:

a. "the Chamber take every reasonable step to mitigate Mr Al-Hassan's distress and maintain his fitness in relation to the ongoing court proceedings. It includes the implementation of measures that facilitate his attendance at the court when he is needed and facilitate his participation in the proceedings as they continue";[92]
b. there be "a review of the treatment options available to AH both at the detention facility and if required externally. Western mental health options should be coordinated with his Iman as to ensure both approaches are congruent and complementary with one another";[93]
c. "[d]uring transit to and from the Court, utilizing a restraint that is less triggering is advisable and hence recommended by the POE in AH's case";[94] and
d. "it would clearly be desirable if AH could be allowed to have some direct contact with family members as soon as this can be safely facilitated". [95]

27. Although some of these issues fall within the *prima facie* remit of the Registry, the Chamber's jurisdiction and positive duty to intervene is triggered by virtue of the direct impact on Mr. Al Hassan's ability to effectively participate in the proceedings.

[92] Report, paras 299-300.
[93] Report, para. 113.
[94] Report, para. 299.
[95] Report, para. 326.

28. As concerns the first and second aspects, a critical aspect of the PoE's findings turned on Mr. Al Hassan's ability to recover from distress during intervals in the hearings.[96] His recovery is thus contingent on the existence of adequate intervals between witnesses, and during their testimony. As observed by Dr. Chisholm, this is also tied to the need for predictability, and sufficient time to review sensitive materials.[97] Mr. Al Hassan attempts to cope by giving himself self-affirmations concerning his ability to endure and recover from certain periods of activity. This depends on there being a clear and ascertainable 'light at the end of the tunnel', such that he is aware, in advance, that he can benefit from a pre-identified period of non-court activity.

29. Similarly, although the PoE opine that EMDR can, in principle, prove effective as a means to treat conditions akin to those experienced by Mr. Al Hassan, the PoE attach the caveat that this will depend on whether it is administered by someone who is experienced in using it with this population.[98] As further explained by Dr. Chisholm, the effective use of EMDR is also contingent on its application in a consistent and frequent manner: to have one psychologist/psychiatrist administer it, and to do so on at least a fortnightly basis, or in a block of treatment.[99] This can be contrasted to Mr. Al Hassan's experience: he saw at least three different psychiatrists, and the sessions were scheduled intermittently over the course of months.[100] The use of EMDR also produces intense emotional reactions, including nightmares and flashbacks.[101] Notably, Mr. Al Hassan's reluctance to pursue treatment was tied to his concerns regarding the impact that treatment would have on his ability to enjoy family visits, or to engage in trial preparation.[102] Mr. Al Hassan has a right to receive treatment, but it would create an undue and unfair legal disadvantage to schedule such treatment during periods of active court activity. The first and second aspect thus both speak to the importance of scheduling regular and predictable breaks during the witness blocks, to allow Mr. Al Hassan to recover and receive treatment. This would also be consistent with the practice in other ICL cases.[103] The Defence has been advised, for example, that the hearing blocks in the *Yekatom* and *Ngaïssona* case have been scheduled

[96] Report, para. 320.
[97] Annex B, Chisholm Report, paras 35, 59.
[98] Report, para. 100.
[99] Annex B, Chisholm Report, para 50.
[100] MLI-D28-0003-1373; MLI-D28-0003-1943; MLI-D28-0003-1948; MLI-D28-0002-0535 at 0580-0581.
[101] Annex B, Chisholm Report, para. 51; MLI-D28-0003-1444; MLI-D28-0003-1401.
[102] MLI-D28-0003-1399, MLI-D28-0003-1411.
[103] Annex F.

to allow for predictable breaks between short chunks of hearings (i.e. two and half weeks on, one and a half off, then four weeks on, two weeks off *et cetera*), and the Chamber does not sit on Wednesdays.

30. Whereas the PoE appear to think that Mr. Al Hassan does not want treatment, Mr. Al Hassan has repeatedly and recently asked to see a psychiatrist or psychologist,[104] and the PoE acknowledge that the act of speaking to specialists (the experts) appears to have a salutary impact on Mr. Al Hassan's well-being.[105] Mr. Al Hassan has been unable to exercise this right due to the fact that the Detention Unit Medical Officer has decreed, first, that external medical practitioners cannot access the Detention Unit, and second, any meetings with in-house specialists must be conducted through remote conferencing as concerns interpretation.[106] As a result, the only persons that Mr. Al Hassan has been able to speak to concerning his psychological concerns (particularly in light of his recent bereavement) have been his Defence.[107] The Defence are not trained specialists in this area, and the fact that circumstances have required the Defence to assume such a role has triggered significant psychological and professional burdens for the Defence,[108] and further hindered Mr. Al Hassan's path to recovery.

31. A key hurdle that needs to be cleared in relation to an effective treatment plan is the role played by [REDACTED] as the gatekeeper as concerns Mr. Al Hassan's medical and psychological needs. The PoE note Mr. Al Hassan's concerns regarding his loss of confidence in [REDACTED].[109] These concerns must be viewed in light of the role that [REDACTED] played in relation to the PoE's assessment itself. This included [REDACTED] providing incorrect information concerning the status of Mr. Al Hassan's consent to provide medical records, impeding the transmission of such records, and actively advising the PoE not to conduct in person evaluations, notwithstanding the existence of a Defence request, and Chamber recommendation to the contrary.[110] This raises questions concerning [REDACTED]. In any case, the existence of these concerns

[104] Annex G, p 1, para. 2; see also pp 5-7, paras 16-23.
[105] Report, paras 41, 147: "One had the sense that the experience of speaking freely without hostility or judgment about him or his situation had brought him a sense of relief".
[106] Annex G, p 9, paras 27-28; see also pp 5-7, paras 16-23.
[107] His communications with his family are monitored, and he cannot speak to them about issues concerning the case, which includes his experiences at the DGSE.
[108] Annex B, Chisholm Report, paras 61-62.
[109] Report, para. 216.
[110] Annex H.

and lack of trust will hamper Mr. Al Hassan's ability to seek and obtain necessary medical assistance, particularly in light of the conditions identified by the PoE, including his passivity/learned helplessness,[111] and betrayal trauma and trust issues.[112]

32. As concerns the recommendation that such treatment needs be coordinated with his religious requirements, Mr. Al Hassan's previous request to attend Friday prayers was rejected due to the fact that it would have required him to interact with the Dutch population. Now there are more Muslim detainees at the Detention Unit, Mr. Al Hassan would appreciate being afforded the possibility of exercising this right on a regular basis (for example, by not scheduling witness testimony on Fridays). Mr. Al Hassan's ability to recover during breaks in the hearings is also dependent on his ability to engage in prayer. Mr. Al Hassan's ability to exercise this right effectively has been undermined by the conditions under which he has been required to do so. Specifically, although the Defence has informed the Registry that is contrary to the Koran to conduct prayer in the immediate vicinity of a toilet, the Registry has refused to allow Mr. Al Hassan to use the consultation room for this purpose,[113] even though Mr. Al Hassan is allowed to enter this room, and to be in this room (briefly) before and after his lawyers leave. The PoE have underscored in this regard the central role that religion plays in Mr. Al Hassan's coping strategy,[114] and noted that disrespect for his religion could be a trauma trigger.[115]

33. As noted above, a significant component of the Report concerns the impact of restraints on Mr. Al Hassan's mental well-being at a critical juncture of the proceedings (his arrival at the Court at the beginning of the hearings). The Defence has attempted to resolve this issue with the Registry but has been unable to do so.[116] Indeed, it is concerning that notwithstanding the fact that [REDACTED] has accessed a range of different reports concerning Mr. Al Hassan's history of being handcuffed continuously in Mali, and the impact of restraints on him, he appears to have expressed the view that he sees no issue with the use of such restraints.[117] The PoE's unequivocal recommendation on this point thus highlights [REDACTED] to address trauma related sequelae. Although this matter

[111] Report, para. 40.
[112] Report, paras 166-167, 185, 189, 202, 216.
[113] Annex I.
[114] Report, para. 208: "If for example he lost his sustaining faith in Allah it could have far more catastrophic effects than would be captured in a PTSD diagnosis"; para. 325: "AH's religion is a further protective factor, reading the Koran, praying and having regular contacts with the Iman is necessary for his psychological wellbeing and for sustaining hope."
[115] Report, para. 38.
[116] Annex J.
[117] Annex J, p 1: "[REDACTED]"

falls within the primary competence of the Host State, the Court is competent to address requests for assistance under the Headquarters Agreement, with a view to identifying alternative measures.

34. Finally, a critical aspect of Mr. Al Hassan's mental well-being is tied to his ability to enjoy meaningful interactions with his family. Mr. Al Hassan was scheduled to have an in person family visit in the first part of 2020, which visit has been postponed indefinitely. As things stand, Mr. Al Hassan has no concrete information as to if and when he will see his family. This is a source of considerable stress and despair, particularly in light of the current level of insecurity in Mali, and his regrettably rational fear that something could happen to family members before he sees them again.[118]

35. The COVID pandemic has not resulted in a cessation of family visits at the Scheveningen penitentiary.[119] This fundamental right has nonetheless been curtailed for ICC detainees by the particular policies implemented by the Detention Unit Medical Officer, and the absence of any attempt to devise practical solutions for in person visits. This could include, for example, prioritizing the ability of the detainees to access the vaccine (and, where possible, arranging for visiting family members to receive the vaccine in advance of visits) or transferring detainees to a temporary secure Dutch safe house for the duration of the visit. The point is that solutions that allow for in-person visits exist, and have been implemented in detention centres and prisons throughout The Hague,[120] notwithstanding the COVID pandemic, and there is a positive obligation on the part of the Court to find these solutions, as a matter of priority.

36. As noted by the PoE, this issue directly impacts on Mr. Al Hassan's mental well-being, and thus his fitness to stand trial.[121] Given that the Chamber has ordered his ongoing detention at the seat of the Court, the Chamber also has an overall supervisory responsibility to

[118] See Annex B, Chisholm Report, para. 35: "The next largest mitigator of PTSD symptoms following severe trauma is predictability. Torture in particular is predicated on a lack of control and not being able to predict. There is necessarily a lack of control in a prison environment, but there is normally a lot of predictability, at least in safely run prisons such as the ICC one. However, in the pandemic there is a loss of the ability to engage in distracting activities and a large decrease in being able to predict the environment. Of significant concern to AH is likely not knowing when he will see his family because of the pandemic."
[119] Scheveningen PI website (accessed 23 February 2021): "DJI has taken measures to limit the spread of the corona virus (…) At the moment, a prisoner can receive one visitor for a maximum of one hour per week."
[120] E.g., even though the Kosovo detention facility is located in the same location as the ICC DU, it appears to apply completely different regulations, including as concerns in person visits and quarantine requirements.
[121] Report, paras 220 ("the worst deprivation is not seeing his family"), 222-223 (referring to "profoundly distressing" interruptions as concerns right to see his family), 227, 242, 315, 325, 326.

ensure: *first*, its compliance with internationally recognized human rights norms, *per* Article 21(3) of the Statute, such as the right to family life, which entails a right to regular, in person interactions;[122] and *second*, that the overall mental suffering occasioned by his detention and prolonged and indefinite separation from his family is not unnecessary, disproportionate, or otherwise incompatible with his protection against cruel and inhumane treatment.[123] The Defence has set out above detailed concerns and considerations regarding the ongoing suggestion that Mr. Al Hassan's right to have in-person physical contact with his family can be satisfied through video-conferencing. A key aspect of his request to have a family visit concerns his need to establish a familial bond with his youngest son, whom he has never held in his arms; conversely, "conversations via video calls may not be appropriate for very young children—the artificial nature of such interactions may make it difficult for younger children to bond or interact with adults virtually".[124] Rather than presenting Mr. Al Hassan with Hobson's choice (that is, no choice in reality), the Defence respectfully and urgently requests the Court to identify a solution for in person visits, that would allow Mr. Al Hassan to have a concrete possibility to see his family as soon as possible, ideally, during, or at the end of Ramadan. Since his increased allotment of hours expired at the end of January,[125] it would also be appropriate to prolong the adjustment to the monitoring regime, to allow him to have additional contacts with his family in the interim.

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Dated this 23rd Day of February 2021
At The Hague, The Netherlands

[122] ICC-RoR217-02/08-8, paras 31-36; ICC-RoR220-01/19-2-Red, paras 19-21.
[123] General Comment No. 21, paras 3-4; *Shadurdy Uchetov v. Turkmenistan*, para. 7.4; *Kayum Ortikov v. Uzbekistan*, para. 10.4; *Kudla v. Poland*, 30210/96, para. 94.
[124] 'The effects of digital contact on children's well-being: evidence from public and private law contexts', *Nuffield Family Justice Observatory*, p. 2.
[125] Annex K.