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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 and C and Confidential *ex parte* Annex D [Defence and Registry only]

Public redacted version of “Defence request for leave to appeal ‘Decision on Mr Al Hassan’s ongoing fitness to stand trial’” (ICC-01/12-01/18-1476-Conf)

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. At the outset, the Defence expresses its sincere appreciation for the steps taken by the Trial Chamber and the Registry to address issues pertaining to Mr Al Hassan's mental health and to accommodate his family and religious rights during trial proceedings. The Defence appreciates that the COVID-19 pandemic has introduced significant unforeseen challenges for the Court and that the judiciary and Court staff have worked assiduously to address and ameliorate the impact of these challenges on the ongoing trial proceedings. This request has been brought due to concern that notwithstanding such efforts, the current arrangement of the trial proceedings does not ensure Mr Al Hassan's right to effectively participate in a manner that is consistent with both key fair trial rights and intrinsic personal rights.
2. With a view to protecting and preserving these rights, the Defence for Mr Al Hassan respectfully seeks leave to appeal the 'Decision on Mr Al Hassan's ongoing fitness to stand trial' ('the Decision'),¹ in relation to the following issues:
 - i. Whether the procedure employed for instructing the Panel of Experts, receiving observations and adjudicating the observations was consistent with the requirements of open, impartial and adversarial proceedings (the 'First Issue');
 - ii. Whether the Trial Chamber erred in law and fact by finding that Mr Al Hassan is and will remain fit to instruct his Counsel and plead in his Defence, under the current trial arrangements (the 'Second Issue'); and
 - iii. Whether the Trial Chamber abused its discretion by failing to implement any adjustments to the trial proceedings for the purpose of facilitating Mr Al Hassan's right to participate in an effective manner, consistent with the principle with equality of arms (the 'Third Issue').

II. Confidentiality

3. Pursuant to Regulation 23bis(2) of the Regulations of the Court, this response has been filed confidentially as it refers to filings of the same classification.

¹ ICC-01/12-01/18-1467.

III. Submissions

The First Issue

The issue arises from the Decision

4. Although the fitness proceedings were initiated by an *inter partes* Defence request filed in the court record, key aspects of the related proceedings were convened on an *ex parte* basis through email exchanges that were not copied to the Defence, even though the content of such exchanges directly concerned the Defence and Mr Al Hassan. This includes:
 - a. Correspondence between the Registry and the Trial Chamber concerning the modalities of the trial hearing schedule;²
 - b. Correspondence between the Registry and the Panel of Experts concerning the transmission of Mr Al Hassan's medical records and issues pertaining to the modalities of the evaluation of Mr Al Hassan;³ and
 - c. Correspondence between the Panel of Experts and the Detention Unit Medical Officer.⁴

The issue impacts upon the fairness and expeditiousness of the proceedings and the outcome of the case

5. The use of *ex parte* channels of communication for such matters directly impacted on the fairness and efficacy of the process. Specifically:
 - a. The Defence was never apprised that its submissions on the hearing modalities were not considered by the Chamber and were not otherwise part of the case record.⁵ This deprived the Defence of its right to receive a reasoned ruling as concerns either the receivability or content of such submissions. This, in turn,

² Annex A, pp. 2-6.

³ ICC-01/12-01/18-1124-Conf-AnxA; ICC-01/12-01/18-1124-Conf-AnxB.

⁴ ICC-01/12-01/18-1316-Conf-AnxH.

⁵ Annex A, p. 2: "The Defence also notes that, apparently contrary to the Chamber's instruction described at paragraph 42, the Defence received no notification from the Registry or at all that 'the Chamber has not found it appropriate to consider these submissions as provided beyond what was strictly required.'"

deprived the Defence of the opportunity to file such submissions as a separate application or as part of its observations on fitness.

- b. The Defence invested a significant amount of time and resources in seeking access to a full index and related medical records, and preparing draft translations, with a view to ensuring that the Panel of Experts would be in a position to access all relevant information for their assessment in a timely manner and comprehensible format. This objective was impeded and ultimately frustrated by the system devised by the Registry, which depended on the Detention Unit Medical Officer to effectuate disclosure, in a manner wholly lacking in transparency. The Defence expressed its concerns to the Trial Chamber that this system could first, result in partial and delayed disclosure and second, create a misleading impression for the reasons for such delays, and therefore sought leave to communicate such records to the Panel of Experts, via the Registry.⁶ This request was rejected,⁷ and no steps were taken to disabuse the Panel of Experts of the incorrect notion (conveyed by [REDACTED]) that the Defence or Mr Al Hassan had refused to transmit certain records.⁸ This undermined the integrity of the process. As a result of the piecemeal manner in which items were conveyed to the Panel of Experts, they conducted the evaluation without the benefit of a full evaluation of Mr Al Hassan's record.⁹ As a result, certain findings rest on a clear misapprehension as concerns the content of this record.¹⁰ The Panel of Experts' mistaken belief

⁶ Annex B, pp. 4, 10-11.

⁷ Annex B, p. 2.

⁸ ICC-01/12-01/18-1316-Conf-AnxH, pp. 1: "[REDACTED]." See also ICC-01/12-01/18-1197-Conf ('Report'), para. 59: "Non provision of AH's clinical and custody records during his detention. These were requested but access to them was declined by AH following advice from his defense team."

⁹ Report, paras 59-65.

¹⁰ **Report, para 147** in contradiction with MLI-D28-0003-1950, MLI-D28-0003-1399 at 1399, MLI-D28-0003-1967 at 1968 (Dutch) & MLI-D28-0003-1432 (English) at 1433; MLI-D28-0003-2028 at 2029 (Dutch); MLI-D28-0003-1847 at 1849 (English); MLI-D28-0003-2028 at 2029 (Dutch); MLI-D28-0003-1847 at 1848 (English); MLI-D28-0003-2194 at 2211, 2220; MLI-D28-0003-2184 at 2184; MLI-D28-0003-1916-R01 at 1916 (Dutch); MLI-D28-0003-1373- R01 at 1373 (English); MLI-D28-0003-1943 at 1943 (Dutch); MLI-D28-0003-1390 at 1390 (English); MLI-D28-0003-1944 at 1944 (Dutch); MLI-D28-0003-1391 at 1391 (English). **Report, para 196** in contradiction with MLI-D28-0003-1950 (Dutch); MLI-D28-0003-1399 at 1399 (English); MLI-D28-0003-1967 at 1968 (Dutch); MLI-D28-0003-1432 at 1433; MLI-D28-0003-2028 at 2029 (Dutch); MLI-D28-0003-1847 at 1848-1849 (English); MLI-D28-0003-2194 at 2220; MLI-D28-0003-2184 at 2184 (English); MLI-D28-0003-1916-R01 at 1916 (Dutch); MLI-D28-0003-1373- R01 at 1373 (English); MLI-D28-0003-1943 at 1943 (Dutch); MLI-D28-0003-1390 at 1390 (English); MLI-D28-0003-1944 at 1944 (Dutch); MLI-D28-0003-1391 at 1391 (English); MLI-D28-0003-2114-R01 at 2114. **Report, para 215** in contradiction with MLI-D28-0003-1950 (Dutch); MLI-D28-0003-1399 at 1399 (English); MLI-D28-0003-2114-R01 at 2114;

that they had received a partial record also appears to have impacted their assessment of Mr Al Hassan.¹¹

- c. Even though the Single Judge directed the Registry to take steps with a view to ensuring in-person evaluation by all experts,¹² the Detention Unit Medical Officer directly counter-acted this directive, by specifically advising the Panel of Experts not to conduct in-person evaluations.¹³ As a result, Dr Mezey conducted her evaluation by telephone, without evaluating his countenance, and being unaware of the fact that Mr Al Hassan was forced to participate during the first session in the presence of a guard.¹⁴ While the Defence received some correspondence between [REDACTED] and the POE (where the Registry was copied), the Defence did not receive a record of all exchanges between either the Registry and the POE or, [REDACTED] and the POE.¹⁵ As a result, the Defence was unable to identify and address the source of counter-factual claims (including, that Mr Al Hassan had never requested medication or that he was not woken up by nightmares).¹⁶
- d. While Mr Al Hassan participated in the interviews on the understanding that he would be given an opportunity to speak to the POE after receiving their evaluation (with a view to addressing any errors caused by mistakes in interpretation or their transcription of notes), the Chamber rejected this request,¹⁷ and failed to convene a hearing, thereby providing no avenue to the Defence to correct errors that impacted on the POE's findings.

6. The fair and adversarial nature of the process was further impacted by the Chamber's decision to reject Defence arguments and disregard the Registry recommendations

MLI-D28-0003-2194 at 2220 entry on 02-12-2019. **Report, para 214** in contradiction with MLI-D28-0003-1444.

¹¹ Report, para. 59.

¹² Annex C, p. 2: "[REDACTED]." See also p. 5 (**emphasis added**): "[REDACTED]"

¹³ ICC-01/12-01/18-1316-Conf-AnxH, pp. 2: "ICC-01/12-01/18-1316-Conf-AnxH" See also pp. 8-24 (ICC-01/12-01/18-1316-Conf-AnxH).

¹⁴ Report, para. 55.

¹⁵ Annex D, p. 2: "[REDACTED]" The Defence had requested disclosure of 'all interim correspondence between the Detention Unit Medical Services and the Panel': Annex D, p. 3.

¹⁶ Report, para. 148, contradicted by medical records at MLI-D28-0003-1916-R01 at 1916; MLI-OTP-0003-1373-R01 at 1373; MLI-D28-0003-1950 (Dutch), MLI-D28-0003-1399 at 1399 (English); MLI-D28-0003-1444 at 1444..

¹⁷ Annex D, p. 4.

concerning Panel composition, by appointing two experts who were appearing contemporaneously as Prosecution experts in ongoing proceedings in the Ongwen case in relation to identical issues (PTSD and dissociative disorder - DSM 5). This provided an unfair advantage to the Prosecution, insofar as on the one hand, the two experts were familiar with Prosecution strategies for countering expert evaluations of PTSD,¹⁸ and on the other, the Prosecution was more familiar with their language and the logic underpinning their conclusions. In contrast, the Chamber failed to make any determination as to the suitability of the Defence candidate (Dr Chisholm) in its initial decision.¹⁹ Human rights law establishes the right of the Defence to obtain and rely on expert opinions to ensure equality of arms and informed adversarial debate. ICL case law further confirms that the Defence may appoint Defence experts to assist the Defence to respond to observations on fitness prepared by the Chamber's experts.²⁰ Given the complexity and opaque nature of some of the findings, this right is of crucial importance in circumstances where the Defence is unable to question the POE as concerns the logic and factual basis underpinning their findings. The Chamber nonetheless disregarded key Defence submissions, holding that the Defence was not entitled to appoint an expert for the purpose of assisting the Defence to formulate its submissions.²¹ Consequently, the Chamber unreasonably and arbitrarily failed to take into consideration arguments relating to the fact that the POE's findings clearly supported a diagnosis of PTSD and severe psychological trauma.²²

7. Finally, the Trial Chamber's finding that Mr Al Hassan has the capacity to effectively participate in the proceedings rests on an unexplained reference to trial filings that were not addressed by the POE or in the related observations.²³ This includes the Defence Article 69(7) reply, which was filed after the conclusion of the fitness

¹⁸ Notably, Dr Mezey disputed the Court expert's assessment of PTSD in Ongwen (ICC-02/04-01/15-T-162-Red-ENG, p. 38), and the majority of the POE in this case (Report, p. 4, and paras. 206 and 235).

¹⁹ See ECtHR, *Khodorkovsky & Lebedev v Russia*, paras. 731: "the Court stresses that it may be hard to challenge a report by an expert without the assistance of another expert in the relevant field. Thus, the mere right of the defence to ask the court to commission another expert examination does not suffice. To realise that right effectively the defence must have the same opportunity to introduce their own "expert evidence".

²⁰ See, inter alia, ICTY, *Prosecutor v. Kovacevic*, [Public Version Of The Decision On Accused's Fitness To Enter A Plea And Stand Trial](#), 12 April 2006, para. 8; *Prosecutor v. Gvero*, [Public Redacted Version Of 30 November 2012 Decision On Request To Terminate Appellate Proceedings In Relation To Milan Gvero](#), 16 January 2013, para. 29 (relying on findings of both Chamber's experts and the Defence expert).

²¹ Decision, paras. 29-35.

²² ICC-01/12-01/18-1316-Conf, paras 9-14.

²³ Decision, fn 146.

litigation. The Defence had no notice that the Chamber would rely on such filings and was thus deprived of the right to be heard on such matters. The absence of any explanation as to the relevance of such filings to issues of psychological fitness is also contrary to the right to a reasoned opinion.

The Second Issue

The issue arises from the Decision

8. The Trial Chamber's findings that the POE, first, did not diagnose Mr Al Hassan with PTSD and, second, found that Mr Al Hassan was fit to plead,²⁴ are based on a partial reading of the Report. The overarching conclusion that Mr Al Hassan is fit to plead is also predicated on the assumption that Counsel can substitute for the defendant in relation to the fundamental right to review evidence and instruct the Defence. The issue thus arises as to whether the Trial Chamber erred in fact and law by finding that Mr Al Hassan is and will remain fit to instruct his Counsel and plead in his Defence, under the current trial arrangements.
9. As concerns the errors of fact, the POE found that Mr Al Hassan is experiencing "marked suffering",²⁵ and "the symptoms he currently experiences would represent a manifestation of PTSD, which is coherent with the reports and notes of other experts".²⁶ In assessing the individual criteria for PTSD, the POE also found that Mr. Al Hassan fulfilled five separate symptoms of criterion B,²⁷ two separate symptoms of criterion C,²⁸ four separate symptoms of criterion D,²⁹ four separate symptoms of criterion E,³⁰ and the existence of aspects of derealization when memories of torture surfaced.³¹ 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".³² In their ultimate findings, the POE found first, that Mr Al Hassan's background and symptoms

²⁴ Decision, paras. 74 and 78.

²⁵ Report, para. 289.

²⁶ Report, para. 235.

²⁷ Criteria B.1, B.2, B. 3, B. 4, and B.5 (Report, paras. 174-181).

²⁸ Criteria C.1, and C.2 (Report, paras. 182-183).

²⁹ Criteria D.2, D.3, D.4, D.6 (Report, paras. 184-190).

³⁰ Criteria E.1, E.3, E.5, E.6; Report, paras 191-196.

³¹ 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."

³² Report, para. 197.

“suggest a more complex trauma picture than would be typically associated with a PTSD diagnosis”,³³ and second, that “the symptom profile of AH could very well support the presence of a sub clinical form of PTSD.”³⁴ As concerns fitness, the POE made no finding that Mr Al Hassan was fit to testify in his defence; the Report, to the contrary, sets out several obstacles that would exist if he were to testify and be cross-examined by the Prosecution.³⁵ The POE provided recommendations at the end of the Report because the Chamber requested recommendations: the POE did not specify that the implementation of these recommendations would address or fully remedy the barriers to fairness that they identified.³⁶ The POE also attached the explicit caveat to their overall finding concerning fitness to plead that this finding related to “those aspects of his case that do not relate to torture evidence”,³⁷ and further, that “AH’s current state of mind might interfere with his abilities to exercise his fair trial rights”.³⁸

10. As concern errors of law, the Chamber found that “processing the wealth of complex information inherent in proceedings before the Court is the role of the defence

³³ Report, para. 322.

³⁴ Report, para. 324.

³⁵ Report, paras 282-283: “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.”

³⁶ See Report, para. 328, listing “Measures that may help to mitigate distress and maintain fitness during the trial” (emphasis added).

³⁷ Report, para. 281.

³⁸ Report, para. 291. See also paras. 292-293: **AH might face impairments in his ability to give evidence in his own defence.** On an intellectual level, AH is clearly able to give evidence and engage in his own defence, even in the situation of a more complex cross-examination. However, 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. **AH might face significant impairments to engage in exercising his fair trial rights.** If AH faces the aforementioned issues during the court proceedings, he is no longer able to exercise his fair trial rights. If 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 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.”

counsel, 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”.³⁹ This finding effectively eliminates a core element of the legal test concerning fitness to plead – that is, the ability of the defendant to review evidence and instruct his Counsel. The case law cited in reliance of this finding is also inapposite:

- a. in *Grigoryevskikh v. Russia*, the ECHR found an article 6(1) violation due to inability of the defendant to hear evidence and further emphasized the positive obligation of the Court to take steps to ensure that the defendant could effectively follow the proceedings;⁴⁰
- b. *Stanford v. UK* concerned the entirely different situation of a screen being placed between a defendant and a testifying witness (and the defence choosing for tactical reasons not to bring hearing issues (which did not impede the ‘satisfactory’ acoustics in the courtroom) to the attention of the Chamber;⁴¹
- c. in *Hadžić*, the Chamber found that “*Hadžić* understands the essentials of the proceedings and has the ability to communicate with and instruct counsel.”⁴² The cited finding concerned the defendant’s ability to process testimony of a Defence witness heard in court and not his preliminary ability to review disclosed Prosecution evidence with a view to instructing Counsel;
- d. in *Strugar*, the Appeals Chamber addressed the overall capacity of the defendant to participate with the assistance of Counsel and further noted case law that “[t]he representation by skilled and experience lawyers can however be found insufficient to guarantee effective participation of an accused in the proceedings against him where he or she is incapable to cooperate with his or

³⁹ Decision, para. 77.

⁴⁰ ECtHR, *Grigoryevskikh v. Russia*, no. [22/03](#), paras. 77-84. See also para. 78: “The defendant should be able, *inter alia*, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence (see, for example, *Stanford*, cited above, § 30; *V. v. the United Kingdom* [GC], no. [24888/94](#), §§ 85, 89, 90, ECHR 1999-IX; and *S.C. v. the United Kingdom*, no. [60958/00](#), § 29).”

⁴¹ ECtHR, *Stanford*, no. [16757/90](#), paras 27-29.

⁴² ICTY, *Hadžić*, [Consolidated Decision on the Continuation of Proceedings](#), para. 54.

her lawyers for the purposes of his or her defence due to, for example, his or her immaturity and/or disturbed emotional state”;⁴³ and

- e. in *Nahak*, the Chamber recognized that the role of Counsel could not substitute for the defendant’s capacity to instruct Counsel.⁴⁴

The issue impacts upon the fairness and expeditiousness of the proceedings and the conduct of the trial

11. Mr Al Hassan’s ability to review evidence and instruct Counsel is of central importance to the fair and expeditious conduct of the proceedings and the outcome of the proceedings. The Chamber’s approach to these issues of fact and law was also central to its ultimate finding that Mr Al Hassan is currently fit to stand trial. This

⁴³ ICTY, *Prosecutor v. Strugar*, [Appeals Judgment](#), fn. 145.

⁴⁴ Special Panels for Serious Crimes, *Deputy General Prosecutor for Serious Crimes v. Josep Nahak*, [Findings and Order on Defendant Nahak's Competence to Stand Trial](#), para. 147: “Present ability to consult with counsel and to assist in his defense - The final matter that this Court must consider is whether the Defendant has a present ability to consult with his lawyer and to assist in the preparation of his defense. This is perhaps the most significant element of the test of competence because “In some cases legal assistance to an accused may be a sufficient measure to compensate for any limitations of capacity of the accused to stand trial.” Nonetheless, “[t]he use of counsel requires, however, that the accused has the capacity to be able to instruct counsel sufficient for this purpose.”” See also paras 129-131: “Dr. Freeman also commented on the interplay between a defendant's competence to stand trial and the role of counsel. Essentially, Dr. Freeman concluded that even in circumstances where a defendant is unable to comprehend the charges against him or the nature of the criminal process, he could nonetheless proceed to trial. He based this conclusion on the view that if a defendant complies with counsel and is willing to participate, the trial could go forward so long as the defendant remains represented. In this respect he testified that he discerned sufficient “intentionality” on the part of Nahak to conclude that he was willing to participate in the process. Dr. Freeman further concluded that since the Defendant is represented by capable counsel, he is consequently fit to proceed to trial. 130. The view taken by Dr. Freeman is essentially a legal conclusion rather than a psychological one. Whether or not a lawyer may substitute his competence for that of his otherwise incompetent client is to be determined as a matter of law and is thus not a fit subject for expert medical testimony. 131. This Court concludes that it is not sufficient that a defendant is compliant with the criminal process and in that respect alone is cooperative with counsel. Even the minimum standard of competence requires that a defendant be able to cooperate with counsel, to inform his attorney concerning the facts of his case and to assist in the preparation of his own defense. Absent the capacity to make rational decisions at trial, a defendant who is simply yielding to the process is likely to do nothing more than accept the decisions of counsel as being the easiest available alternative. Although a defendant need not be able to go to trial unaided, when a defendant is represented by counsel he must have sufficient present ability to assist his attorney in some meaningful way. 132. Necessarily, the involvement of counsel will enable a defendant to deal more readily with his limited knowledge of the law and legal formalities. Nonetheless, the major function of counsel is to assist the defendant but not to replace him. “The use of counsel requires, however, that the accused has the capacity to be able to instruct counsel sufficiently for this purpose.” Accordingly, the mere fact that a defendant is represented by counsel does not mean, *ipso facto*, that the accused is competent simply because his lawyer is. Moreover, the mere fact that a defendant has the theoretical ability to say yes or no to his attorney does not mean that he has the capacity to make intelligent decisions concerning his own defense. Accordingly, a lawyer's presence in a case, even where he or she serves the best interests of the client, is not a substitute for a defendant being able to instruct his counsel and to actively assist in his own defense. A defendant, who is unable to do more than agree with his attorney because he does not have the capacity to do otherwise, cannot be described as competent, even though represented by counsel”.

issue thus significantly affects the fair and expeditious conduct of the proceedings and the outcome of the trial.

The Third Issue

The issue arises from the Decision

12. The POE made several recommendations as concerns the modalities of detention and trial proceedings. This included recommending:

- a. In light of the profound psychological distress caused by family separation, that Mr Al Hassan have direct contact with his family as soon as possible;⁴⁵
- b. Minimising the use of handcuffs;⁴⁶ and
- c. The “[i]ntroduction of frequent breaks and providing AH with additional support (this could be medical or religious e.g. through the Iman) in between appearances.”⁴⁷

13. The Chamber found that many of these recommendations fell within the purview of the Registry,⁴⁸ and further determined that “[c]onsidering 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”.⁴⁹ The Chamber also cited the schedule adopted during Ramadan in support of its overall finding that no structural adjustments were required.⁵⁰

14. As set out in the introduction, the Defence is profoundly grateful for the measures that have been pursued by the Chamber and the Registry. The Chamber’s position that certain issues remain within the remit of the Registry does not, however, take sufficient account of the direct nexus between the trial schedule and the ability of the

⁴⁵ Report, paras 146-147, 220-223, 227-228, 326.

⁴⁶ Report, para. 328.

⁴⁷ Report, para. 328.

⁴⁸ Decision, para. 85, referring to handcuffs; family visits; treatment options and activities at the detention centre. The Chamber further affirmed that 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”.

⁴⁹ Decision, para. 84.

⁵⁰ Decision fn. 163.

Registry to implement such measures. For example, even if it is correct that the Registry is responsible for organizing the logistics of a family visit, a family visit can only be organized during a break in trial hearings. Accordingly, unless the Chamber and the Registry coordinate to arrange such a break, there is a risk that Mr Al Hassan's right to see his family will be further frustrated, simply because all necessary arrangements cannot be finalized within the limited window of time available during the summer judicial recess. Similarly, while there have been frequent breaks in the hearings, these breaks have occurred as a result of last-minute developments – some hearings have been adjourned with less than 24 hours' notice, with the result that it has not been possible for the Defence to organize detention unit visits, or otherwise take advantage of these breaks. In order to organize for Mr Al Hassan to receive ongoing treatment, it will be necessary for such breaks to occur on a regular and predictable basis (for example, every Friday, as requested). Otherwise, unless Mr Al Hassan is given the time and opportunity to build his resilience, when unexpected trial developments occur (for example, when the examination of certain witnesses runs longer than expected), the Defence will be forced to choose between electing for extended sitting hours to ensure sufficient time for cross-examination or ensuring the presence of the defendant.⁵¹ The onus of requesting breaks also cannot rest solely on Mr Al Hassan, as experience has shown that he lacks the capacity to identify in advance that his coping threshold will be exceeded.⁵² The necessity and proportionality of the use of restraints is also necessarily a matter that must be subject to the possibility of judicial review, since such restraints are directly tied to the conditions of arrest and detention ordered by the Chamber.

⁵¹ Mr Al Hassan waived his right to be present during the testimony of Witness P-0635 on 14 April 2021: ICC-01/12-01/18-T-073-ENG ET, p. 2, lines 8-10: "I note for the record that Mr Al Hassan has been excused from attending today because he was not feeling well" and during the testimony of Witness P-0646 in the afternoons of 20 April 2021: ICC-01/12-01/18-T-077-ENG ET, p. 45, lines 3-6, and 21 April 2021: ICC-01/12-01/18-T-078-CONF-ENG ET, p. 55, lines 23-24.

⁵² ICC-01/12-01/18-1415-Conf; ICC-01/12-01/18-1415-Conf-AnxA: "Yesterday, Mr Al Hassan started observing Ramadan. As part of this, he stopped drinking any caffeine or taking any paracetamol during the day. He experienced severe headaches yesterday but informed us that he thought he would be better today. He just contacted us to inform us that his headaches had returned. He therefore asked if it would be possible to be excused from today's hearing. (...) This is the first time that Mr. Al Hassan has had trial hearings during Ramadan and it is difficult for the Defence and for Mr. Al Hassan to predict the manner in which it will impact on his ability to follow the proceedings. We will endeavour to update the Trial Chamber on an ongoing basis as soon as we receive any information that might impact on his ability to following proceedings or the trial schedule." See also fn. 51, *supra*.

The issue significantly impacts upon the fairness and expeditiousness of the proceedings

15. The Chamber's decision to place such matters within the remit of the Registry has a direct impact on the fairness of the proceedings, as it severs the Chamber's oversight as concerns the impact of such measures on Mr Al Hassan's psychological well-being and related effective participation in the proceedings. This approach also affects the efficacy of the proceedings, as the Registry has no control over the hearing schedule and cannot, therefore, ensure that matters of family visits and medical treatment are implemented in a manner that the least disruptive to trial proceedings and Defence trial preparation. The ICC Presidency has, moreover, recognized the direct nexus between timely and regular family visits and the expeditious conduct of the proceedings.⁵³ The Decision thus directly affects the expeditiousness of the proceedings by diluting or eliminating judicial oversight of a factor that generates direct consequences for the efficacy and expeditiousness of the proceedings.

An immediate resolution of the Three Issues by the Appeals Chamber would materially advance the proceedings

16. Issues concerning the effective participation of the defendant in the trial proceedings should be resolved immediately, in order to avoid the miscarriage of justice that could result from holding trial hearings at a point where the defendant was not able to effectively participate in such hearings.⁵⁴ Given the significance of the Three Issues, an immediate decision by the Appeals Chamber on the Three Issues would materially advance the proceedings by "removing doubts about the correctness" of the Chamber's resolution of these Three Issues, and further "map (...) a course of action along the right lines" thereby providing "a safety net for the integrity of the proceedings."⁵⁵

⁵³ "Family visits may indeed play a significant role in respect of such well-being which, in itself, may enhance the effectiveness of Court proceedings. Where a detained person has his or her physical and psychological well-being properly safeguarded, delays of the proceedings for health-related reasons may, for example, be less likely": [ICC-RoR220-01/19-2-Red](#), para. 20.

⁵⁴ *Strugar*, [Appeals Judgment](#), para. 34.

⁵⁵ [ICC-01/04-168](#), para. 15.

IV. Relief sought

17. The Defence respectfully requests that Trial Chamber X **GRANT LEAVE TO APPEAL** on the Three Issues.



Melinda Taylor
Counsel for Mr Al Hassan

Dated this 17th Day of May 2021
At The Hague, The Netherlands