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No. ICC-01/12-01/18

Date: 10 May 2021

TRIAL CHAMBER X

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

SITUATION IN THE REPUBLIC OF MALI

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

Public

Decision on Mr Al Hassan's ongoing fitness to stand trial

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

The Office of the Prosecutor

Fatou Bensouda
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Melinda Taylor
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Legal Representatives of Victims

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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

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States Representatives

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Counsel Support Section

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**Victims Participation and Reparations
Section**

Other

Professor Roland Weierstall-Pust
Professor Gillian Mezey
Dr Michael Korzinski

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

I. Procedural history

1. On 13 July 2020, the Chamber issued the ‘Decision on the Defence notice on Mr Al Hassan’s unfitness to stand trial’ (the ‘Defence Notice Decision’) in which it rejected a Defence ‘formal notice of its intention to raise the defence that Mr Al Hassan is not fit to stand trial’.¹ The Chamber found it was untimely, that the issue of unfitness should 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.²
2. On 14 July 2020, the trial against Mr Al Hassan commenced. At the start of the trial hearing, the Defence orally raised a motion asserting its doubt of the accused’s fitness to stand.³ The Chamber rendered an oral decision on the same day reaffirming its conclusion in the Defence Notice Decision and accordingly rejecting the motion.⁴ However, pursuant to Rule 135 of the Rules which allows the Chamber to order a medical examination *proprio motu*, the Chamber instructed the Registry, in consultation with the parties, to make recommendations on medical experts.⁵

¹ Defence notice of its intention to raise unfitness to stand trial and request for a status conference, 9 July 2020, ICC-01/12-01/18-942-Conf (with confidential Annex A; a public redacted version was filed on 14 August 2020).

² Decision on the Defence notice on Mr Al Hassan’s unfitness to stand trial, ICC-01/12-01/18-952-Conf (a public redacted version was issued on 2 September 2020).

³ Transcript of hearing, ICC-01/12-01/18-T-017-Red-ENG, p. 23, line 1 - p. 25, line 17. The Defence referred during the hearing to a written motion which was notified that same day at 14:18. Defence request regarding Mr. Al Hassan's fitness, ICC-01/12-01/18-956-Conf (with one confidential *ex parte* annex only available to the Defence and the Registry).

⁴ Transcript of hearing, ICC-01/12-01/18-T-017-Red-ENG, p. 30, line 2 – p. 32, line 10.

⁵ 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. See Email from the Chamber to the parties, 24 July 2020, at 15:55 and Email from the Chamber to the parties, 24 July 2020, at 16:06.

3. On 21 August 2020, the Chamber issued its ‘Decision appointing experts for the purpose of a medical examination pursuant to Rule 135 of the Rules of Procedure and Evidence’ (the ‘Appointment Decision’).⁶ The Chamber appointed a panel of experts composed of Professor Roland Weierstall-Pust, Professor Gillian Mezey and Dr Michael Korzinski (the ‘Panel’) in order to receive expert advice to identify any medical issues which could affect the accused’s ongoing fitness to stand trial. The Panel was instructed to provide its report by 15 October 2020.
4. On 10 September 2020, the Chamber dismissed an open-ended extension of time limit for the provision of the Panel report⁷ as premature and without prejudice.⁸
5. On 7 October 2020, the Chamber granted the Panel’s second request for an extension of time⁹ and instructed the Panel to submit its report by 8 December 2020.¹⁰ In order to ensure that the medical examination is conducted without any further impediments, the Chamber instructed the Registry to submit, by 22 October 2020, a report setting out a concrete timeline for the completion of the medical examination.
6. On 12 October 2020, and in response to an email from the Registry dated 9 October 2020,¹¹ the Chamber instructed the Registry to provide access to six additional filings to the Panel.¹²

⁶ Decision appointing experts for the purpose of a medical examination pursuant to Rule 135 of the Rules of Procedure and Evidence, ICC-01/12-01/18-1006-Conf (a public redacted version was issued on 24 March 2021).

⁷ Email from the Registry to the Chamber, 9 September 2020, at 16:11 and corresponding attachment. In that e-mail, the Panel also requested access to a number of documents prior to interviewing Mr Al Hassan.

⁸ Email from the Chamber to the parties and participants, 10 September 2020, at 17:16, ICC-01/12-01/18-1286-Anx8.

⁹ Email from the Registry to the Chamber, 2 October 2020, at 16:33 and corresponding attachment. An additional letter seeking extension until mid-December signed by Professor Weierstall-Pust and Dr Korzinski was submitted to the Chamber on 6 October 2020. Email from the Registry to the Chamber, 6 October 2020, at 15:00.

¹⁰ Email from the Chamber to the parties and participants, 7 October 2020, at 11:30, ICC-01/12-01/18-1403-Conf-Anx10.

¹¹ Email from the Registry to the Chamber, 9 October 2020, at 06:42. The Registry confirmed that, to the Registry’s knowledge, the Panel has been provided with the relevant documents in line with the

7. On 22 October 2020, the Registry filed its report on the timeline for the completion of the medical examination.¹³
8. On 27 October 2020, the Single Judge rejected a Defence request to address submissions to the Panel as unnecessary.¹⁴
9. On 28 October 2020, the Single Judge granted a Defence request to file an index of records¹⁵ and instructed the Registry to organise a telephone meeting between Professor Mezey and Mr Al Hassan as well as to explore the possibility of having Arabic translators physically present during the examination by the Panel.¹⁶
10. On 29 October 2020, the Chamber was informed by the Registry that the Panel was requesting access to additional documents.¹⁷
11. On 30 October 2020, the Single Judge addressed the Panel's enquiries of 22 October 2020 and the request to access additional documents dated 29 October 2020.¹⁸

Chamber's instructions and informed the Chamber that the Panel is additionally requesting access to 'all the prosecution documents'.

¹² Email from the Chamber to the parties and participants, 12 October 2020, at 13:56, ICC-01/12-01/18-1403-Conf-Anx14.

¹³ Registry Report on Timeline for the Completion of the Medical Examination by the Experts Appointed for the Purposes of Rule 135 of the Rules of Procedure and Evidence, ICC-01/12-01/18-1124-Conf (with confidential annexes A and B). An email from the Panel was annexed, in which it enquired, *inter alia*: (i) whether Mr Al Hassan consents to meeting with the Panel; (ii) whether there are any other documents which the Panel should be receiving; and (iii) whether the Panel's mandate is redundant given that the trial and evidentiary hearings have commenced.

¹⁴ Email from the Chamber to the parties and participants, 27 October 2020, at 13:00, ICC-01/12-01/18-1403-Conf-Anx25. Mr Al Hassan's consent to be examined was provided by the Defence on 28 October 2020. See Email from the Defence dated 28 October 2020, at 12:03.

¹⁵ Email from the Defence, 27 October 2020, at 18:44. Email from the Defence, 27 October 2020, at 18:44.

¹⁶ Email from the Chamber to the parties and participants, 28 October 2020, at 16:38, ICC-01/12-01/18-1403-Conf-Anx27.

¹⁷ Email from the Registry to the Chamber, 29 October 2020, at 10:54. The Panel requested *inter alia*: (i) 'An indexed record of all the interviews where the ICC investigators were either present in or conducting/leading the interviews with Mr Al Hassan when he was detained Mali.'; (ii) Regarding the hearings: '(a) the number of court sessions since the request for an assessment of Mr. Al Hassan's fitness to plead; (b) the number of sessions during which he was present in court or followed them remotely; (c) the court protocols from these sessions.'; and (iii) 'The OTP' full indictment, as well as the list of the appointed witnesses/other material that will appear in court or any other documents that help [the Panel] to anticipate what Mr. Al Hassan might face during the court proceedings'.

¹⁸ Email from the Chamber to the parties and participants, 30 October 2020, at 10:25, ICC-01/12-01/18-1403-Conf-Anx30.

12. On 6 November 2020, and having regard to email exchanges between the Defence and the Registry,¹⁹ the Single Judge confirmed that the Defence should be provided with a complete index of all medical records of Mr Al Hassan at the Detention Centre and confirmed that, provided that Mr Al Hassan consents, all medical records of Mr Al Hassan as concerns any consultations that occur at the ICC building should be transmitted to the Panel.²⁰ On 9 November 2020, the Single Judge reiterated her previous directions and urged the Registry and the Defence to engage in constructive discussion in order to find a viable solution.²¹
13. On 9 December 2020, the Registry filed the report of the Panel (the ‘Panel Report’) on the record.²²
14. On 11 December 2020, the Defence requested the Chamber to instruct the Registry to: transmit a copy of the correspondence between the Detention Unit medical services and the Panel to Mr Al Hassan; and transmit all items in the list attached to its email to the Panel.²³
15. On 5 January 2021, the Single Judge partially granted the Defence Request of 11 December 2020 and requested the Panel to review the additional material and indicate whether the newly provided material warrants substantive adjustments to the conclusions in the Panel Report.²⁴ The Single Judge rejected the Defence request to allow the Panel to conduct a read-back of the Panel

¹⁹ See Email from the Defence to the Chamber, the Prosecution and the participants, 2 November 2020 at 17:58; Email from the Defence to the Chamber, the Prosecution and the participants, 2 November 2020 at 18:27; Email from the Registry to the Chamber, the parties and the participants, 5 November 2020 at 13:06; Email from the Defence to the Chamber, the Prosecution and the participants, 5 November 2020 at 15:36.

²⁰ Email from the Chamber to the parties and participants, 6 November 2020 at 09:04. The Defence was requested to consult with Mr Al Hassan as soon as practicable with a view to obtaining his consent for the provision of the medical records.

²¹ Email from the Chamber to the parties and participants, 9 November 2020, at 11:25, ICC-01/12-01/18-1404-Conf-Anx3.

²² ICC-01/12-01/18-1197-Conf-Exp-Anx (filed as confidential *ex parte* Registry and Defence only; reclassified as confidential *ex parte* Defence, Registry and Chamber only on 19 January 2021).

²³ Email from the Defence to the Chamber and the Registry, 11 December 2020, at 13:08. The Registry was instructed to respond by 14 December 2020. Email from the Chamber to the Registry and the Defence, 11 December 2020, at 13:37. The Registry responded on the same date. Email from the Registry to the Chamber and the Defence, 11 December 2020, at 17:16. Supplementary information was provided by the Registry on 14 December 2020. Email from the Registry to the Chamber and the Defence, 14 December 2020, at 15:01. See also Email from the Defence to the Chamber and the Registry, 14 December 2020, at 21:06.

²⁴ Email from the Chamber to the parties and participants, 5 January 2021, at 10:38.

Report with Mr Al Hassan as being unnecessary, noting that the parties and participants will be given an opportunity to submit observations on the Panel Report.²⁵

16. On 8 January 2021, the Defence requested the Chamber to confirm that as per the aforementioned decision of 5 January 2021: (i) the Registry should transmit the items directly, and immediately to the Panel; (ii) the transmission should be implemented by the Registry and not the Detention Unit Medical Services; (iii) the Panel should be informed that Mr Al Hassan provided his consent to the release of the items; and (iv) all interim correspondence between the Detention Unit Medical Services and the Panel should be disclosed to the Defence.²⁶
17. On the same date, the Single Judge instructed the Registry to immediately proceed with the transmission of the relevant items to the Panel, without seeking further consent from the accused.²⁷ On 11 January 2021, the Registry provided clarification as regards the provision of these items,²⁸ and subsequently confirmed that the 36 documents shared by the Defence will be immediately transmitted to the Panel.²⁹
18. On 19 January 2021, the Panel provided an additional report (the ‘Supplementary Report’) in which it concluded that ‘there is nothing within the additional material that the [Panel] has seen that would give them cause to review or revise their opinion as expressed in [the Panel Report], with regard to Mr Al Hassan’s mental health or his fitness to plead’.³⁰
19. On 26 January 2021, the Chamber reclassified as confidential the Panel Report, initially only available to the Registry and the Defence, and instructed the parties and participants to file any observations on the Panel Report by 23

²⁵ Email from the Chamber to the parties and participants, 5 January 2021, at 10:38.

²⁶ Email from the Defence to the Chamber and the Registry, 8 January 2021 at 09:59.

²⁷ Email from the Chamber to the Defence and the Registry, 8 January 2021, at 12:46.

²⁸ Email from the Registry to the Chamber and the Defence, 11 January 2021, at 16:35.

²⁹ Email from the Registry to the Chamber and the Defence, 11 January 2021, at 19:23.

³⁰ Email from the Registry to the Chamber and the Defence, 19 January 2021, at 11:36 and corresponding attachment; ICC-01/12-01/18-1269-Conf-Anx, p. 2.

February 2021.³¹ On the same date, the Single Judge instructed the Registry to file the Supplementary Report on the record.³²

20. On 18 February 2021, the Defence filed a request seeking that the Chamber grant an extension of time to submit observations on the Panel Report and set the new deadline at 22 March 2021.³³ The Defence argued that extension was warranted as: (i) additional time was required for Dr Brock Chisholm (the ‘Defence Consultant’) to review the Panel Report and associated material as well as to examine Mr Al Hassan; and (ii) additional time was required due to the Defence’s current workload. This request was rejected on the same day (the ‘Decision on Extension Request’).³⁴
21. On 23 February 2021, the Office of the Prosecutor (the ‘Prosecution’),³⁵ the Defence³⁶ and the Legal Representatives of Victims (the ‘LRVs’)³⁷ filed their observations on the Panel Report (the ‘Prosecution Observations’, the ‘Defence Observations’ and the ‘LRVs Observations’ respectively).

³¹ Email from the Chamber to the parties and participants, 26 January 2021, at 09:33. On 4 March 2021, the Chamber instructed the Registry to prepare, in consultation with the Defence, a public redacted version of the Panel Report. Email from the Chamber to the parties and participants, 4 March 2021 at 11:18. A Public redacted version of the Panel Report was filed on 23 March 2021.

³² Email from the Chamber to the parties and participants, 26 January 2021, at 13:40. The Supplementary Report was notified on 27 January 2021: Registry Transmission of “Review of additional documents submitted to the Panel of Experts in relation to the MEDICAL EXAMINATION pursuant to Rule 135 of the Rules of Procedure and Evidence in the case of Mr. AL HASSAN Ag Abdoul Aziz Ag Mohamed Ag Mahmoud”, ICC-01/12-01/18-1269-Conf (with confidential annex, ICC-01/12-01/18-1269-Conf-Anx).

³³ Defence request under Regulation 35 for extension of time to file its observations to the “Registry Transmission of the Report of the Expert (ICC-01/12-01/18-1197-Anx-Red)”, ICC-01/12-01/18-1306-Conf (with one confidential annex and one confidential *ex parte* annex only available to the Registry and the Defence).

³⁴ Email from the Chamber to the parties and participants, 18 February 2021, at 16:29.

³⁵ Prosecution’s Observations regarding Panel of Experts’ Report concerning the Accused’s fitness to stand trial, ICC-01/12-01/18-1317-Conf (a public redacted version was filed on 6 May 2021).

³⁶ Defence Observations on Report of Panel of Experts, ICC-01/12-01/18-1316-Conf (with 10 confidential annexes, one confidential *ex parte* annex only available to the Defence and the Registry, and one confidential *ex parte* annex only available to the Defence, the Registry and the Prosecution; a public redacted version was filed on 6 May 2021).

³⁷ Observations sur le rapport du groupe d’experts ICC-01/12-01/18-1197-Anx-Red, ICC-01/12-01/18-1315 (filed as confidential; reclassified as public on 6 May 2021).

22. On 3 March 2021, the Prosecution filed a request seeking that the Chamber strike out four annexes to the Defence Observations (the ‘Request to Strike Annexes’).³⁸
23. On 15 March 2021, the Defence filed its response to the Request to Strike Annexes (the ‘Response to Request to Strike Annexes’).³⁹

II. Request to Strike Annexes

A. Submissions

24. The Prosecution requests that Annexes A, B, D and F to the Defence Observations be stricken from the record. The Prosecution refers to the Chamber’s findings in the Decision on Extension Request and submits that these annexes are nothing but an attempt to circumvent the aforesaid decision of the Chamber.⁴⁰ Accordingly, it requests the Chamber to strike Annexes A and B as well as any observations made by the Defence based on the Defence Consultant’s assessment.⁴¹
25. Further, the Prosecution submits that Annexes D and F of the Defence Observations are in fact additional submissions by the Defence. As regards Annex D which contains a 15 page-long table, the Prosecution submits that this constitutes an internal work product by the Defence detailing its own assessment of the purported facts and that large portions of this document appear to be a patchwork of different items of evidence, which reflect, in part, the Defence’s own interpretation of circumstances rather than a purely objective representation of the facts.⁴² As regards Annex F, the Prosecution submits that Defence clearly seeks to use this annex to supplement its arguments on the alleged need for the accused to undergo treatment and regarding adjustments to

³⁸ Prosecution’s request to strike out four annexes to the Defence Observations on Report of Panel of Experts (ICC-01/12-01/18-1316-Conf) and to obtain access to ex parte annexes thereto, ICC-01/12-01/18-1333-Conf.

³⁹ Defence response to ‘Prosecution’s request to strike out four annexes to the Defence Observations on Report of Panel of Experts (ICC-01/12-01/18-1316-Conf) and to obtain access to ex parte annexes thereto’, ICC-01/12-01/18-1383-Conf (with one confidential annex).

⁴⁰ Request to Strike Annexes, ICC-01/12-01/18-1333-Conf, paras 7-15.

⁴¹ Request to Strike Annexes, ICC-01/12-01/18-1333-Conf, para. 16.

⁴² Request to Strike Annexes, ICC-01/12-01/18-1333-Conf, para. 18.

the modalities of the trial, and notes that this annex is in fact only cited once to refer to ICL case law contained therein.⁴³

26. The Defence submits that the Request to Strike Annexes should be rejected in its entirety. As regards annexes A and B, the Defence submits that the Prosecution confuses and conflates multiple rulings of the Chamber as concerns experts in order to deprive the Defence of an opportunity to address critical issues concerning Mr Al Hassan's fitness.⁴⁴ The Defence firstly points out that the Prosecution itself has instructed its own expert.⁴⁵ Further, the Defence avers that given the link between the Defence Consultant's report and other issues including the Article 69(7) litigation, and that it would be artificial to exclude the annexes.⁴⁶ The Defence also submits that it is Mr Al Hassan's right under Regulation 103 of the Regulations of the Court (the 'Regulations') to consult with a doctor of his own choosing.⁴⁷
27. As regards Annex D, the Defence notes that it reproduces verbatim quotes from the Panel Report and the English translations of Mr. Al Hassan's Detention Unit medical records and that it is therefore an objective record with no analysis or conclusions drawn in relation to the inconsistencies between these documents.⁴⁸ As regards Annex F, the Defence submits that it does not contain submissions on this issue but is rather intended to preserve for the record the Defence's submissions as they were provided in August 2020.⁴⁹

B. The Chamber's determination

28. The Chamber notes that in its Request to Strike Annexes, the Prosecution also requested access to *ex parte* annexes to the Defence Observations.⁵⁰ While this part of the Request to Strike Annexes has already been granted by the Single

⁴³ Request to Strike Annexes, ICC-01/12-01/18-1333-Conf, para. 18.

⁴⁴ Response to Request to Strike Annexes, ICC-01/12-01/18-1383-Conf, para. 7.

⁴⁵ Response to Request to Strike Annexes, ICC-01/12-01/18-1383-Conf, para. 8.

⁴⁶ Response to Request to Strike Annexes, ICC-01/12-01/18-1383-Conf, para. 9.

⁴⁷ Response to Request to Strike Annexes, ICC-01/12-01/18-1383-Conf, para. 10.

⁴⁸ Response to Request to Strike Annexes, ICC-01/12-01/18-1383-Conf, para. 13.

⁴⁹ Response to Request to Strike Annexes, ICC-01/12-01/18-1383-Conf, para. 14.

⁵⁰ Request to Strike Annexes, ICC-01/12-01/18-1333-Conf.

Judge on 3 March 2021,⁵¹ the parties are reminded that, in accordance with Regulation 23bis of the Regulations, parties are required to state the factual and legal basis for the chosen classification.

1. *Annexes A and B – annexes relating to the Defence Consultant*

29. Annexes A and B are documents relating to the Defence Consultant. The Chamber notes that, as reflected in Annex A to the Defence observations,⁵² the Defence instructed the Defence Consultant *inter alia* to review the Panel Report. The Chamber further notes that the Defence Consultant was proposed by the Defence for inclusion in the Panel,⁵³ and that the Chamber subsequently rejected this by appointing the Panel in its current composition.⁵⁴
30. The Chamber recalls that the Decision on Extension Request set out in detail the reasons as to why it was inappropriate for the Defence to appoint its own ‘expert’ to review the conclusion of the Panel and submit such observations to the Chamber. Firstly, it is recalled that in the Appointment Decision, the Chamber found it appropriate to ‘have *the opinions of independent experts who are appointed by virtue of the present decision* in order to properly continue to assess fitness to stand trial as the proceedings continue’.⁵⁵ Further, in appointing the independent experts to the Panel, the Chamber explicitly stated that ‘from the standpoint of impartiality and neutrality, individuals who have already been engaged with the present case on behalf of a party or the participants should not be appointed’.⁵⁶
31. As recalled in the Decision on Extension Request, ‘the Chamber has appointed the Panel, taking into account the views of the parties, precisely in order to have independent, Chamber appointed experts provide their professional opinions in relation to Mr Al Hassan’s ongoing fitness, rather than having both parties

⁵¹ See Email from the Chamber to the parties and participants, 3 March 2021 at 17:50; Email from the Defence to the Email from the Defence to the Chamber, Prosecution and participants, 5 March 2021, at 15:47; Email from the Chamber to the parties and participants, 5 March 2021 at 17:47.

⁵² ICC-01/12-01/18-1316-Conf-AnxA

⁵³ See Annex B to the Registry Recommendations on Experts for the purposes of Rule 135 of the Rules of Procedure and Evidence, ICC-01/12-01/18-980-Conf-AnxB, pp. 12-13.

⁵⁴ Appointment Decision, ICC-01/12-01/18-1006-Red.

⁵⁵ Appointment Decision, ICC-01/12-01/18-1006-Red, para. 21

⁵⁶ Appointment Decision, ICC-01/12-01/18-1006-Red, para. 25.

appointing experts on their own behalf’.⁵⁷ The Chamber reiterates that to allow a party to appoint its own consultant to review the conclusion of the Chamber appointed Panel and to base its eventual determination on the view of such consultants would ‘defeat the very purpose of the present process, which is to determine Mr Al Hassan’s ongoing fitness based on the professional opinions of independent Chamber appointed experts’.⁵⁸ Indeed, as the *Gbagbo* Pre-Trial Chamber stated: ‘[R]ule 135 of the Rules is intended to ensure that the crucial determination of the fitness of the person to participate in proceedings is made *following an impartial procedure resorting to approved experts only*’.⁵⁹

32. The Chamber is deeply concerned that, despite the ruling of the Chamber in the context of these proceedings related to the fitness of the accused, the Defence nonetheless disregarded the Chamber’s clear directions and submitted the report of the Defence Consultant.
33. The Chamber emphasises that the Defence is not barred from consulting with medical professionals on matters relating to the present trial proceedings. In fact, the Chamber clearly indicated this was a possibility.⁶⁰ However, the Chamber considered that it was neither necessary nor appropriate to ‘receive such observations of such individual(s) at this stage, *for the purpose of the Chamber’s determination pursuant to Rule 135 of the Rules*’.⁶¹ Accordingly, the Defence argument that the exclusion of Annexes A and B would be contrary to Mr Al Hassan’s right under Regulation 103 of the Regulations to consult with a doctor of his own choosing misrepresents the Chamber’s ruling and is without merit.

⁵⁷ Email from the Chamber to the parties and participants, 18 February 2021, at 16:29.

⁵⁸ Email from the Chamber to the parties and participants, 18 February 2021, at 16:29. *See also* Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Defence Request to Order an Adjournment and a Medical Examination, 16 January 2019, ICC-02/04-01/15-1412-Red (hereinafter: ‘Second *Ongwen* Decision’), paras 10-11.

⁵⁹ Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision on issues related to the proceedings under rule 135 of the Rules of Procedure and Evidence and postponing the date of the confirmation of charges hearing, 2 August 2012, ICC-02/11-01/11-201, para. 15 (emphasis added).

⁶⁰ Email from the Chamber to the parties and participants, 18 February 2021, at 16:29 (‘the Defence may of course decide to consult with medical experts of its choosing as necessary’).

⁶¹ Email from the Chamber to the parties and participants, 18 February 2021, at 16:29 (emphasis added).

34. Similarly, the Defence's argument that the Prosecution has instructed its own consultant to provide opinions on fitness in the context of the termination motion is also irrelevant as the Chamber bases its determination in the present decision on the opinion of the Panel.⁶²
35. In light of the above, the Chamber will not consider Annexes A and B to the Defence Observations.

2. *Annex D – table containing alleged factual inaccuracies in the Panel Report*

36. Regulation 36(2)(b) of the Regulations provides that in order not to be counted in the calculation of page limits, an appendix shall be limited to 'references, authorities, copies from the record, exhibits and other non-argumentative material' and 'shall not contain submissions'. The Chamber considers that portions of an annex that constitute 'summaries' or 'synthesis' of evidence, which reflect, at least to some extent, the parties' interpretation of circumstances, rather than a purely objective representation of facts, are contrary to this provision.⁶³
37. In the instant case, the Chamber notes that Annex D is a table containing extracts of the Panel Report with corresponding columns indicating the 'reference in the panel report', 'extract from medical record', 'reference to medical record' and 'other source of information'. The Chamber considers that the very purpose of the annex is for the Defence to put forward its interpretation of the facts and circumstances in order to demonstrate alleged factual inaccuracies which 'caused the Panel to reach conclusions that ignored or minimised the conditions experienced by Mr Al Hassan'.⁶⁴ The Chamber also notes that the Annex includes, although to a limited extent, the Defence's

⁶² See Panel Report, ICC-01/12-01/18-1197-Anx-Red, paras 97-122, 230.

⁶³ Decision on Prosecution requests concerning the Defence motion to terminate the proceedings, 6 July 2020, ICC-01/12-01/18-932-Corr-Red, para. 14. See also Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", ICC-01/05-01/13-2275-Red, para. 778.

⁶⁴ Defence Observations, ICC-01/12-01/18-1316-Red, para. 6.

comments on why the relevant portion of the Panel Report is factually inaccurate.

38. In these circumstances, the Chamber finds that Annex D is not in compliance with Regulation 36 of the Regulations and accordingly decides not to consider Annex D.

3. *Annex F – Defence submission on the hearing schedule*

39. Annex F is a 14 page document composed of an email from the Defence to the Registry dated 14 August 2020 as well as its submissions on the hearing schedule. The Defence submits that since the Chamber had access to this material, no prejudice is occasioned by the Defence preserving submissions made in August 2020 for the record.⁶⁵
40. The Chamber notes that Annex F contains a significant amount of submissions by the Defence on the hearing schedule and related requests and is consequently manifestly contrary to Regulation 36 of the Regulations.
41. Although the contents of Annex F were submitted to the Registry by the Defence on 14 August 2020 and subsequently transmitted by the Registry to the Chamber *ex parte*,⁶⁶ the Chamber stressed that⁶⁷

it has not sought general submissions on the hearing schedule, either from the Registry or the parties and participants. In particular, the Chamber notes that the Defence appears to have made detailed observations on the hearing schedule citing a range of different reasons. The Chamber is of the view that these observations, which go beyond logistical difficulties faced due to the pandemic, clearly fall outside the scope of the consultation process that was requested.

42. Accordingly, the Registry was instructed to inform the parties and participants that ‘the Chamber has not found it appropriate to consider these submissions as provided, beyond what was strictly required’.⁶⁸
43. In light of the above, the Chamber considers that its prior ruling still stands and therefore will disregard Annex F.

⁶⁵ Response to Request to Strike Annexes, ICC-01/12-01/18-1383-Conf, para. 14.

⁶⁶ Email from the Registry to the Chamber, 18 August 2020 at 17:40.

⁶⁷ Email from the Chamber, 21 August 2020 at 08:47.

⁶⁸ Email from the Chamber, 26 August 2020 at 13:53.

III. The ongoing fitness of the accused

A. Observations of the parties and participants on the Panel Report

1. *The Prosecution*

44. Referring to the Panel's conclusions, the Prosecutions submits that Mr Al Hassan is fit to stand trial, in light of the legal test for fitness as articulated by the Chamber in its previous decisions.⁶⁹
45. The Prosecution observes that, while fitness to stand trial does not concern, in and of itself, whether the accused has particular medical conditions, the Panel has concluded that the accused is not suffering from any post-traumatic stress disorder (hereinafter: 'PTSD'), depressive disorder, or any other recognised psychiatric condition and that the accused also does not consider he has any mental health problems.⁷⁰ The Prosecution also takes note of the Panel's conclusion that the accused's feeling of betrayal and despair may be due *inter alia* to his status as an alleged perpetrator.⁷¹
46. The Prosecution observes that the Panel's information about torture allegations comes solely from the accused and that there is no evidence that any alleged torture by the Malian or French authorities is attributable to the Prosecution.⁷² In the Prosecution's view, any determination on the veracity of the accused's allegations regarding torture should be made by the Chamber and not the Panel.⁷³ Further, the Prosecution submits that the possibility of experiencing increased stress is not a reasonable basis for limiting the Prosecution's cross-examination of the accused, as the applicable threshold is whether the accused can meaningfully exercise his fair trial rights.⁷⁴
47. With respect to the Panel's recommendations that there be a review of Mr Al Hassan's treatment options, the Prosecution observes that this appears to be

⁶⁹ Prosecution Observations, ICC-01/12-01/18-1317-Red, paras 26-30.

⁷⁰ Prosecution Observations, ICC-01/12-01/18-1317-Red, paras 46-50.

⁷¹ Prosecution Observations, ICC-01/12-01/18-1317-Red, para. 51.

⁷² Prosecution Observations, ICC-01/12-01/18-1317-Red, paras 31-39, 43.

⁷³ Prosecution Observations, ICC-01/12-01/18-1317-Red, para. 44.

⁷⁴ Prosecution Observations, ICC-01/12-01/18-1317-Red, para. 45.

inconsistent with the Panel's findings that the accused does not require any psychological support or treatment and that the symptoms experienced by the accused may be unrelated to trauma.⁷⁵ The Prosecution also observes that in any event, it is unclear as to how these treatment options impact on the accused's fitness to stand trial, that is, his ability to meaningfully exercise his fair trial rights.⁷⁶

48. Similarly, with respect to the Panel's observations regarding review of Mr Al Hassan's family contacts, the Prosecution observes that there exists no link to any specific mental condition that impedes his ability to meaningfully exercise his fair trial rights.⁷⁷ However, if the Chamber is minded to review the current restrictions, the Prosecution reiterates its previous submissions that the current restrictions on the accused's contacts must remain in place.⁷⁸ The Prosecution however does not object to the accused being allowed some direct contact with family members, as soon as this can be safely facilitated.⁷⁹
49. The Prosecution objects to the implementation of the Panel's recommendation that Mr Al Hassan's positioning be adjusted so that he does not have to directly look at members of the Prosecution *inter alia* as this is based on flawed assertions that the Prosecution was complicit in his alleged torture.⁸⁰ The Prosecution however does not object to additional assessments by medical staff to consider the need for support, provision of medical support in between appearances or provision of religious support, provided that such contacts are made in accordance with the applicable restrictions.⁸¹
50. As regards periodic review, the Prosecution submits that any future review should be done only if the accused's medical condition substantially alters.⁸² The Prosecution submits that if the Chamber decides to order periodic review, the Panel should be instructed to remain neutral at all times and to strictly

⁷⁵ Prosecution Observations, ICC-01/12-01/18-1317-Red, paras 55-56.

⁷⁶ Prosecution Observations, ICC-01/12-01/18-1317-Red, para. 56.

⁷⁷ Prosecution Observations, ICC-01/12-01/18-1317-Red, para. 57.

⁷⁸ Prosecution Observations, ICC-01/12-01/18-1317-Conf, para. 57.

⁷⁹ Prosecution Observations, ICC-01/12-01/18-1317-Red, para. 57.

⁸⁰ Prosecution Observations, ICC-01/12-01/18-1317-Red, para. 58.

⁸¹ Prosecution Observations, ICC-01/12-01/18-1317-Conf, para. 58.

⁸² Prosecution Observations, ICC-01/12-01/18-1317-Red, para. 59.

follow the Chamber's instructions as regards the legal test to be applied and the scope of recommendations.⁸³

51. For the aforementioned reasons, the Prosecution requests the Chamber to find that: (i) the accused remains fit to stand trial; (ii) there is currently no impairment to his effective exercise of his fair trial rights; and (iii) if the accused decides to testify, the accused may be subject to cross-examination by the Prosecution.

2. *The Defence*

52. The Defence firstly observes that although the Chamber clearly articulated the applicable legal test, the Panel has relied on the *Pritchard* test to assess Mr Al Hassan's fitness.⁸⁴ Further, the Defence submits that the Panel failed to apply the *Pritchard* test in its entirety, or in a manner fully encapsulating the matters set out by the Chamber for its assessment.⁸⁵ The Defence moreover avers that the Panel Report contains a number of inaccuracies and that these errors appear to have caused the Panel to reach conclusions that ignored or minimised the conditions experienced by Mr Al Hassan.⁸⁶
53. The Defence recalls the Chamber's previous decisions on the issue of Mr Al Hassan's fitness and observes that the Panel was not required or empowered to make ultimate conclusions on whether Mr Al Hassan was fit to stand trial.⁸⁷ The Defence therefore submits that the Panel's conclusion that Mr Al Hassan is fit to stand trial should be disregarded.⁸⁸
54. As regards Mr Al Hassan's current medical condition, the Defence submits that the accused suffers from PTSD and that the reasons for the Panel not reaching this conclusion was not due to the absence of symptoms but rather their inability to adequately assess the existence of symptoms due to limitations of the

⁸³ Prosecution Observations, ICC-01/12-01/18-1317-Red, para. 60.

⁸⁴ Defence Observations, ICC-01/12-01/18-1316-Red, paras 4-5.

⁸⁵ Defence Observations, ICC-01/12-01/18-1316-Red, para. 4.

⁸⁶ Defence Observations, ICC-01/12-01/18-1316-Red, para. 6.

⁸⁷ Defence Observations, ICC-01/12-01/18-1316-Red, paras 7-8.

⁸⁸ Defence Observations, ICC-01/12-01/18-1316-Red, para. 8.

examination process.⁸⁹ The Defence observes that while the Panel went to great lengths to avoid triggering Mr Al Hassan, for example, by structuring discussions in a manner designed to avoid stress, and changing the topic of discussion whenever triggering topics were encountered, this in turn led to failure to fully capture the feelings of trauma and distress experienced by the accused.⁹⁰

55. The Defence submits that contrary to the Panel's conclusions, the accused is unable to exercise critical fair trial rights, due *inter alia* to his inability to review certain filings and provide instructions to the Defence and psychological harm that would result from him participating in the trial.⁹¹
56. Relying on the Panel Report, the Defence further raises difficulties caused to Mr Al Hassan as a result of the use of current handcuffs during transport and being in the physical presence of the Prosecution.⁹² It also reiterates its position that Mr Al Hassan does not wish to use video-conferencing.⁹³ The Defence submits that these matters should be considered cumulatively, that the recent death of the accused's daughter might have exacerbated PTSD, and that if due to COVID-19 restrictions the Panel's recommendations cannot be implemented, the trial should not continue.⁹⁴
57. As regards the Panel's recommendations, the Defence submits that: the Chamber should not rely on evidence related to the *Direction Générale de la Sécurité d'Etat au Mali* (the 'DGSE'); there should be regular breaks in the hearing schedule; and Mr Al Hassan should be allowed to exercise his right to receive treatment, and that requiring this to be conducted using remote conferencing is a *de facto* curtailment of his right.⁹⁵ The Defence further raises concern regarding the Detention Centre Medical Officer's behaviour throughout

⁸⁹ Defence Observations, ICC-01/12-01/18-1316-Red, paras 9-14.

⁹⁰ Defence Observations, ICC-01/12-01/18-1316-Red, paras 13, 21.

⁹¹ Defence Observations, ICC-01/12-01/18-1316-Red, paras 15-17.

⁹² Defence Observations, ICC-01/12-01/18-1316-Red, paras 18-20.

⁹³ Defence Observations, ICC-01/12-01/18-1316-Red, para. 23.

⁹⁴ Defence Observations, ICC-01/12-01/18-1316-Red, paras 23-25.

⁹⁵ Defence Observations, ICC-01/12-01/18-1316-Red, paras 26-30.

the proceedings.⁹⁶ It also requests that adjustments be made to accommodate the accused's religious requirements.⁹⁷ Finally, the Defence requests that Mr Al Hassan be allowed to have physical visits with his family, and draws the Chamber's attention to practice in other detention facilities where visits are accommodated notwithstanding the COVID-19 pandemic.⁹⁸

3. *The LRVs*

58. The LRVs observe that after assessing the mental state of the accused, the Panel concluded that he is fit to stand trial.⁹⁹ The LRVs further observe that the Panel has reached a clear conclusion that Mr Al Hassan does not suffer from PTSD, clinical depression or diagnosable psychiatric conditions.¹⁰⁰
59. The LRVs take note of the Panel's views on possible explanations for the accused's symptoms and observes that it is probable that these are results of Mr Al Hassan feeling guilt or realising the seriousness of the consequences of his acts.¹⁰¹ While submitting that this probability should not be overshadowed, the LRVs also point out that this does not fall within the question of the accused's fitness to stand trial.¹⁰²
60. The LRVs take note of a number of observations in the Panel Report, in particular, the accused's claim that 90% of the evidence is obtained by forced confession, and regrets that due to the Panel's inability to access relevant material, this is based solely on the self-report of the accused.¹⁰³ In the LRVs' view, the Panel being provided the necessary access was also important in light of its findings on betrayal trauma.¹⁰⁴

⁹⁶ Defence Observations, ICC-01/12-01/18-1316-Red, paras 31-32.

⁹⁷ Defence Observations, ICC-01/12-01/18-1316-Red, para. 33.

⁹⁸ Defence Observations, ICC-01/12-01/18-1316-Red, paras 34-35.

⁹⁹ LRVs Observations, ICC-01/12-01/18-1315, para. 20.

¹⁰⁰ LRVs Observations, ICC-01/12-01/18-1315, para. 11.

¹⁰¹ LRVs Observations, ICC-01/12-01/18-1315, paras 12-16, 17-18.

¹⁰² LRVs Observations, ICC-01/12-01/18-1315, para. 16.

¹⁰³ LRVs Observations, ICC-01/12-01/18-1315, paras 21-25.

¹⁰⁴ LRVs Observations, ICC-01/12-01/18-1315, para. 26.

61. While not making any specific comments on the measures proposed by the Panel, the LRVs observe, *inter alia*, that the Panel was unable to attend hearings and regret that this might have limited the Panel's observations.¹⁰⁵

B. Analysis

1. Preliminary considerations

62. For the purpose of assessing Mr Al Hassan's ongoing fitness to stand trial, the Panel was requested to make observations on the following issues:¹⁰⁶

- 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 [...]; 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.

63. The Chamber observes that the Panel noted it did not have time, or access to information, that may have been relevant to fully explore these matters,¹⁰⁷ including certain medical records.¹⁰⁸ The Chamber reiterates that all records relevant to the Panel's mandate, identified by the Registry, in consultation with the Defence, have been provided to the Panel. Relatedly, the Chamber finds that the Defence has failed to substantiate its assertion that alleged factual

¹⁰⁵ LRVs Observations, ICC-01/12-01/18-1315, paras 27-29.

¹⁰⁶ Appointment Decision, ICC-01/12-01/18-1006-Red, para. 37.

¹⁰⁷ Panel Report, ICC-01/12-01/18-1197-Anx-Red, paras 168, 171, 182. In particular, the Panel observes that its request 'for access to the Court during a hearing in order to be able to observe [the accused]'s behaviour and demeanour' was rejected (para. 64). The Chamber regrets that it has received no such requests from the Panel at any time. Nonetheless, the Chamber does not consider this as affecting the overall reliability of the Panel Report, considering in particular that the Chamber can take into account its own observations of Mr Al Hassan during the course of the trial hearings, together with any observations made by the Panel on the accused's ability to exercise his fair trial rights, in making its determination on the accused's ongoing fitness. *Similarly see* ICTY, Trial Chamber II, *The Prosecutor v. Pavle Strugar*, Decision re the Defence Motion to Terminate Proceedings, 26 May 2004, IT-01-42-T, para. 51.

¹⁰⁸ Panel Report, ICC-01/12-01/18-1197-Anx-Red, paras 59-63; Supplementary Report, ICC-01/12-01/18-1269-Conf-Anx, para. 8.

inaccuracies, including the claim that the Panel was not provided access to detention unit medical records, ‘appears to have caused the [Panel] to reach conclusions that ignored or minimised the conditions experienced by Mr. Al Hassan’.¹⁰⁹

64. The Chamber also considers that the submission of the Defence that the Panel adopted an erroneous methodology by going 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 of discussion whenever triggering topics were encountered’ is untenable.¹¹⁰ In this regard, it is recalled that in the Appointment Decision, the Chamber ‘sought to appoint a panel which is overall well balanced and includes experts with complementary expertise’, while ‘plac[ing] great importance on the experts’ forensic experience in assessing fitness to stand trial’.¹¹¹ The Chamber considers that the methodology by which the Panel conducts its assessment is essentially within its professional discretion and it is in principle not for the Chamber to assess whether a particular approach was preferable over the other.¹¹²
65. Further, the Chamber observes that in preparing the report, two of the Panel members interviewed the accused in-person for 11 hours and 30 minutes and the remaining member interviewed the accused via telephone for 4 hours and 20 minutes.¹¹³ In interviewing Mr Al Hassan: the Panel decided to utilise different approaches, in order to evaluate the consistency between information gathered by each other;¹¹⁴ the Panel adopted a rigorous and critical approach to questioning the accused, while taking care to avoid giving him the feeling that he was being interrogated;¹¹⁵ the Panel Report acknowledged the limits of its

¹⁰⁹ Defence Observations, ICC-01/12-01/18-1316-Red, para. 6.

¹¹⁰ Defence Observations, ICC-01/12-01/18-1316-Red, para. 13.

¹¹¹ Appointment Decision, ICC-01/12-01/18-1006-Red, paras 28-29. *See also* para. 31 regarding the qualifications of the members of the Panel.

¹¹² *Similarly see* Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the fitness of Laurent Gbagbo to stand trial, 27 November 2015, ICC-02/11-01/15-349 (hereinafter: ‘Second *Gbagbo* Decision’), para. 39.

¹¹³ Panel Report, ICC-01/12-01/18-1197-Anx-Red, paras 16-28.

¹¹⁴ Panel Report, ICC-01/12-01/18-1197-Anx-Red, paras 30-31.

¹¹⁵ Panel Report, ICC-01/12-01/18-1197-Anx-Red, para. 34.

exercise;¹¹⁶ and the Panel very prudently highlighted the limits of the conventional approach to fitness and informed the range from worst to best case scenarios based on their professional evaluation.¹¹⁷

66. Accordingly, the Chamber is satisfied that the Panel Report is sufficiently comprehensive and reliable for the Chamber to make its determination on Mr Al Hassan's ongoing fitness.
67. The Panel concluded, based on the *Pritchard* criteria,¹¹⁸ that Mr Al Hassan is able to comprehend the evidence, follow the course of the trial and instruct his lawyers, and accordingly fit to plead.¹¹⁹ As regards the Defence's assertion that the Panel misapplied the *Pritchard* criteria,¹²⁰ the Chamber observes that, contrary to the arguments by the Defence, the Panel did not fail to consider the accused's ability to give evidence. To the contrary, the Panel Report explicitly stated that '[i]n order to be fit to plead, a Defendant must understand the charge(s), decide whether to plead guilty or not, exercise the right to challenge jurors, instruct solicitors or advocates, follow the course of proceedings *and give evidence in his or her own defence*'.¹²¹
68. Moreover, as noted by the parties,¹²² and as indicated by the Chamber in the Appointment Decision, regardless of the criteria used by the Panel, it is ultimately the Chamber's mandate to determine the fitness of the accused, in view of its obligations under Article 64(2) of the Statute.¹²³ The decision with respect to the fitness of the accused is a legal and not a scientific determination.¹²⁴ In this sense, the role of the Panel is better seen as assisting

¹¹⁶ Panel Report, ICC-01/12-01/18-1197-Anx-Red, paras 55-65.

¹¹⁷ Panel Report, ICC-01/12-01/18-1197-Anx-Red, para. 233.

¹¹⁸ Panel Report, ICC-01/12-01/18-1197-Anx-Red, para. 237. *See also R v Pritchard* [1836] EWHC KB 1.

¹¹⁹ Panel Report, ICC-01/12-01/18-1197-Anx-Red, paras 285, 321.

¹²⁰ Defence Observations, ICC-01/12-01/18-1316-Red, para. 4.

¹²¹ Panel Report, ICC-01/12-01/18-1197-Anx-Red, para. 284 (emphasis added).

¹²² Defence Observations, ICC-01/12-01/18-1316-Red, paras 7-8; Prosecution Observations, ICC-01/12-01/18-1317-Red, para. 31.

¹²³ Appointment Decision, ICC-01/12-01/18-1006-Red, para. 36.

¹²⁴ SPSC, *Deputy General Prosecutor for Serious Crimes v. Josep Nahak*, Findings and Order on Defendant Nahak's Competence to Stand Trial, 1 March 2005, 01A/2004 (hereinafter: '*Nahak Decision*'), para. 120.

the Chamber in the exercise of its mandate,¹²⁵ and consequently the Chamber is not bound by the Panel's conclusion that Mr Al Hassan is fit to stand trial. Accordingly, the Chamber will set out below the applicable criteria and its own findings in relation to the ongoing fitness of the accused.

2. *Applicable law on fitness*

69. The Chamber recalls that 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.¹²⁶
70. From the catalogue of fair trial rights contained in Article 67(1) of the Statute, a number of relevant capacities can be discerned which are necessary for the meaningful exercise of these procedural rights. These include the capacities to understand the charges and the conduct, purpose and possible consequences of the proceedings, as well as to instruct counsel and to make a statement.¹²⁷ As previously indicated, it is not however required that these capacities must be present at their notionally highest level, or at the highest level that a particular accused has ever enjoyed in respect of each capacity; the threshold is met when an accused has these capacities, viewed overall and in a reasonable manner.¹²⁸
71. Furthermore, the meaningful exercise of one's fair trial rights does not require that the person be able to exercise them as if he or she were trained as a lawyer or judicial officer.¹²⁹ Whether the accused is represented by a lawyer whom he can freely consult during the trial and provide with the necessary information is

¹²⁵ Appointment Decision, ICC-01/12-01/18-1006-Red, para. 36.

¹²⁶ Appointment Decision, ICC-01/12-01/18-1006-Red, para. 33; Defence Notice Decision, ICC-01/12-01/18-952-Red, para. 33. *See also* ECtHR (Grand Chamber), *Murtazaliyeva v. Russia*, Judgement, 18 December 2018, 36658/05, para. 91.

¹²⁷ Appointment Decision, ICC-01/12-01/18-1006-Red, para. 34; Defence Notice Decision, ICC-01/12-01/18-952- Red, para. 34.

¹²⁸ Appointment Decision, ICC-01/12-01/18-1006-Red, para. 35; Defence Notice Decision, ICC-01/12-01/18-952- Red, para. 34.

¹²⁹ Appointment Decision, ICC-01/12-01/18-1006-Red, para. 35; Defence Notice Decision, ICC-01/12-01/18-952- Red, para. 35.

an important factor in determining whether the accused can exercise his fair trial rights.¹³⁰

72. When deciding if an accused is fit to stand trial, the Chamber must take into account ‘all the relevant circumstances of each individual case’.¹³¹ Accordingly, the meaningful exercise of one’s procedural rights cannot be split up separately in individual, compartmentalised rights, but instead must be assessed in a holistic manner.¹³²
73. Importantly, the question of whether an accused is unfit to stand trial does not concern, in and of itself, whether they have particular medical conditions, but whether the accused is able to exercise effectively their fair trial rights in the proceedings.¹³³

3. *The Chamber’s determination on Mr Al Hassan’s ongoing fitness to stand trial*

74. At the outset, the Chamber emphasises that it is not called upon to reconsider its decision on Mr Al Hassan’s fitness at the commencement of trial.¹³⁴ The question before it is rather whether Mr Al Hassan’s ongoing fitness to stand trial is impaired.¹³⁵ Further, as recalled above, the Chamber is not tasked with determining the full extent of medical conditions, if any, that are suffered by the accused; any such conditions are relevant only insofar as they impact his ability to exercise his fair trial rights. It is nonetheless noted that the Panel, as a whole,

¹³⁰ Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court, 2 November 2012, ICC-02/11-01/11-286-Red (hereinafter: ‘First *Gbagbo* Decision’), para. 52; ECtHR, *Harry Liebreich v. Germany*, Decision (admissibility), 8 January 2008, 30443/03; ECtHR, *Timergaliyev v. Russia*, Judgment, 14 October 2008, 40631/02, para. 54; ECtHR, *Stanford v. UK*, Judgment, 23 February 1994, 16757/90, para. 30.

¹³¹ Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Further Defence Request for a Medical Examination, 1 October 2019, ICC-02/04-01/15-1622 (hereinafter: ‘Third *Ongwen* Decision’), para. 15; First *Gbagbo* Decision, ICC-02/11-01/11-286-Red, para. 51.

¹³² Third *Ongwen* Decision, ICC-02/04-01/15-1622, para. 15; Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen, 16 December 2016, ICC-02/04-01/15-637-Red (hereinafter: ‘First *Ongwen* Decision’), para. 10.

¹³³ Appointment Decision, ICC-01/12-01/18-1006-Red, paras 20, 28. See also ECtHR, *Harry Liebreich v. Germany*, Decision (admissibility), 8 January 2008, 30443/03.

¹³⁴ Appointment Decision, ICC-01/12-01/18-1006-Red, para. 17; Defence Notice Decision, ICC-01/12-01/18-952-Conf, para. 42; Transcript of hearing, ICC-01/12-01/18-T-017-Red-ENG, p. 30, line 2 – p. 32, line 10.

¹³⁵ Appointment Decision, ICC-01/12-01/18-1006-Red, paras 17-20.

concluded that the accused does not suffer from PTSD, depressive disorder or any other recognised psychiatric condition.¹³⁶

75. As regards Mr Al Hassan's ability to follow and understand the nature of the proceedings and the evidence and to understand the consequences of the proceedings, the Panel concluded that Mr Al Hassan is 'of average or above average intelligence and is well educated', and that he 'is capable of understanding the evidence from an intellectual perspective', given that there are no psychological or cognitive impairments.¹³⁷ The Panel indicated that the accused has been able to follow and understand most of what has been said in Court, despite the stress and anxieties he experiences, and understands the roles of different individuals in the courtroom.¹³⁸ Further, according to the Panel Report, Mr Al Hassan 'understands the case and the charges that are brought up against him very well' and could also 'remember all the things that have happened very well'.¹³⁹

76. In assessing the accused's ability to exercise his fair trial rights, the Chamber has also taken into account that the accused has full trust in his lead counsel and is able to meaningfully participate in the proceedings through her assistance.¹⁴⁰ In this regard, the Panel concluded that¹⁴¹

[Mr Al Hassan] is able to instruct his solicitor. He has no cognitive or psychological impairment that might prevent him from instructing his solicitor. He likes and trusts his solicitor and his legal team. He has felt able to talk to his lawyer at length about the charges he faces. He understands and believes the advice his lawyer gives him and follows the advice, but is also able to express any disagreement or his own wishes if they do not accord with the advice he is given.

77. The Chamber is mindful of the Panel's observation that Mr Al Hassan reported that 'some of the files are a potential trigger for him' and that 'he has therefore not read some of the Court documents that have been disclosed to him' since it

¹³⁶ Panel Report, ICC-01/12-01/18-1197-Anx-Red, paras. 164-201, 234, 322. The Panel nonetheless observes that certain symptoms of anxiety and distress are being experienced by the accused (para. 323). Further, the Panel clarifies that its conclusion 'does not mean he has not suffered from PTSD in the past nor that he is not at risk for a later development of PTSD' (para. 206).

¹³⁷ Panel Report, ICC-01/12-01/18-1197-Anx-Red, para. 257. *See also* paras 158-59.

¹³⁸ Panel Report, ICC-01/12-01/18-1197-Anx-Red, paras 247-253, 257-258.

¹³⁹ *See* Panel Report, ICC-01/12-01/18-1197-Anx-Red, paras 162-163, 239-246, 250.

¹⁴⁰ *See* Panel Report, ICC-01/12-01/18-1197-Anx-Red, paras 251, 256. *See also* Decision on Independent Counsel's Report, 20 October 2020, ICC-01/12-01/18-1118-Red, para. 8.

¹⁴¹ Panel Report, ICC-01/12-01/18-1197-Anx-Red, para. 256.

is too painful to read and he would fear reliving the torture.¹⁴² On this basis, the Defence submits that Mr Al Hassan's ability to effectively participate in the proceedings and instruct his Defence in relation to evidence related to the DGSE has been impaired.¹⁴³ The Chamber considers that processing the wealth of complex information inherent in proceedings before the Court is the role of the defence counsel,¹⁴⁴ and that, for the accused to be found fit to stand trial, it is not required that the accused be able to review and analyse each and every piece of evidence and filing by himself.¹⁴⁵ The case record in fact contains numerous examples attesting to the fact that Mr Al Hassan, with the assistance of his counsel, effectively participates in the ongoing trial proceedings and to date litigates multiple matters, including those relating to the alleged torture he has suffered.¹⁴⁶

78. In respect of Mr Al Hassan's capacity to make a statement or provide evidence, the Chamber considers that the aforementioned considerations regarding the accused's cognitive abilities equally apply. The Chamber has also had regard to other findings in the Panel Report, in particular that Mr Al Hassan's alleged experience of torture 'may impact his ability to give testimony and his defence would be unduly disadvantaged as a result.'¹⁴⁷ Nonetheless, the Chamber does not consider that these findings lead to the conclusion that Mr Al Hassan does not possess the requisite capacity to exercise his fair trial rights when testifying on his behalf, should he choose to do so, or to be cross examined. To the contrary, the Panel merely underlines, as part of its prudent approach predicting

¹⁴² Panel Report, ICC-01/12-01/18-1197-Anx-Red, paras 135, 264, 277.

¹⁴³ Defence Observations, ICC-01/12-01/18-1316-Red, paras 15-16, 26.

¹⁴⁴ Appointment Decision, ICC-01/12-01/18-1006-Red, para. 35; IRMCT, Appeals Chamber, *The Prosecutor v. Ratko Mladić*, Public Redacted Version of "Decision on a Motion to Stay the Appeal Hearing" of 6 March 2020, 11 March 2020, MICT-13-56-0321/2, p. 3.

¹⁴⁵ Similarly see ECtHR, *Grigoryevskikh v. Russia*, Judgment, 9 April 2009, 22/03, paras 80-82; ECtHR, *Stanford v. UK*, Judgment, 23 February 1994, 16757/90, paras 24-32. See also ICTY, Trial Chamber, *The Prosecutor v. Goran Hadžić*, Consolidated Decision on the Continuation of Proceedings, 26 October 2015, IT-04-75-T, para. 54. Even if there were limitations on the accused's capacity, legal representation may compensate for such limitations. See ICTY, Appeals Chamber, *The Prosecutor v. Pavle Strugar*, Judgment, 17 July 2008, IT-01-42-A, para. 60 and jurisprudence cited therein; *Nahak* Decision, 01A/2004, para. 147.

¹⁴⁶ See for example Defence Article 69(7) Reply, 12 April 2021, ICC-01/12-01/18-1411-Red2; Article 69(7) Application, 8 March 2021, ICC-01/12-01/18-1346-Red2; Defence Request to terminate the proceedings, 16 June 2020, ICC-01/12-01/18-885-Corr-Red3. See also Defence Notice Decision, ICC-01/12-01/18-952- Red, paras 27, 37-39.

¹⁴⁷ Panel Report, ICC-01/12-01/18-1197-Anx-Red, para. 283 (emphasis added).

different possible scenarios,¹⁴⁸ the possibility that further care, and where necessary adjustments, are required when the accused is put on stand.¹⁴⁹ The Chamber notes that in fact, notwithstanding the aforesaid finding, the Panel proceeds to conclude that Mr Al Hassan is fit to plead as he possess the relevant abilities including that to give evidence in his defence.¹⁵⁰

79. In light of the aforementioned considerations, the Chamber is satisfied that Mr Al Hassan, with the assistance of counsel and her team, continues to be able to exercise his procedural rights under Article 67(1) of the Statute. Accordingly, the Chamber finds that Mr Al Hassan continues to be fit to stand trial.
80. The Panel indicated that Mr Al Hassan's participation in the court proceedings is a risk factor that may deteriorate his mental health¹⁵¹ and recommended that there be a periodic review of the impact of ongoing proceedings.¹⁵² In this regard, the Chamber recalls that the Registry continues to provide medical care and ensures the continued physical and mental wellbeing of detained persons.¹⁵³ In particular, Regulation 155(3) of the Regulations of the Registry (the 'Registry Regulations') stipulates that '[t]he medical officer shall inform the Chief Custody Officer in writing whenever he or she considers that the physical or mental health of a detained person has been or will be adversely affected by any condition of or treatment in detention'. Pursuant to Regulation 155(4) of the Registry Regulations, the Registrar shall inform the Chamber of any relevant information concerning the physical or mental health of the accused. Accordingly, the Chamber considers it unnecessary to order a further medical examination pursuant to Rule 135 of the Rules unless new facts or indications

¹⁴⁸ Panel Report, ICC-01/12-01/18-1197-Anx-Red, paras 233, 238.

¹⁴⁹ *Similarly see* Third *Ongwen* Decision, ICC-02/04-01/15-1622, para. 28. The Chamber notes that the Panel Report recommends, as one of the measures that could be adopted when the accused testifies, that the positioning of Mr Al Hassan be adjusted in court. *See* Panel Report, ICC-01/12-01/18-1197-Anx-Red, para. 318. As the Chamber has received no indication at this point that Mr Al Hassan wishes to exercise his right to testify, the Chamber considers it premature to decide on whether such adjustments are in fact required.

¹⁵⁰ Panel Report, ICC-01/12-01/18-1197-Anx-Red, paras 284-285.

¹⁵¹ Panel Report, ICC-01/12-01/18-1197-Anx-Red, para. 290. *See also*, paras 282, 295, 311.

¹⁵² Panel Report, ICC-01/12-01/18-1197-Anx-Red, para. 304.

¹⁵³ *See also* Second *Ongwen* Decision, ICC-02/04-01/15-1412-Red, para. 12.

arise that would suggest the existence of medical conditions impacting the present determination of the Chamber.¹⁵⁴

4. *Additional measures and adjustments*

81. The Panel Report recommended that ‘the Chamber take every reasonable step to mitigate Mr Al-Hassan’s distress and maintain his fitness in relation to the ongoing court proceedings’.¹⁵⁵ While full consideration has been given to the Panel’s observations, the Chamber also notes that the majority of the recommendations fall within the purview of the Registry.
82. Fitness to stand trial, as the Panel observed, ‘is not a static state but is a dynamic variable which may change according to circumstances’,¹⁵⁶ and the Chamber is mindful of its obligation to ensure the ongoing fitness of the accused. However, this does not mean that, when a fitness challenge is made, a chamber must assume overarching supervisory role regarding conditions of detention or the mental and physical well-being of the accused. Rather, and notably in the case at hand, it is for the Registry to take into account the Panel’s recommendations¹⁵⁷ and, where appropriate, for the Presidency to exercise oversight pursuant to Articles 38(3) and 43(2) of the Statute and the relevant provisions of the Registry Regulations, save for matters directly involving the fair trial rights of the accused.¹⁵⁸

a. The current trial schedule

83. As one of the measures which may help mitigate distress and maintain fitness throughout the trial, the Panel mentions ‘the introduction of frequent breaks’.¹⁵⁹ In this regard, the Panel refers to Mr Al Hassan’s own report that ‘he is able to

¹⁵⁴ Similarly see Second *Ongwen* Decision, ICC-02/04-01/15-1412-Red, para. 17.

¹⁵⁵ Panel Report, ICC-01/12-01/18-1197-Anx-Red, para. 296.

¹⁵⁶ Panel Report, ICC-01/12-01/18-1197-Anx-Red, para. 238.

¹⁵⁷ Similarly see First *Ongwen* Decision, ICC-02/04-01/15-637-Red, para. 32; Second *Gbagbo* Decision, ICC-02/11-01/15-349, para. 46.

¹⁵⁸ Presidency, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*, Decision on the ‘Requête en vertu des Articles 38-3-a, 43-2 et 115-b’ dated 25 September 2020 (ICC-02/05-01/20-165), 12 October 2020, ICC-02/05-01/20-180, para. 5; Order instructing the Registry to lift certain measures imposed on Mr Al Hassan, 3 July 2020, ICC-01/12-01/18-925, paras 7-8.

¹⁵⁹ Panel Report, ICC-01/12-01/18-1197-Anx-Red, para. 318. See also Defence Observations, ICC-01/12-01/18-1316-Red, paras 28-29.

recover in the intervals between hearings, i.e. when the Chamber does not sit', and concludes that 'any disturbance would appear to be fairly short-lived and self-limiting'.¹⁶⁰

84. Considering the current sitting schedule, as well as circumstances, including the COVID-19 pandemic and the security situation in Mali, which resulted in a significant number of hearing dates being vacated, the Chamber finds it unnecessary to have any further scheduled breaks in the trial hearings.¹⁶¹ The Chamber is not persuaded by the submissions of the Defence that the current hearing schedule impedes Mr Al Hassan's right to receive treatment¹⁶² and finds that these submissions are not supported by the Panel Report's conclusions. However, as previously done throughout the trial, the Chamber will continue considering on a case-by-case basis whether there is a need for an adjournment outside of natural points of breaks in the hearings.¹⁶³ In this regard, the Chamber notes the Panel's observation that Mr Al Hassan reports that he 'has been told he is able to ask for breaks when he wants and so far he has felt able to do this'.¹⁶⁴

b. Other recommendations

85. The Chamber considers that the remainder of the recommendations made by the Panel fall within the purview of the Registry and accordingly instructs the Registry to take note of these recommendations. These include: the use of

¹⁶⁰ Panel Report, ICC-01/12-01/18-1197-Anx-Red, para. 320.

¹⁶¹ Panel Report, ICC-01/12-01/18-1197-Anx-Red, para. 254. *See also* Email from the Chamber, 21 April 2021 at 13:45; Email from the Chamber, 20 April 2021 at 14:10; Email from the Chamber to the parties and participants, 14 April 2021 at 13:15.

¹⁶² Defence Observations, ICC-01/12-01/18-1316-Red, para. 29.

¹⁶³ *See* Decision on Defence Adjournment Request, ICC-01/12-01/18-940-Red, para. 30. *See also* Email from the Chamber to the parties and participants, 26 January 2021 at 10:22; Email from the Chamber to the parties and participants, 23 November 2020 at 09:15; Email from the Chamber to the parties and participants, 22 September 2020 at 13:23; Email from the Chamber to the parties and participants, 14 July 2020 at 16:37. For example, the Chamber has made specific adjustments for the period of Ramadan. *See* Email from the Chamber to the parties and participants, 9 March 2021 at 14:17.

¹⁶⁴ Panel Report, ICC-01/12-01/18-1197-Anx-Red, para. 254.

handcuffs;¹⁶⁵ family visits;¹⁶⁶ treatment options;¹⁶⁷ and activities at the detention centre.¹⁶⁸

86. The Chamber observes that the Defence raises an issue as regards the accused's prayer while attending trial hearings.¹⁶⁹ While it is ultimately for the Registry to make any necessary arrangements in light of the relevant safety and security requirements, as well as any COVID-19 associated restrictions, considering the importance of the accused being able to perform his religious activities alongside trial hearings, the Chamber expects that the possibility of Mr Al Hassan being allowed to pray in the consultation room in between sessions will be fully explored.
87. Finally, the Panel also underlined that staff and inmate relationships are the day-to-day fabric of both trauma recovery and re-traumatisation.¹⁷⁰ In this regard, it is noted that the Panel observed that Mr Al Hassan reports having established positive coping strategies and relationships with the prison guards and encourages his continued positive engagement with the detention facility guards.¹⁷¹ The Chamber also recalls the Registry's previous assurance that 'while the COVID-19 measures require social distancing, this does not stop custody officers from actively engaging with him on a daily basis'.¹⁷² The Chamber commends the staff of the Detention Centre for their commitment and encourages their continued positive engagement, most notably that of the various custody officers, with Mr Al Hassan.

¹⁶⁵ Panel Report, ICC-01/12-01/18-1197-Anx-Red, paras 300, 324.

¹⁶⁶ Panel Report, ICC-01/12-01/18-1197-Anx-Red, paras 325-326. The Chamber reiterates that family visits should be facilitated as soon as possible. However, it is for the Registrar to decide on the concrete timing of such visits in light of the continuing restrictions on international travel and in particular in the Host State. See Decision on the measures restricting Mr Al Hassan's contacts while in detention, ICC-01/12-01/18-871-Conf-Exp, paras 52, 54.

¹⁶⁷ Panel Report, ICC-01/12-01/18-1197-Anx-Red, paras 310-313, 318.

¹⁶⁸ Panel Report, ICC-01/12-01/18-1197-Anx-Red, paras 220-229, 325-326.

¹⁶⁹ Defence Observations, ICC-01/12-01/18-1316-Red, para. 32; ICC-01/12-01/18-1316-Conf-AnxI.

¹⁷⁰ Panel Report, ICC-01/12-01/18-1197-Anx-Red, paras 314, 317.

¹⁷¹ Panel Report, ICC-01/12-01/18-1197-Anx-Red, paras 314, 317.

¹⁷² See Registry's Observations on the "Defence notice of its intention to raise unfitness to stand trial and request for a status conference" (ICC-01/12-01/18-942-Conf), 18 August 2020, ICC-01/12-01/18-945-Red2, para. 8; Defence Notice Decision, ICC-01/12-01/18-952-Red, para. 45.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DECIDES that Annexes A, B, D and F to the Defence Observations will not be considered;

FINDS that Mr Al Hassan continues to be fit to stand trial;

INSTRUCTS the Prosecution and the Defence to file public redacted versions of ICC-01/12-01/18-1333-Conf and ICC-01/12-01/18-1383-Conf, respectively, within twenty days of notification of the present decision; and

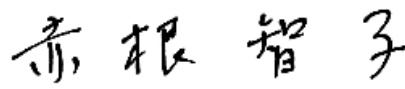
INSTRUCTS the Registry to file a public redacted version of the Supplementary Report (ICC-01/12-01/18-1269-Conf-Anx), redacting Appendix 1 in its entirety.

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



Judge Antoine Kesia-Mbe Mindua

Presiding Judge



Judge Tomoko Akane



Judge Kimberly Prost

Dated this Monday, 10 May 2021

At The Hague, The Netherlands