

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 21 May 2021

TRIAL CHAMBER X

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

SITUATION IN THE REPUBLIC OF MALI

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

Confidential

**Prosecution response to Defence request for leave to appeal
"Decision on Mr Al Hassan's ongoing fitness to stand trial"**

Source: Office of the Prosecutor

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

Court to:

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Counsel for the Defence

Ms Melinda Taylor

Ms Kirsty Sutherland

Mr Antoine Vey

Ms Alka Pradhan

Legal Representatives of the Victims

Mr Seydou Doumbia

Mr Mayombo Kassongo

Mr Fidel Luvengika Nsita

**Legal Representatives of the
Applicants**

Unrepresented Victims

Unrepresented Applicants

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section Other**

I. Introduction

1. The Defence for Mr Al Hassan's application ("Request")¹ for leave to appeal Trial Chamber X's ("Chamber") "Decision on Mr Al Hassan's ongoing fitness to stand trial" ("Decision") should be dismissed.²
2. In its Request, the Defence identified three purportedly appealable issues ("Issues") which allegedly arise from the Decision. However, these issues do not arise from the Decision or do not otherwise constitute an appealable "issue" within the terms of article 82(1)(d) of the Statute.
3. The Request should in any event be denied as the Issues fail to meet the remaining cumulative criteria under rule 82(1)(d) of the Statute. The proposed Issues do not significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, nor do they require immediate resolution by the Appeals Chamber to materially advance the proceedings.

II. Confidentiality

4. Pursuant to regulation 23bis(2) of the Regulations of the Court ("Regulations"), this response is filed confidentially because it responds to a Request and refers to filings of the same classification.

III. Submissions

A. The Issues do not constitute appealable issues within the terms of article 82(1)(d)

- i. **The First Issue:** 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.³

5. The First Issue, regarding the purported *ex parte* manner in which "key aspects of the related [fitness] proceedings were convened", does not arise from the Decision.⁴ Rather than identifying an appealable issue arising from the Decision, the Defence challenges decisions

¹ ICC-01/12-01/18-1476-Conf ("Request").

² ICC-01/12-01/18-1467 ("Decision").

³ Request, para. 2(i). *See also* para. 4-7.

⁴ *Contra* Request, p. 4, para. 4.

previously made by the Chamber/ Single Judge elsewhere than in the Decision.

6. Thus, the procedure employed for instructing the Panel of Experts (“Panel”), receiving observations and adjudicating them was set out in the Chamber’s decision appointing the Panel for the purpose of a Rule 135 medical examination.⁵ There, the Chamber *inter alia* directed the Registry to provide all necessary assistance to the Panel in order for it to undertake the medical examination, instructed the Panel to submit its report to the Registry and instructed the Registry to facilitate the Panel’s access to medical records and opinions filed on the case record.⁶ The Chamber also determined that “[i]n order to maintain the impartiality of the Panel, the parties and participants shall refrain from any contact with the appointed experts on matters which relate to the present case.”⁷ The Defence challenges this decision under the First Issue in its Request, showing that this issue does not emanate from the Decision for which the Defence requests leave to appeal.⁸ In addition, the Defence challenges this decision on aspects that have nothing to do with the First Issue as enunciated by the Defence.

7. In addition, rather than the Decision, the Defence challenges the following other decisions in its Request:

- The Chamber’s e-mail decisions addressed to the Registry of 21 and 26 August 2020 not to consider the Defence submissions on hearing modalities,⁹ which decisions the Defence argues were not communicated to it;¹⁰
- The Single Judge’s e-mail decision addressed to the parties and participants of 27 October 2020, finding that it was not necessary at that juncture for the Defence to directly address submissions to the Panel;¹¹
- The Single Judge’s decision, to which the Prosecution does not have access, apparently addressed to the Defence and purportedly finding that it was not necessary for the

⁵ ICC-01/12-01/18-1006-Conf.

⁶ ICC-01/12-01/18-1006-Conf, para. 38-41, p. 15.

⁷ ICC-01/12-01/18-1006-Conf, para. 40.

⁸ See Request, para. 6, referring to “the Chamber’s decision to reject Defence arguments and disregard the Registry recommendations concerning Panel composition” and to the Chamber’s purported failure “to make any determination as to the suitability of the Defence candidate (Dr Chisholm) in its initial decision”.

⁹ See Decision, para. 41-43, citing Emails from the Chamber, 21 August 2020 at 08:47 and 26 August 2020 at 13:53.

¹⁰ See Request, para. 5(a), citing ICC-01/12-01/18-1476-Conf-AnxA, p. 2.

¹¹ See Request, para. 5(b), citing ICC-01/12-01/18-1476-Conf-AnxB, p. 2. See also Decision, para. 8, citing Email from the Chamber to the parties and participants, 27 October 2020, at 13:00.

Registry to transmit further correspondence (presumably between the Detention Unit Medical Services and the Panel) to the Defence;¹²

- The Single Judge's e-mail decision addressed to the parties and participants of 5 January 2021, rejecting the Defence request to allow the Panel to conduct a read-back of the Panel's report with Mr Al Hassan as being unnecessary because the Defence would have the opportunity to submit observations on the Panel's report.¹³

8. A clear indication that none of these challenges emanate from the Decision's ruling is that the Defence does not identify where the First Issue arises in the Decision.¹⁴

9. Second, and in any event, the Defence misrepresents the procedure employed for instructing the Panel. Contrary to what the Defence argues, the five cited decisions and the proceedings in which they were rendered show that the Defence was kept apprised of the key aspects of the fitness proceedings.¹⁵ The Defence was kept apprised of these developments,¹⁶ it had recourse to judicial oversight with respect to them,¹⁷ and it was informed of the resulting

¹² See Request, para. 5(c), citing confidential and *ex parte* (available only to the Defence and the Registry) Annex D to the Request, to which annex the Prosecution does not have access. See also Decision, para. 14 (referring to Defence email request for the Registry to *inter alia* transmit to Mr Al Hassan a copy of the correspondence between the Detention Unit Medical Services and the Panel), 16 (referring to a Defence email request *inter alia* for disclosure of all interim correspondence between the Detention Unit Medical Services and the Panel).

¹³ See Request, para. 5(d), citing confidential and *ex parte* (available only to the Defence and the Registry) Annex D to the Request, to which annex the Prosecution does not have access. Judging by the subject-matter referred to in the Request, the Prosecution considers the Defence to be referring to the Single Judge's e-mail decision addressed to the parties and participants of 5 January 2021. See Decision, para. 15, citing "Email from the Chamber to the parties and participants, 5 January 2021, at 10:38."

¹⁴ See Request, para. 4. Instead, the Defence makes generalised reference to *inter partes* annexes either previously filed containing correspondence (see Request, para. 4 (b) citing ICC-01/12-01/18-1124-Conf-AnxA and ICC-01/12-01/18-1124-Conf-AnxB and para. 4(c) citing ICC-01/12-01/18-1316-Conf-AnxH). or filed together with the Request containing Chamber's decisions and correspondence (see Request, para. 4(a) (citing ICC-01/12-01/18-1476-Conf-AnxA).

¹⁵ *Contra* Request, para. 4.

¹⁶ See e.g. Decision, para. 4, (regarding Panel's requests for extension of time, citing Emails from the Chamber to the parties and participants); para. 6 (regarding access to additional documents to the Panel, citing Email from the Chamber to the parties and participants); 7 (regarding Registry timeline on the completion of the medical examination, which was filed on the record at the Chamber's order and which included an email from the Panel, citing ICC-01/12-01/18-1124-Conf (with confidential annexes A and B); 11 (addressing Panel's enquiries which had been filed on the record, as well as its request for additional documents, citing Email from the Chamber to the parties and participants).

¹⁷ See e.g. Decision, para. 8 (regarding Defence request to address submissions to the Panel, citing Email from the Chamber to the parties and participants); para. 9 (regarding Defence request to file an index of records, citing Email from the Chamber to the parties and participants); para. 12 (regarding that the Defence should be provided with a complete index of all medical records of Mr Al Hassan at the Detention Centre and confirming that, provided that Mr Al Hassan consents, all medical records of Mr Al Hassan as concerns any consultations occurring at the ICC building should be transmitted to the Panel, and urging viable solution, citing Emails from the Chamber to the parties and participants); para. 14-15 (referring to a Defence request 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, which was partially granted, as well as rejecting a Defence request for a read-

outcome and decisions. The one instance when apparently the Defence was not informed of a decision that concerned it, appears to have resulted from the Registry's oversight to communicate it despite the Chamber's instruction for the Registry to do so.¹⁸ The Registry apparently did not inform the Defence that the Chamber had determined that it would not consider the Defence submissions regarding the hearing schedule (contained in an email from the Defence to the Registry), which the Chamber had determined "clearly" fell "outside the scope of the consultation process that was requested".¹⁹

10. The Defence also omits facts, when it complains of the "piecemeal manner"²⁰ in which records were conveyed to the Panel and implies that this had an impact on the Panel's ultimate conclusions in the Report.²¹ The Defence omits to indicate that as a result of the transmission of additional items following the Report, the Panel provided a 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 Report], with regard to Mr Al Hassan's mental health or his fitness to plead".²² The Defence also repeats previous submissions when it argues that as a result of this process, certain of the Panel's findings "rest on a clear misapprehension as concerns the content of the record",²³ while at the same time conceding that the Panel received a complete record.²⁴ Indeed, in the Decision the Chamber found that "all records relevant to the Panel's mandate, identified by the Registry, in consultation with the Defence, have been provided to the Panel."²⁵

11. Finally, the only two references to the Decision in its arguments under the First Issue, have nothing to do with the purported *ex parte* manner of conducting the fitness proceedings.²⁶ Rather, they relate to the Chamber's determination—stemming from an earlier *inter partes*

back of the Panel Report with the Accused, citing Email from the Chamber to the parties and participants); 16-17 (regarding inter alia transmission of additional items, citing Email from the Chamber to the Defence and the Registry).

¹⁸ See Decision, para. 42 (Registry being instructed to inform the parties and participants that the Chamber would not consider those submissions).

¹⁹ Decision, para. 41, citing Email from the Chamber, 21 August 2020 at 08:47 and Email from the Chamber, 26 August 2020 at 13:53.

²⁰ See Request para. 5(b).

²¹ ICC-01/12-01/18-1197-Conf-Anx ("Report"). See also ICC-01/12-01/18-1269-Conf-Anx ("Supplementary Report").

²² Decision, para. 18. See also Supplementary Report.

²³ Compare Request, para. 5(b) and fn. 10, with ICC-01/12-01/18-1316-Conf, para. 6, citing ICC-01/12-01/18-1316-Conf-AnxD.

²⁴ See Request, para. 5(b) (referring to the Panel's "mistaken belief that they had received a partial record").

²⁵ Decision, para. 63.

²⁶ Request, para. 4.

decision—not to consider two annexes from Defence Consultant Dr Chisholm,²⁷ and to the Chamber's reliance on *inter partes* filings relating to the accused's alleged torture.²⁸

ii. The Second Issue: 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.²⁹

12. The Second Issue is not an appealable issue. The Defence (i) misconstrues the Decision when it argues that the Chamber erred in law;³⁰ and (ii) merely expresses disagreement with the Chamber's findings and repeats its previous submissions, when it argues that the Chamber erred in fact “based on a partial reading of the Report”.³¹

13. As regards purported errors of law, and contrary to the Defence's mischaracterisation, the Chamber did not base its conclusion that Mr Al Hassan continues to be fit to stand trial “on the assumption that Counsel can *substitute* for the defendant in relation to the fundamental right to review evidence and instruct the Defence.”³²

14. Rather, the Chamber's conclusion 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” and thus continues to be fit to stand trial,³³ was based on several factors. Among them, the Chamber considered his ability to follow and understand the nature of the proceedings and the evidence and to understand the consequences of the proceedings,³⁴ and that “the accused has full trust in his lead counsel and is able to meaningfully participate in the proceedings *through her assistance*.”³⁵

15. Second, the Defence incorrectly submits that the Chamber's finding that fitness for trial does not require that the accused be able to review and analyse each and every piece of evidence and filing by himself, “effectively eliminates a core element of the legal test concerning fitness

²⁷ Request, para. 6, citing Decision, para. 29-35, referring to Decision on Extension Request, Email from the Chamber to the parties and participants, 18 February 2021, at 16:29.

²⁸ Request, para. 7, citing Decision, fn. 146.

²⁹ Request, para. 2(ii). *See also* para. 8-10.

³⁰ Request, para. 8.

³¹ Request, para. 8.

³² Request, para. 8 (emphasis added).

³³ Decision, para. 79 (emphasis added).

³⁴ *See* Decision, para. 75.

³⁵ Decision, para. 76 (footnote omitted).

to plead – that is, the ability of the defendant to review evidence and instruct his Counsel.”³⁶ The Defence misconstrues the Decision by taking this finding out of context. The Chamber’s more limited finding was made in connection with the confined “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’”.³⁷ The Chamber found in this context that (1) “*processing the wealth of complex information*” inherent in ICC proceedings is Defence counsel’s role; (2) “it is not required that the accused be able to review and analyse *each and every piece* of evidence and filing *by himself*”; and (3) “*with the assistance of counsel*”, Mr Al Hassan effectively participates in trial proceedings and to date litigates multiple matters including those related to his alleged torture.³⁸

16. The Defence further misconstrues the Decision by mischaracterizing the case-law it relies upon. Contrary to the Defence submission,³⁹ the case law cited by the Chamber fully supports its finding 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.⁴⁰

17. In *Grigoryevskikh v. Russia*, the ECtHR found no violation arising from the fact that the accused “could not hear some evidence given at trial due to poor acoustic in the courtroom, in view of the fact that his counsel, who could hear everything that was said and was able to take his client’s instructions at all times”.⁴¹

18. In *Stanford v. UK*, it is true that the ECtHR noted that “[i]n the present case neither the applicant nor the legal representatives sought to bring his hearing difficulties to the attention of the trial judge at any stage throughout the six-day hearing”.⁴² However, central in the ECtHR’s finding that there was no violation of the right to a fair trial was its consideration that the applicant who did have difficulties to hear the evidence “was represented by a solicitor and counsel who had no difficulty in following the proceedings and who would have had every opportunity to discuss with the applicant any points that arose out of the evidence which did

³⁶ Request, para. 10, citing Decision, para. 77.

³⁷ Decision, para. 77 (emphasis added).

³⁸ Decision, para. 77 (emphasis added).

³⁹ Request, para. 10, citing Decision, para. 77.

⁴⁰ See Decision, para. 77, fn. 145, and citations therein.

⁴¹ *Grigoryevskikh v. Russia*, Judgment, 9 April 2009, 22/03, para. 81.

⁴² *Stanford v. UK*, Judgment, 23 February 1994, 16757/90, para. 27.

not already appear in the witness statements”.⁴³

19. In *Hadžić*, the ICTY Trial Chamber found that “[e]ffective participation requires a “broad understanding” of the trial process with a comprehension of the “general thrust” of what is said in court. Hadžić need not process evidence in real time or comprehend all the details of the evidence. It is the job of Hadžić’s counsel to respond or object to evidence as it is being adduced in court.”⁴⁴ As noted in the Decision, this authority stands for the proposition that “[e]ven if there were limitations on the accused’s capacity, legal representation *may* compensate for such limitations”.⁴⁵

20. In *Strugar*, the ICTY Appeals Chamber found that “what is required from an accused to be deemed fit to stand trial is a standard of overall capacity allowing for a meaningful participation in the trial, provided that he or she is duly represented by Counsel” and that “an accused represented by counsel cannot be expected to have the same understanding of the material related to his case as a qualified and experienced lawyer.”⁴⁶ In fact, the Defence appears to agree with this point in its Request when it refers to the ICTY Appeals Chamber’s finding that representation by skilled lawyers *can* be found insufficient to guarantee effective participation—which implies that it *can* be sufficient to guarantee effective participation, a point that is consistent with the Decision.⁴⁷

21. In *Nahak*, the East Timor Special Panel for Serious Crimes found that “[i]n 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 [...] that the accused has the capacity to be able to instruct counsel sufficient for this purpose.”⁴⁸ Again, this case supports the Chamber’s proposition that in order to be found fit to stand trial it is not required that the accused be able to review and analyze *each and every piece of evidence* and filing *by himself*.

22. As regards purported errors of fact, the Defence merely expresses disagreement with the

⁴³ *Stanford v. UK*, Judgment, 23 February 1994, 16757/90, para. 30.

⁴⁴ *The Prosecutor v. Goran Hadžić*, Consolidated Decision on the Continuation of Proceedings, 26 October 2015, IT-04-75-T, para. 54.

⁴⁵ Decision, fn. 145 (emphasis added).

⁴⁶ *The Prosecutor v. Pavle Strugar*, Judgement, 17 July 2008, IT-01-42-A, para. 60.

⁴⁷ See Request, para. 10(d), citing *The Prosecutor v. Pavle Strugar*, Judgement, 17 July 2008, IT-01-42-A, fn. 145. Note however that the relevant passage can be found in fn. 174).

⁴⁸ 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, para. 147.

Chamber's findings and repeats its previous submissions.

23. First, the Defence fails to identify an appealable error when it disagrees with the Chamber's finding that "the Panel, as a whole, concluded that the accused does not suffer from PTSD."⁴⁹ Its argument that the Chamber misread the Panel's Report,⁵⁰ merely expresses a disagreement with the Chamber's conclusion, and repeats its previous submissions regarding the Panel's factual findings in particular regarding the individual criteria for PTSD.⁵¹ The Defence repetitive submissions also overlook that the Chamber noted the Panel's observation that the accused experiences certain symptoms of anxiety and distress, and also noted the Panel's clarification that its conclusion did not mean that the Accused has not suffered from or is not at risk of developing PTSD in the future.⁵²

24. Second, the Defence fails to identify an appealable error when it disagrees with the Chamber's finding that the Panel concluded that Mr Al Hassan was fit to plead,⁵³ again merely expressing disagreement with the Chamber's conclusion.

25. While the Defence states that "the Report [...] sets out several obstacles that *would* exist if he were to testify",⁵⁴ the cited part of the Report uses the conditional and phrases illustrating that such obstacles are only a possibility.⁵⁵ The Chamber had regard in particular to the finding in the Report "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.'"⁵⁶ The Chamber stated that it did not 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, but rather that the Panel underlined "the possibility that further care, and where necessary adjustments, are required when the accused is put on stand."⁵⁷

⁴⁹ Decision, para. 74.

⁵⁰ Request, para. 8, citing Decision, para. 74.

⁵¹ Compare Request, para. 9 with ICC-01/12-01/18-1316-Conf, para. 9, 12. See also Request, para. 6, citing ICC-01/12-01/18-1316-Conf, para. 9-14.

⁵² Decision, fn. 136, citing Report, para. 206, 323.

⁵³ Request, para. 8, citing Decision, para. 78.

⁵⁴ Request, para. 9 (emphasis added), citing Report, para. 282-283.

⁵⁵ The "potential impact" of testifying "could be" considerable; "may become" unfit to give evidence; fitness "is liable to change" particularly under stressful circumstances; cross-examination "may be" a particularly high risk time and "could trigger" episodes; his "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" (see Report, para. 282-283).

⁵⁶ Decision, para. 78 (footnote omitted).

⁵⁷ Decision, para. 78, citing Report, para. 283.

iii. The Third Issue: 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.⁵⁸

26. The Third Issue brought by the Defence in its Request does not arise from the Decision or in any case is not an appealable issue since it misconstrues the Decision. The Defence misconstrues the Decision when it argues that the Chamber's finding (that many of the Panel's recommendations fell within the purview of the Chamber)⁵⁹ takes insufficient "account of the direct nexus between the trial schedule and the ability of the Registry to implement such measures."⁶⁰ While the Chamber found "it unnecessary to have any further scheduled breaks in the trial hearings", it also found that "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",⁶¹ and expressly referred to the specific adjustments made by the Chamber for the period of Ramadan.⁶² The Chamber therefore did not rule out adjournments, for example for the purpose of facilitating a family visit, even if it is for the Registry to organise the logistics of such family visits. Indeed, the Defence itself appears to recognise that some recommendations can be implemented if the Chamber and the Registry coordinate to arrange a break in proceedings.⁶³

27. Similarly, the Defence argument that the Decision "severs the Chamber's oversight as concerns the impact of such measures [within the Registry's purview] on Mr Al Hassan's psychological well-being and related effective participation in the proceedings",⁶⁴ overlooks the Chamber's findings. The Chamber found that matters directly involving the fair trial rights of the accused—including the accused's ability to effectively exercise them—continue to be under the Chamber's supervision.⁶⁵ Second, that "[p]ursuant 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", so that information that may impact

⁵⁸ Request, para. 2(iii). *See also* para. 12-14.

⁵⁹ Request, para. 13, citing Decision, para. 85.

⁶⁰ Request, para. 14.

⁶¹ Decision, para. 84.

⁶² Decision, fn. 163.

⁶³ *See* Request, para. 14. *Contra* Request, para. 15 (Registry has no control over the hearing schedule and cannot ensure family visits and medical treatment are implemented in a manner that the least disruptive to trial proceedings and Defence trial preparation).

⁶⁴ Request, para. 15.

⁶⁵ *See* Decision, para. 82.

the Chamber's fitness determination may be transmitted to it.⁶⁶

28. In addition, the Defence submission that the recommendation regarding handcuffs, "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",⁶⁷ overlooks that the Chamber found that it was "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", where appropriate. This would provide the required judicial oversight and review where the matter does not fall directly within the Chamber's purview.⁶⁸

29. The remainder of the Defence submissions, such as regarding the need for regular and predictable breaks in the trial schedule for Mr Al Hassan to receive ongoing treatment,⁶⁹ are merely disagreements with the Chamber's conclusion and repeat previous submissions.⁷⁰

B. The Issues do not meet the remaining criteria for leave to appeal under article 82(1)(d)

i. The Issues would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial

30. For all three Issues, the Defence maintains that they significantly impact upon the fairness and expeditiousness of the proceedings.⁷¹ For the Second Issue, the Defence additionally maintains that it significantly affects the outcome of the trial.⁷²

31. As regards the First Issue, it would not significantly affect the fair and expeditious conduct of the proceedings because as explained earlier, it does not arise from the Decision. In any event, contrary to the Defence arguments and as described above,⁷³ the Defence was allowed to and did effectively participate in the proceedings leading to the Chamber's Decision.

32. As regards the Second Issue, contrary to the Defence argument, the Chamber did not find

⁶⁶ Decision, para. 80.

⁶⁷ Request, para. 14 (emphasis added).

⁶⁸ Decision, para. 82.

⁶⁹ Request, para. 14.

⁷⁰ See Decision, para. 84 (Chamber not persuaded by Defence submissions that the current hearing schedule impedes Mr Al Hassan's right to receive treatment), citing ICC-01/12-01/18-1316-Red, para. 29.

⁷¹ Request, para. 5, 11, 15. *Contra* Request, p. 4 (regarding the First Issue, arguing that it impacts upon the fairness and expeditiousness of the proceedings and the outcome of the case, but not addressing the second limb).

⁷² Request, para. 11.

⁷³ See Request, para. 4.

that counsel can substitute for the accused nor did it eliminate the need to consider the accused's ability to review evidence and instruct counsel as part of the fitness test. In addition, the Defence interpretation of the Report is nothing more than a disagreement with the Chamber's own interpretation. As a result, contrary to the Defence argument,⁷⁴ "[t]he Chamber's approach to these issues of fact and law" is not an issue which would significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial.

33. As regards the Third Issue, because the Defence has not shown that the Decision has the effect of "diluting or eliminating judicial oversight of a factor that generates direct consequences for the efficacy and expeditiousness of the proceedings",⁷⁵ it would not significantly affect the proceedings' fair and expeditious conduct.

34. In particular as regards the First and Second Issue, it is speculative for the Defence to raise them at this stage, which further underlines that they would not significantly affect the fairness of the proceedings. The Chamber noted the Panel's observation that fitness to stand trial is not a static state but is a dynamic variable which may change according to circumstances, and was mindful of its obligation to ensure the ongoing fitness of the accused.⁷⁶ The Chamber also indicated that it 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.⁷⁷ This highlights that the remaining cumulative criteria under rule 82(1)(d) of the Statute are also not met.

ii. An immediate resolution of the Issues would not materially advance the proceedings

35. The Defence argues that the Issues relate to the Accused's effective participation in trial proceedings and as a result should be resolved immediately, and that "[g]iven the significance" of the Issues an immediate resolution by the Appeals Chamber would materially advance proceedings.⁷⁸ The "significance" of the Issues has been addressed above. The Issues do not arise or misconstrue the Decision or amount to a mere disagreement with it, and as a result, an immediate resolution of the Issues would not materially advance the proceedings.

⁷⁴ Request, para. 11.

⁷⁵ Request, para. 15.

⁷⁶ Decision, para. 82.

⁷⁷ Decision, para. 84.

⁷⁸ Request, para. 16.

IV. Requested Relief

36. For the reasons set out above, the Prosecution requests that the Chamber deny the Defence Request.



Fatou Bensouda, Prosecutor

Dated this 21st of May 2021

At The Hague, The Netherlands