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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

Public redacted version of '*Corrigendum* to "Defence Request to terminate the proceedings"'

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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Introduction

1. The charges against Mr. Al Hassan are irrevocably tainted by the poisonous fruits of torture, cruel, inhuman and degrading treatment ('CIDT'), and severe human rights violations. At the outset of its investigation against Mr. Al Hassan, the Prosecution was informed, in unequivocal terms, that [REDACTED] Mr. Al Hassan) had been interrogated under highly coercive and abusive circumstances, and/or subjected to severe detention abuses, which were likely to meet the threshold of torture. There were clear indicia that the effects of torture continued to dominate [REDACTED] continued to be tainted by the coercive effects of torture and mistreatment, but the Prosecution either took no, or insufficient steps to ascertain whether [REDACTED] were in a position to provide free and informed consent to providing statements in such an environment. The Prosecution then relied on information obtained from tainted evidence and interviews to [REDACTED], and justify its request to arrest and detain Mr. Al Hassan before the ICC.

2. After Mr. Al Hassan was transferred to the ICC, the Prosecution aggravated and compounded the effects of the torture undergone by Mr. Al Hassan by: relying on tainted evidence to request and justify the particularly severe detention restrictions imposed on Mr. Al Hassan; substantiating the charges and facts of the case with evidence derived from tainted evidence; and opposing his request for release, by relying on tainted evidence.

3. As a result, the constituent elements of a fair trial cannot be pieced together. Tainted evidence has already been relied upon to substantiate key investigative acts, and the facts and charges in this case. It is too late to turn back the clock, as the very foundation of the case has been contaminated,[1] and the continuation of a trial constructed on torture evidence would bring the administration of justice at this Court into disrepute.[2] The proceedings should be terminated, Mr. Al Hassan should be released immediately, and the Prosecutor should investigate and bring to justice the individuals responsible for the torture and abuse of [REDACTED] in this case.

[1] *Ibrahim v United Kingdom*, 50541/08 and others, para. 309.
[2] UN General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment, A/71/298, 5 August 2016 para. 21: "Torture, ill-treatment and coercion have devastating long-term consequences for individuals, institutions and society as a whole, causing serious and long-lasting harm to victims ... Such practices corrupt the cultures of institutions that perpetrate, participate in, assist in or overlook them."

4. This application comprises three parts: **Part 1** addresses issues concerning the burden of proof, and the definition of complicity; **Part 2** sets out the basis for qualifying evidence in this case as being tainted by torture or CIDT; **Part 3** demonstrates a termination of the proceedings is warranted, and the only appropriate remedy.

Part 1.1 Evidentiary issues including the burden of proof

5. This application is tied intrinsically to the Prosecution's reliance on evidence tainted by torture. The burden of argumentation must be interpreted and applied in a manner consistent with firstly, the Prosecution's obligation to satisfy the Chamber that Prosecution evidence fulfils the criteria for admission under the Statute and secondly, human rights principles concerning the burden of demonstrating the occurrence of torture and abuses, within facilities controlled by a State. As concerns first aspect, whilst the Defence must raise "issues" regarding the admissibility of Prosecution evidence when tendered, the burden of arguing against a determination of admissibility of evidence should not fall on the Defence.[3] If the burden concerning the *admission* of Prosecution evidence falls on the Prosecution, there is no justification for determining that the burden concerning the *exclusion* of Prosecution evidence falls on the Defence. Article 69(7) is also the *lex specialis* of the reliability and prejudice components set out in Article 69(4).[4] Under Article 69(4), the Prosecution is obliged to satisfy the Chamber that its evidence is sufficiently reliable to be admitted, and that the probative value outweighs any prejudicial impact on the fairness of the proceedings. Since Article 69(7) issues are subsumed within these reliability and prejudice components, it follows that when Article 69(7) issues arise, the burden remains with the Prosecution to demonstrate either that the evidence was not obtained by a violation of the Statute or internationally recognised human rights law, or that the violation does not cast doubt on the reliability of the evidence or otherwise seriously damage the integrity of the proceedings.[5]

[3] ICC-01/05-01/08-1386, para. 73.
[4] ICC-01/04-01/06-1981, para. 34.
[5] See ICTY, *Prosecutor v. Mucic et al*., IT-96-21-T, "Decision on Zdravko Mucic's Motion for the Exclusion of Evidence", 2 Sep 1997, paras. 41-42: "The burden of proof of voluntariness or absence of oppressive conduct in obtaining a statement is on the Prosecution. (…) the Prosecution claiming voluntariness on the part of the Accused/suspect, or absence of oppressive conduct, is required to prove it convincingly and beyond reasonable doubt." ICTY, *Prosecutor v. Martic*, IT-95-11-T, "Annex A: Guidelines on the Standards Governing the Admission of Evidence", 19 Jan 2006, para. 9; *Prosecutor v. Oric*, IT-03-68-T, "Order Concerning Guidelines on Evidence and the Conduct of Parties During Trial Proceedings", 21 Oct 2004, Section III, para (x).

6. With respect to implications of human rights law, where an individual raises a founded complaint that evidence was obtained directly or indirectly through torture, or that torture occurred in State-controlled premises, the burden then shifts to the State, or public authority, to demonstrate the contrary.[6] This burden is also consistent with the defendant's right to an effective remedy, and the obligation of public authorities to ensure that allegations of torture investigated fully.[7] This approach is particularly apposite in this case given that the ICC Prosecution is in a privileged position as concerns its ability to prove or disprove the existence of torture and detention abuses, as reflected by RFAs, which granted the Prosecution access to domestic case files,[8] whereas the Defence has faced a significant amount of difficulties in obtaining access to the same type of information, and has yet to receive documents that it identified as being relevant to core aspects of this application.[9]

7. The Prosecution (as the public authority in this case) also cannot discharge that burden by relying only on testimony from the investigating officers.[10] The citation of investigators' notes also does not constitute waiver regarding Defence concerns as to the reliability and admissibility of such documents, but given they were produced by the Prosecution, the Defence should be entitled to rely on them for the purpose of demonstrating the Prosecution's knowledge of the events set out in the notes.

8. As foreshadowed in earlier filings, the Defence requests the Trial Chamber to convene a public evidentiary hearing,[11] to allow for testimony from Drs. Porterfield, Cohen and Crosby, and Me. Sangaré, and the introduction and authentication of their expert reports, which are cited in this application. The Defence also seeks timely guidance as

[6] African Commission: *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*, Communication 334/06, paras. 169, 216-219. See also K. Ambos, The Transnational Use Of Torture Evidence 2009. ISR. L. REV. Vol. 42(2), pp. 362-397, 394.
[7] UN General Assembly, Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/25/60, 23 September 2014, paras. 25-26.
[8] ICC-01/12-01/18-857-Conf, para. 22.
[9] The Chamber rejected Defence requests for the deadline to be suspended pending the receipt of such documentation: ICC-01/12-01/18-859-Conf; ICC-01/12-01/18-880.
[10] A/HRC/25/60, para. 25.
[11] *Bati & ors. v. Turkey*, 462773, para. 137: where an individual raises allegations of torture or CIDT, "there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory". See also Lord Bingham, *A and others v. Secretary of State for the Home Department (2004)*, para. 50: "I am not impressed by the argument based on the practical undesirability of upsetting foreign regimes which may resort to torture."

to whether Rule 68 applies to applications of this nature,[12] so that it can, if necessary, submit Rule 68(2) applications.

Part 1.2 The Prosecution's positive obligation to avoid complicity in torture and CIDT

9. The Rome Statute prohibits the Prosecution from interviewing, or collecting evidence from persons, who are subjected to torture or CIDT, or held in arbitrary detention. Articles 55(1)(a), (b) and (d) of the Statute establish, categorically, the suspect's right not to be questioned in a coercive manner, subjected to torture or CIDT, or held in arbitrary detention. The right to be free from such violations applies in connection with "any investigative steps that are taken either by the Prosecutor or by national authorities at his or her behest".[13] Rule 111(2) further specifies that when the Prosecutor questions a person, the Prosecutor shall have due regard to "Article 55": this wording refers to Article 55 as a whole, and not just paragraph 2. It follows that it would be incompatible with the object and purposes of Article 55 and Rule 111(2) for the ICC Prosecution to take investigative steps in relation to a person who is at risk of torture or coercion, as a result of their participation in such interviews, or, to interview a person who is arbitrarily arrested or detained by national authorities. The Prosecution's obligation to "fully respect the rights of persons arising under this Statute" under Article 54(1)(c) also presupposes that the Prosecution will not countenance or condone the torture, CIDT, or arbitrary detention of a suspect or witness. The *raison d'être* of Article 55(1) is to purge the interview process of illegal or coercive acts, that would taint the reliability of the interview and undermine the voluntary nature of the suspect's participation. This objective would be vitiated if the Prosecution were to interview suspects in an inherently coercive environment.

10. This prohibition, as concerns interviewing persons who are held in incommunicado detention or at risk of torture/CIDT, also derives from *jus cogens* principles, and internationally recognized human rights law. The *jus cogens* nature of the prohibition on torture, and arbitrary, incommunicado detention (where such detention amounts to torture) imposes a positive duty on public officials "to suppress, prevent and discourage such practices".[14] Responsibility can be triggered through active or passive forms of co-operation, by condoning or acquiescing to practices that involved torture, CIDT, or

[12] ICC-01/05-01/13-1753, para. 11.
[13] ICC-02/11-01/11-212, para. 96
[14] A/HRC/25/60, para. 40.

severe human rights violations,[15] or by engaging in conduct that exposes individuals to a risk of torture or CIDT.[16] This obligation is heightened "if a State is known to torture detainees, or specific categories of detainees, systematically".[17] In the context of the receipt of third party torture evidence:[18]

> after the fact acceptance and use of information also could forcefully be argued to constitute implicit recognition of the situation created by torture as lawful since it treats the information no differently than legally-obtained information.

11. Based on the advice of Professor Sands, the UK Joint Committee on Human Rights has acknowledged that complicity in torture exists where a state:[19]

- *sends interrogators to question a detainee who is known to have been tortured by those detaining and interrogating him*
- *has intelligence personnel present at an interview with a detainee in a place where he is being, or might have been tortured*
- *systematically receives information known or thought likely to have been obtained from detainees subjected to torture.*
- *States are also complicit when they act in these ways in circumstances where they should have known of the use of torture.*

12. Apart from the negative obligation to avoid complicity through contributions or acquiescence, there is also a positive obligation to investigate claims of torture or mistreatment in a full and effective manner. This obligation is engaged in particular where an individual raises an arguable claim concerning mistreatment at the hands of the police or State agents,[20] and,[21]

> while there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, an adequate response by the authorities in investigating allegations of serious human rights violations (…) may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.

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[15] CoE, Venice Commission, 'Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners', paras. 54, 126; Habib v Commonwealth of Australia [2010] FCAFC 12, para. 3.

[16] D. Akande, 'UK Case on Complicity by UK Intelligence Agencies in Torture Abroad', EJIL Talk! 5 July 2011, referring to a positive obligation arising under "arising from human rights treaties such as [the ECHR], [the CAT] and the International Covenant on Civil and Political Rights (ICCPR) not to engage in activity which exposes an individual to a risk of torture or inhuman and degrading treatment."

[17] A/HRC/25/60, para. 54: Thus, if a State is known to torture detainees, or specific categories of detainees, systematically, no other State may actively collect, share or recognize any information it receives from an agency of that State as "lawfully obtained", nor may it "passively" accept such information. In addition, collecting, sharing or receiving information from a State that is known, or ought to be known, to use torture in a widespread or systematic way would also trigger State responsibility".

[18] M. Pollard, 'Rotten Fruit: State Solicitation, acceptance, and use of information obtained through torture by another state', NQHR, Vol.23/3, 349–378 (2005), at 377 (endorsed by the UN Special Rapporteur on Torture: A/HRC/25/60, para. 56).

[19] UK House of Lords, House of Commons, 'Joint Committee on Human Rights': Allegations of UK Complicity in Torture', 2008-2009, p. 3. See also paras. 37, 41.

[20] El-Masri v FYR Macedonia, 39630/09, 13 December 2012, para. 182.

[21] El-Masri v FYR Macedonia, 39630/09, 13 December 2012, para. 192.

13. The 'Istanbul Protocol'[22] promulgated by the UN Office of the High Commissioner for Human Rights sets out the "minimum" scope of these obligations in relation to interviews conducted with detained torture victims.[23] The Protocol underscores that such visits are fraught with risk:[24] "[t]he notion that some evidence is better than no evidence is not valid when working with prisoners who might be put in danger by giving testimony."[25] Further, Principle 6(d) of the African Guidelines on Fair Trial stipulates that "[a]ny confession or admission obtained during incommunicado detention shall be considered to have been obtained by coercion."[26] This principle derives from the prohibition on the use of torture evidence, set out in Article 7 of the African Charter.[27] The ECHR has further concluded that holding an individual in incommunicado detention can amount to a form of coercion and psychological pressure, which can vitiate the voluntary nature of interviews conducted in such an environment.[28]

14. The UN Working Group on Arbitrary Detention has characterized the prohibition of arbitrary detention as *jus cogens*,[29] and avowed "[s]ecret and/or incommunicado detention constitutes the most heinous violation of the norm protecting the right to liberty of human beings under customary international law";[30] by holding persons "outside the cloak of the law", it increases their vulnerability to torture, mistreatment, and coercion. It has thus been recognized at the international,[31] and domestic level,[32] that

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[22] *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Istanbul Protocol")*, 2004, HR/P/PT/8/Rev.1. The Istanbul Protocol has been relied upon by the ECHR, in its assessment as to whether States have complied with their legal obligations under CAT, and Articles 3 and 13 of the ECHR: *Bati & ors. v. Turkey*, 462773, paras. 100, 133; *Eren v. Turkey*, 32347/02, paras. 41, 43; *Sarwari v. Greece*, 38089/12, paras. 66-68, 118; *El-Masri v. Macedonia*, 39630/09, para. 96. The UN Special Rapporteur on Torture has also described its provisions as reflecting "existing obligations of States under international treaty and customary international law": United Nations, General Assembly, Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/69/387, 23 September 2014, para. 23.

[23] *Istanbul Protocol*, pgs. 2, 26.

[24] *Istanbul Protocol*, pg. 26, para. 127: "… investigators may fall into the trap of visiting a prison or police station, without knowing exactly what they are doing. They may obtain an incomplete or false picture of reality. They may inadvertently place prisoners that they may never visit again in danger. They may give an alibi to the perpetrators of torture, who may use the fact that outsiders visited their prison and saw nothing".

[25] *Istanbul Protocol*, pg. 26, para. 128.

[26] African Union, Principles And Guidelines On The Right To A Fair Trial And Legal Assistance In Africa.

[27] Egyptian Initiative, (2011) AHRLR 42 (ACHPR 2001), para. 212.

[28] *Magee v United Kingdom*, 28135/95 para. 43: "The austerity of the conditions of his detention and his exclusion from outside contact were intended to be psychologically coercive and conducive to breaking down any resolve he may have manifested at the beginning of his detention to remain silent."

[29] Deliberation No. 9, Report of the Working Group on Arbitrary Detention ('WGAD'), A/HRC/22/44, p.20.

[30] Deliberation No. 9, Report of the WGAD, A/HRC/22/44, p. 21.

[31] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 4 February 2009, A/HRC/10/3, para. 54; United Nations, General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment, A/71/298, 5 August 2016, para. 45: "…the

interrogating persons, who are held in such an environment, would be contrary to CAT, and can amount to complicity in arbitrary detention/torture.

Part 2: The investigations and evidential record of this case are contaminated by information and evidence [REDACTED] tortured, and subjected to CIDT and severe human rights violations

Part 2.1 Mr. Al Hassan was tortured during interrogations in Mali

15. Over the course of a year, Mr. Al Hassan was subjected to the following incidents of torture:[33]

a. At a military base outside of Timbuktu: he was waterboarded; threatened with electrocution, and mock executions; interrogated while hooded; and subjected to sensory forms of torture (loud music, smoke, heat, being forced to stand in confined space, and beaten when he fell);
b. In Gao, he was threatened ('there is no torture here, but unless you tell the truth, you will go back'); and
c. At the DGSE in Bamako, he was repeatedly beaten, including to such a degree of severity that he lost consciousness; told during interrogations that [REDACTED], or would be killed; threatened with death; [REDACTED]; subjected to falaka (beating on the soles of his feet); suspended by his wrists, from a metal rod; subjected to mock

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physical environment and conditions during questioning must be adequate, humane and free from intimidation, so as not to run afoul of the prohibition of torture or ill-treatment."

[32] **United Kingdom,** UK reports, Intelligence and Security Committee of Parliament 'Detainee Mistreatment and Rendition: 2001–2010', p. 117: "G. The conditions of detention clearly amounted to mistreatment in some cases; however, the Agencies continued to engage with detainee interviews. The 'work-around' of interviewing in a Portakabin just outside a detention facility was not an acceptable alternative to ceasing to engage with detainees being kept in unacceptable conditions. H. When a detainee made a complaint to a UK officer about mistreatment, the Agencies had a responsibility to investigate the claims before continuing to engage with the detainee concerned." See also UK Joint Committee on Human Rights (JCHR) Allegations of UK Complicity in Torture (Twenty-third Report of Sessions 2008-09 HL Paper 152 HC 230, August 2009), p. 3; UK Government, The Principles relating to the Detention and Interviewing of Detainees Overseas and the Passing and Receipt of Intelligence Relating to Detainees, July 2019, pp. 4, 15. See also **Canada,** Canadian Commission of Inquiry, Report of the Events Relating to Maher Arar, 2006, pp.346-347 (concerning need for safeguards when interacting, or sharing information with countries, which have reported patterns of human rights violations, even if there is no specific evidence of torture, in order to avoid complicity in torture). **Norway,** Report of the Norwegian Parliamentary Oversight Committee on Intelligence and Security Services, Making International Intelligence Cooperation Accountable 3 September 2015, pp. 67, 73, 119; see also **New Zealand**, Intelligence and Security Act, ss 10(3), 18(b); **Australia,** discussion of Australian intelligence policy in Australia, Inspector-General of Intelligence and Security, Inquiry into the actions of Australian government agencies in relation to the arrest and detention overseas of Mr Mamdouh Habib from 2001 to 2005 (Public Report, December 2011) p. 111; discussion of **German** policy: European Parliament Committee on Legal Affairs and Human Rights, Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states, (Draft report – Part II (Explanatory memorandum), AS/Jur (2006) 16 Part II, 7 June 2006), para. 191.

[33] MLI-D28-0002-0500 at 0503-0509; MLI-D28-0002-0535 at 0540-0566.

executions, a gun was put to the back of his head, and he was told to 'pronounce the shahalia' as he was going to die'; handcuffed, day and night, for 4 months and 20 days; deprived of adequate food; denied access to adequate medical care; and held in prolonged incommunicado detention (approximately a year).

16. Dr. Cohen, a forensic physician with considerable expertise in examining torture victims, conducted a physical examination of Mr. Al Hassan in January 2020. Dr. Cohen concluded that he had physical evidence of the assaults described with:[34]

- One lesion highly consistent with the jaw injury
- One lesion highly consistent with being beaten with a stick on the head
- One lesion highly consistent with being beaten with a cable on the abdomen
- Two lesions consistent with being beaten
- Three lesions highly consistent with abuse of handcuffs
- One lesion highly consistent with being beaten on the foot
- One finding highly consistent with being kicked in the abdomen
- One lesion highly consistent with being beaten on the arm
- One finding highly consistent with falaka.

17. Dr. Cohen further concluded that these physical findings were "highly consistent with the torture described".[35] Dr. Porterfield concluded that the symptoms were (…) highly consistent with what one would expect to find in an individual with his history of severe torture and harsh imprisonment conditions. [36] These forms of treatment, either when considered in isolation or in combination, are considered to amount to torture or CIDT.[37]

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[34] MLI-D28-0002-0500 at 0523.
[35] MLI-D28-0002-0500 at 0524.
[36] MLI-D28-0002-0535 at 0582.
[37] **Falaqa:** *Othman v. United Kingdom*, para. 270*:* "beating on the soles of the feet, more commonly known as bastinado, falanga or falaka (…) causes severe pain and suffering to the victim and, when its purpose has been to punish or to obtain a confession, the Court has had no hesitation in characterising it as torture" .
Hooding: ECHR: *El Haski v. Belgium*, 649/08, para. 98; *Lenev v. Bulgaria*, 41452/07, para 116. See also Istanbul Protocol Statement on Hooding; Equality and Human Rights Commission v Prime Minister & Ors [2011] EWHC 2401 (Admin) (03 October 2011), paras. 92-95 (re complicity arising from questioning a person abroad hooded in transit by state authorities). **Secret/incommunicado detention:** A/HRC/13/42, Joint Study on Global Practices in Relation to Secret Detention, 9 February 2010, pp. 2-3. **Medical treatment:** *Keenan v. the United Kingdom*, 27229/95, para, 111: "lack of appropriate medical care may amount to treatment contrary to Article 3". When combined with incommunicado detention, it can amount to CIDT*: Kudla v. Poland*, 30210/96, paras. 92-94, 158; *Cenbauer v. Croatia*, 73786/01, para. 44. **Prolonged hand-cuffing:** HRW, 'Mali: Detainee Restraints Causing Grievous Injuries Military Should Adopt International Standards for Treating Prisoners': See also United Nations Standard Minimum Rules for the Treatment of Prisoners,which provide that instruments of restraint should never be applied as a sanction for disciplinary offenses and that restraints that are "inherently degrading or painful" are prohibited. **Threats to family:** See UN General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/43/49, 20 March 2020, para. 46: "Withholding or misrepresenting information about the fate of the victims or their loved ones, mock executions, witnessing the real or purported killing or torture of others", as being potential forms of psychological torture. **Hygiene/cell conditions:** I.I. v. Bulgaria, 44082/98, para. 75: "subjecting a detainee to the humiliation of having to relieve himself in a bucket in the presence of his cellmates and of being present while the same bucket was being used by them" can equate to CIDT.

18. In considering the possibility of fabrication, Dr. Cohen noted that Mr. Al Hassan:[38]

> readily and carefully specified 19 lesions as either due to non-torture causes or he could not recall their cause- there was no exaggeration or embellishment of his account. (…) I therefore find no indication of fabrication of the physical findings.

19. Dr. Porterfield also observed a "lack of malingering, feigning, or exaggerating his experiences."[39] Mr. Al Hassan's accounts of torture/CIDT by Barkhane, and then the DGSE, are also corroborated by [REDACTED] evidence collected by the Defence, and reports from credible sources (including the UN and NGOs).

20. [REDACTED] that the DGSE interrogated Mr. Al Hassan, and used torture and threats.[40] [REDACTED] was beaten on a [REDACTED]; the severity was such that he lost consciousness for at least two hours.[41] In relation to Mr. Al Hassan's beating by guards [REDACTED], [REDACTED].[42] [REDACTED] use of hooding, excessive use of handcuffs, threats, and detention conditions amounting to torture/CIDT.[43]

21. Individuals with no link to Mr. Al Hassan or Ansar Dine, have also provided evidence corroborating torture and CIDT at the DGSE. [REDACTED], who was detained at the DGSE [REDACTED],[44] provided evidence concerning violent interrogations over the course of [REDACTED] days. He was shackled, hooded, and beaten on the head if he moved. He was questioned rapidly, and beaten until he lost consciousness.[45] While there, he heard from fellow detainees of instances of electrocution.[46] DGSE detainees, [REDACTED], told him of other instances of electrocution, physical assaults, and a small cell, which was very cold.[47]

22. [REDACTED], the journalist, Birama Touré, was disappeared by the DGSE, then tortured and killed in the DGSE, in retaliation for publishing an article concerning the President of Mali's son.[48] This occurred in January 2016 ([REDACTED]).[49] [REDACTED].[50] [REDACTED],[51] [REDACTED].[52] [REDACTED], [REDACTED],

[38] MLI-D28-0002-0500 at 0520 (para. 96).
[39] MLI-D28-0002-0535 at 0569.
[40] [REDACTED].
[41] [REDACTED].
[42] [REDACTED].
[43] MLI-D28-0003-0031 at 0031, 0038, 0040 para. 43, 0043 para. 78, 0047 paras 103, 108, 0049 para 125, 0057 para 189.
[44] MLI-D28-0003-0416.
[45] MLI-D28-0003-0417-R01 at 0418.
[46] MLI-D28-0003-0417-R01 at 0418.
[47] MLI-D28-0003-0417-R01 at 0419.
[48] [REDACTED].
[49] [REDACTED].
[50] [REDACTED].

was informed that the detainees at the DGSE had been subjected to mistreatment;[53] and [REDACTED] could not stop crying all night; because it was the DGSE, it felt like the end, and that he would never leave.[54]

23. In his report, D28-P5 collected various accounts of individuals, who had been detained at the DGSE. After being transferred to the DGSE, D28-6 was held, in a degrading conditions, in 'cell 4', where he was handcuffed 24/7.[55] In order to gain his confidence, and encourage him to 'talk', [REDACTED] would promise him that he would be released in one or two days, although he was ultimately detained, incommunicado, for [REDACTED].[56] D28-7, a lawyer for [REDACTED], described [REDACTED] client's severe mental and physical degradation caused by detention at the DGSE between [REDACTED].[57]

24. UN and NGO Reports also attest to the illegal detention regime of the DGSE,[58] instances of torture, murder, and severe mistreatment as concerns persons who had been held there, particularly those suspected of terrorism offences,[59] and the lack of external protection and oversight, due to the fact that the UN and independent monitors do not have access to the DGSE.[60] D28-8, [REDACTED], also underlined that "*il n'y a aucun rapport entre la Sécurite d'Etat et la Justice au sens du code procédure pénale*"; for this reason, "*tout interrogatoire d'un détenu de la Sécurite d'Etat, même si ce détenu est provisoirement transféré à un établissement judiciaire, serait un interrogatoire non conforme à la loi*." [61]

25. As concerns Barkhane's use of excessive force, torture and CIDT, [REDACTED], whose arrest and detention [REDACTED], informed the Prosecution that the French "punished" them after [REDACTED]: they would punish them so they would talk, they

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[51] [REDACTED].
[52] [REDACTED].
[53] [REDACTED].
[54] [REDACTED].
[55] MLI-D28-0003-0668-R01 at 0670.
[56] MLI-D28-0003-0668-R01 at 0670.
[57] MLI-D28-0003-0673-R01 at 0674.
[58] [REDACTED]; MLI-D28-0003-0190 at 0193; [REDACTED]. See also MLI-D28-0003-1203 at 1213-128 and 1239-1240.
[59] [REDACTED]; MLI-D28-0003-0277 at 0283; MLI-D28-0003-0074 at 0090; MLI-D28-0003-0304; MLI-D28-0003-0298; MLI-D28-0003-0650, MLI-D28-0003-0238, MLI-D28-0003-0185; MLI-D28-0003-0069, MLI-D28-0003-0618 at 0618, 0619, 0621-0623; MLI-D28-0003-0588 at 0588, 0591-0592; MLI-D28-0003-0154 at 0157; MLI-D28-0003-0185 at 0188-0189; MLI-D28-0003-0571; MLI-D28-0003-0195; MLI-D28-0003-0310.
[60] [REDACTED], MLI-D28-0003-0190 at 0193; See also MLI-D28-0003-1203 at 1213-1218 and 1239-1240.
[61] [REDACTED].

had water thrown on them and one of the French guards electrocuted [REDACTED] on his foot.[62] D28-6 also described being apprehended in violent conditions by Barkhane, and subjected to incessant interrogations, because someone had falsely denounced him for associating with 'jihadists'.[63] Other open source reports refer to Barkhane and FAMA employing excessive force and torture (including water boarding), in relation to arrests and military operations initiated in response to attacks on FAMA and Barkhane in 2016 and 2017.[64]

26. Given the existence of mutually corroborative evidence concerning Mr. Al Hassan's torture at the DGSE (physical and psychological), Mr. Al Hassan should be considered to be a victim of torture for the purposes of this application.[65]

Part 2.2 The ICC Prosecution obtained evidence from and concerning Mr. Al Hassan in circumstances amounting to acquiescence and/or complicity in torture and CIDT

27. The Prosecution interrogated Mr. Al Hassan on 19 occasions, while he was held at the DGSE.[66] These interrogations, and the related evidence collected during them, are tainted by torture, for at least the following reasons:

    a. The Prosecution knowingly interrogated Mr. Al Hassan while he was held in illegal, incommunicado detention, and subjected to ongoing forms of torture; and
    b. The Prosecution was aware, and objectively exploited the fact that the physical and mental torture inflicted on Mr. Al Hassan dominated his mind during interrogations. The Prosecution also knowingly requested, and relied upon information collected by persons who were directly involved in torturing Mr. Al Hassan, and further relied on their cooperation and assistance throughout the interviews.

28. This conduct contravened fundamental protections under the Statute. It amounts to complicity in torture and arbitrary detention, either through direct action (interviewing an individual, who was being subjected to ongoing forms of torture and CIDT, and relying on statements that had been produced through torture), or through the Prosecution's failure to erect safeguards, require assurances, or take measures, to ensure

[62] [REDACTED].
[63] MLI-D28-0003-0668-R01 at 0669; See also, MLI-D28-0003-1203 at 1215-1216 and 1238-1239.
[64] MLI-D28-0003-0571; MLI-D28-0003-0260 (referring to use of waterboarding in relation to persons suspected of aiding Islamists); [REDACTED].
[65] HRC opinion, *Taysumov et al. v. Russia*, Communication No. 2339/2014, Views of 11 March 2020, UN Doc. CCPR/C/128/D/2339/2014, para. 9.2; See also MLI-D28-0003-1203; pp. 1242-1243.
[66] 13, 14, 17 July 2017; 6, 8, 11, 13 September 2017; 2, 6 October 2017; 4, 6, 8 December 2017; 15, 16, 18 January 2018; 5, 6, 7, 8 March 2018.

that the Prosecution's reliance on the DGSE did not condone, assist, or otherwise benefit from acts of torture and CIDT committed by the DGSE.[67]

29. From the very outset of its interviews with Mr. Al Hassan, the Prosecution knew, or should have known that Mr. Al Hassan was detained illegally, and was highly vulnerable to the risk of torture. According to their chain of custody, the Prosecution had received UN reports concerning the illegal nature of detention at the DGSE, and reported incidents of death and torture at the hands of the DGSE, in November 2015.[68] And when the Prosecution met with the Malian authorities to discuss their prospective interview with Mr. Al Hassan, the [REDACTED] indicated that he was unaware of Mr. Al Hassan's arrest and detention.[69] At this point, Mr. Al Hassan had been held at the DGSE for 72 days. The Prosecution knew from the outset that his detention was not sanctioned by [REDACTED], and, further affirmed, in their March 2018 arrest warrant application, that there were no judicial proceedings against him.[70] Throughout the course of his interrogations, Mr. Al Hassan affirmed that he continued to be denied access to the outside world, and had been held outside the judicial system.[71] As such, the Prosecution knew, or must have known that his detention was illegal and arbitrary, [72] and that he had been held in a secret/incommunicado facility, for the entire duration of the ICC interview process. This form of detention is both a form of torture, and a form of forcible disappearance: the psychological harm for the both the detainee, and their family, increases in intensity throughout the duration of the detention/disappearance.[73] The Prosecution's decision to interview Mr. Al Hassan while he was detained in such conditions was incompatible with Article 55(1) of the Statute, and the *jus cogens* obligation not to condone or benefit from a situation amounting to torture.

30. The Prosecution bears a degree of shared responsibility for Mr. Al Hassan's deprivation of liberty; specifically, the Prosecution exercised direct responsibility for Mr. Al

[67] A/HRC/25/60, paras. 54, para. 56.
[68] [REDACTED].
[69] [REDACTED].
[70] ICC-01/12-01/18-1-Conf-Exp-Red, para. 300, which acknowledged the absence of any judicial proceedings against him, and para 311, where the Prosecution acknowledged that it was unaware of any factual or legal basis for his detention at the DGSE.
[71] See e.g. lack of access to the outside world: [REDACTED].
[72] *Hassan v. United Kingdom*, No. 29750/09, paras. 105-106 (concerning obligation to be brought before a detention review body); General Comment no. 35 on Article 9, CCPR/C/GC/35, para. 15; Deliberation No. 9, Report of the WGAD, A/HRC/22/44, para. 6.
[73] A/56/156, para. 14: "prolonged incommunicado detention in a secret place may amount to torture as described in [CAT]. The suffering endured by the disappeared persons, who are isolated from the outside world and denied any recourse to the protection of the law, and by their relatives doubtless increases as time goes by."

Hassan's custody for a period of at least 19 days. As affirmed in the Prosecution's Article 56 application, the Prosecution requested the Malian authorities to obtain and secure Mr. Al Hassan's presence for the purpose of participating in ICC interviews.[74] This request triggered the application of Article 55(1). The interviews took place in a custodial setting, during which Mr. Al Hassan was deprived of his liberty[75] and his security was ensured by the very persons responsible for his torture.[76] The Prosecution was aware that there was no legal arrest warrant or basis for detention, and it knew, or had reason to know, that Mr. Al Hassan was hooded during transit.[77] The Prosecution's decision to conduct interviews over the course of 8 months, while Mr. Al Hassan was held under such conditions, and unlawfully detained, during Prosecution interviews, rendered the Prosecution complicit with his arbitrary detention, and with the use of CIDT (hooding).[78] The effects of this arbitrary detention were compounded by the Pre-Trial Chamber's two month delay in issuing a reasoned decision on Mr. Al Hassan's arrest and detention at the ICC,[79] and failure to comply with the terms of Articles 91 and 92.[80] Indeed, if Mr. Al Hassan had been brought before and detained under the authority of Malian Courts (pending the transmission of a reasoned decision for his arrest), he would have been able to seek a remedy under Malian law as concerns the lawfulness of his arrest and detention.[81] That this process was unlawfully circumvented highlights the ICC's duty to ensure an effective remedy in Mali's stead.[82]

31. Throughout these 8 months, the ICC Prosecution condoned, and acquiesced to practices amounting to torture/CIDT, and, through its acts and omissions, exposed Mr. Al Hassan to a real risk of torture/CIDT. Before the Prosecution submitted its Article 56 application, the Prosecution received direct information from [REDACTED]

[74] ICC-01/12-45-Conf-Exp, para. 25.
[75] Interviews in a police station of a short duration can constitute an arbitrary deprivation of liberty: (I.I. v. Bulgaria, 44082/98, para. 87; Osypenko v. Ukraine, 4634/04, paras. 46-49; Salayev v. Azerbaijan, 40900/05, para. 42; Creangă v. Romania, 29226/03 para. 93.
[76] MLI-D28-0002-0535 at 0557, 0563, 0656.
[77] [REDACTED].
[78] See Equality and Human Rights Commission v Prime Minister & Ors [2011] EWHC 2401 (Admin) paras. 92-95 (re complicity arising from questioning a person abroad who has been hooded in transit by state authorities).
[79] The arrest warrant was issued on 27 March 2018 and its decision was issued on 27 May 2018.
[80] Article 92(3) specifies that the provisionally arrested person may only surrender to the ICC, prior to the receipt of a detailed decision, if the person consents to such surrender.
[81] Schabas, 'Article 59' The International Criminal Court: A Commentary on the Rome Statute (Oxford University Press, 2nd edition), p. 906.
[82] *In the Matter of El Sayed*, CH/AC/20I0/02, Appeals Chamber, Decision on Appeal of Pre-Trial Judge's Order regarding Jurisdiction and Standing, 10 November 2010, para. 60 (see also para. 46, cited with approval in ICC-02/05-03/09-410, para. 74).

concerning indicia of torture and CIDT. [REDACTED].[83] Dr. Cohen described his reports as raising a *"strong concern that he is being subjected to cruel, inhuman or degrading treatment and that his fitness for interview may be in question."*[84] The Prosecution's Article 56 application did not communicate such concerns, or otherwise address matters of public record concerning the risks to detainees at the DGSE. Nor did the Prosecution raise the issue of Mr. A Hassan's physical or psychological fitness to be questioned. Instead, the Prosecution merely noted that Mr. Al Hassan appeared to be [REDACTED].[85] Furthermore, the Prosecution's application was submitted following a meeting with the DGSE [REDACTED] to discuss Mr. Al Hassan and [REDACTED],[86] during which [REDACTED] indicated that the ICC interview with Mr. Al Hassan would have to wait as the DGSE "still needed him".[87] The Prosecution was thus on notice that Mr. Al Hassan was being interrogated in relation to issues that the DGSE considered important. In light of the information conveyed by [REDACTED], the fact that the DGSE wanted the OTP to wait for them to finish their interrogations should have given cause for alarm or at least caution, as concerns the identification of Mr. Al Hassan and [REDACTED] as persons of interests. The Prosecution's failure to consider these implications generated tangible consequences for both Mr. Al Hassan and [REDACTED], including death threats for Mr. Al Hassan, and threat of torture in the case of [REDACTED].[88]

32. Further 'warning signs' were raised during [REDACTED] with [REDACTED] on [REDACTED], where [REDACTED],[89] [REDACTED].[90] The Prosecution were thus on notice, before first questioning Mr. Al Hassan, that first, the DGSE continued to employ interrogation and coercion methods, that amount to torture, and second, these coercion methods were likely to impact on the reliability of the information that they would obtain from Mr. Al Hassan [REDACTED]. The Prosecution's decision to interview Mr. Al Hassan without taking the basic protections required under the Istanbul Protocol was fundamentally incompatible with Articles 54(1)(c) and 55(1), and the duty to avoid complicity in torture and CIDT.

[83] [REDACTED].
[84] MLI-D28-0003-0031 at 0040.
[85] ICC-01/12-45-Conf-Exp, para. 19.
[86] [REDACTED].
[87] [REDACTED].
[88] [REDACTED].
[89] [REDACTED].
[90] [REDACTED].

33. On the first day of interviews, 13 July 2017, Mr. Al Hassan informed the Prosecution in clear terms, that his evidence was tainted by coercion and torture: he had been severely beaten, he had no rights, his life was in the "hands' of the DGSE, and they had threatened to kill him, unless he told the "truth".[91] Mr. Al Hassan also indicated that the DGSE had blindfolded him during interrogations, and continued to manacle him, 24/7.[92] His interview with the Prosecution would have thus constituted his only respite from these manacles. According to Dr. Cohen, in light of the information conveyed by Mr. Al Hassan, "[a] medical examination to investigate this report of potential torture, and any impact this might have on his fitness for interview, is indicated."[93]

34. Mr. Al Hassan put his safety and security on the line by communicating this information to the Prosecution. When Mr. Al Hassan disclosed his torture to the Prosecution, he was gauging whether they would react, so that he could assess whether he would receive protection from harm.[94] But the Prosecution did not intervene to protect him: they completed their questionnaire, and allowed Mr. Al Hassan to be taken back to the DGSE (literally, to the hands of his torturers), which "solidified Mr. Al Hassan's sense that he had no recourse and that his torture was sanctioned or at least accepted by all those who encountered him."[95] As found by the ECHR, a failure on the part of the prosecutor to conduct further inquiries in relation to the nature, cause, and extent of torture injuries of a detainee will give the detainee "cause to feel vulnerable, powerless and apprehensive of the representatives of the State".[96] In line with these considerations, the Prosecution's failure to intervene at this crucial point engendered a particularly harmful dynamic with Mr. Al Hassan, which then impacted on the content and conduct of future interviews. Dr. Porterfield describes this dynamic as follows:[97]

> [f]or a torture victim who continues to be interrogated while being held in the environment in which he was tortured, a cognitive condition called learned helplessness can develop. With learned helplessness, the torture victim learns that, no matter what he does, he will not be able to escape his coercive conditions. Learned helplessness results in a state of passive acquiescence in which the torture victim stops trying to fight against his captors and may actually agree to false statements and to conditions that he does not want because he fears—and actually *expects*—further harm.

35. The fruits of this dynamic, and Mr. Al Hassan's learned helplessness, are reflected in the transcripts of the second day of his interview. After having put the Prosecution on

[91] [REDACTED].
[92] [REDACTED].
[93] MLI-D28-0003-0031 at 0036.
[94] MLI-D28-0002-0535 at 0584.
[95] MLI-D28-0002-0535 at 0586.
[96] *Aksoy v Turkey*, 21987/93, paras. 55-57.
[97] MLI-D28-0002-0535 at 0585.

notice that he had been coerced by the DGSE to provide what they considered to be the truth, Mr. Al Hassan tells the Prosecution the "truth" that the DGSE wanted him to convey. When the Prosecution ask him what he was doing before his arrest, Mr. Al Hassan repeats the information set out in his DGSE interview file: he tells the Prosecution that [REDACTED],[98] [REDACTED].[99] Later in the interview, when asked for further details about [REDACTED], Mr. Al Hassan explains that he had been nominated a year ago, and that his chief of staff was [REDACTED] CJA.[100] Although [REDACTED] and the CJA were opposed to jihadist/extremist groups,[101] the Prosecution does not explore the discrepancy between his role in the CJA, and the 'DGSE script' concerning his 'work' with jihadists: thus telegraphing their disinterest in matters that were not consistent with the 'DGSE script'.

36. During the last session of 14 July 2017, Mr. Al Hassan tells the Prosecution that he has many clarifications to make concerning the reasons for his 'voyages' and movements, but it was a lot, and Mr. Al Hassan agrees to leave these clarifications for the next session.[102] Before the session ends, the Article 56 Counsel noted with "satisfaction" the conduct of Mr. Al Hassan's Counsel who had not intervened, and had acted in accordance with his ethical obligations.[103] This observation, regrettably, reinforced the dynamic of 'learned helplessness': non-intervention in the questioning is equated with 'ethical' conduct, and conversely, that it would be unethical for Mr. Al Hassan or his Counsel to intervene or complain in relation to the Prosecution's decision to continue to question Mr. Al Hassan, notwithstanding DGSE death threats concerning the contents of his statements to the ICC.[104] As a result, Mr. Al Hassan does not attempt to make these clarifications during the next session. Instead, at the end of the session, he informs the Prosecution that he has fears for his security, and that is all he can say. The Prosecution respond that they will do all they can, and keep everything confidential, and

[98] [REDACTED].
[99] [REDACTED].
[100] [REDACTED].
[101] MLI-D28-0003-0422; MLI-D28-0003-0427; MLI-D28-0003-0433; MLI-D28-0003-0436; MLI-D28-0003-0442; MLI-D28-0003-0448; MLI-D28-0003-0454; MLI-D28-0003-0461; MLI-D28-0003-0465; MLI-D28-0003-0535; MLI-D28-0003-0540.
[102] [REDACTED].
[103] [REDACTED].
[104] MLI-D28-0002-0535 at 0587: "Thus, the lawyers representing Mr. Al Hassan's defense interests sanction the investigators' conduct, seemingly disregarding the fact that on the previous day, Mr. Al Hassan said he was told he would be killed if he did not tell "the truth.""

as Mr. Al Hassan knows, their procedure is completely separate from the Malian procedure.[105] As recounted by Dr. Porterfield,[106]

> Mr. Al Hassan acknowledged the investigators' comments about confidentiality, but he pressed on, asking "But then what's going to happen?," indicating that he does not believe he will necessarily be safe once he is back in the custody of the DGSE. (…)
>
> … he does not report some of the most severe things done to him—the [REDACTED] that occurred upon his arrival to DGSE when he was [REDACTED], the mock executions, and the waterboarding in Timbuktu ... Rather, he "tests the water" by reporting some of what was done to him, such as beatings and threats of death and inhumane conditions … the ICC investigators essentially continue questioning him, and the attorney who is supposed to be representing his interests does not appear to intervene or pursue the information that Mr. Al Hassan reports. His attempt on the third day to express his "fears for his security" … is also met with a vague assurance that the information is confidential, to which he pointedly responds that he is afraid of what could happen afterwards.
>
> … [This] sent a clear message to Mr. Al Hassan that this new set of interrogators and an attorney who was with them were not going to be responsive to his reports of abuse. He attempted to raise the issue in both specific and general ways and was met with no substantive response. … For Mr. Al Hassan, these first three days laid the groundwork for his ongoing communication with the ICC investigators: that is, he quickly and immediately learned that they not only would not respond to his reports of torture, but that they would not guarantee his ongoing safety—except to claim there was confidentiality—were there to be retaliation of him after his interviews.

37. In subsequent sessions, the Prosecution use the information collected during the critical July 2017 interviews, to tie Mr. Al Hassan to the 'DGSE script'. For example, on 18 January 2018, the Prosecution tell Mr. Al Hassan that [REDACTED].[107] Even if the Prosecution had not obtained indirect access to the DGSE interviews at this point, their reference to other 'evidence' would, in any case, have been understood by Mr. Al Hassan and those present to refer to this.[108] It is, moreover, a form of coercive questioning for the interviewer to insinuate that he or she has extrinsic 'evidence' on a certain point, in order to lead the person to confess.[109] This is particularly since the Prosecution has confirmed to the Defence that it had not collected any other evidence on this point, apart from Mr. Al Hassan's confessions.[110]

38. During the course of several sessions on this day, Mr. Al Hassan attempts to make the Prosecution understand that he is not in a position to give details concerning the [REDACTED]: he even makes it clear that if he were to give details, he would be lying:[111] essentially, he signals the fact that he was forced to say he [REDACTED],[112] but

[105] [REDACTED].
[106] MLI-D28-0002-0535 at 0588-0589.
[107] [REDACTED].
[108] MLI-D28-0002-0535 at 0558.
[109] A/71/298, para. 40: "Techniques designed to minimize or maximize the suspect's perceptions of responsibility or blame, including (…) presentation of false evidence, claims or insinuations about the existence of evidence against him or her, also increase the likelihood of false confessions."
[110] See Annex D.
[111] [REDACTED].
[112] [REDACTED].

beyond this forced false, statement, he cannot say more, because he did not actually work with them, and therefore has no details which he can supply. The Prosecution not only ignore these markers, they proceed to re-traumatise Mr. Al Hassan, by asking him to accept the 'truth' that he had been forced by the DGSE, under threat of death, to convey during the 13 July 2017 session. They read Mr. Al Hassan what he said in July 2017 concerning [REDACTED], emphasise that it is for the Prosecution to decide whether details are needed, and warn him that unless he provides such details, he will not be considered to be a credible witness for them: Mr. Al Hassan knows what they are going to do, he should think about it, his silence would have "precise consequences".[113] The Prosecution then stop the interview, and tell him that they 'may' come another time.[114] In so doing, in the opinion of Dr. Porterfield, the Prosecution exploited Mr. Al Hassan's vulnerability and status as a torture victim, in order to convince him to provide details "on issues which he had indicated that he was unwilling to address, as well as doing so, without any resolution of the underlying security concerns that he expressed from the very outset".[115] In essence, in this exchange, and in others, the Prosecution exploit the groundwork done by the DGSE. They do not personally mistreat Mr. Al Hassan, but they knew or should have known, that he existed in a permanent state of mistreatment, and, that their absence would necessarily make things worse for him. Mr. Al Hassan's "choice" to either answer or not answer questions is not, therefore, a real choice, since a failure to answer questions (or to provide a particular type of response) would mean that Mr. Al Hassan would lose access to the Prosecution, who represented Mr. Al Hassan's only lifeline to the outside world: his only chance to request access to medicine, to be brought before a judge, to be transferred to a lawful detention facility, to have access to "[REDACTED]". Thus, Mr. Al Hassan's "attempt at taking a small measure of control over what he answers in the interrogation results in their withdrawing, thus leaving him in the inhumane and potentially dangerous conditions of DSGE."[116]

39. This dynamic runs through the course of the interview history between Mr. Al Hassan and the Prosecution. When Mr. Al Hassan attempts to explain that he is psychologically or physically unfit to participate, rather than stopping the interview process, the

[113] [REDACTED].
[114] [REDACTED].
[115] MLI-D28-0002-0535 at 0598.
[116] MLI-D28-0002-0535 at 0598.

Prosecution offer to intercede with [REDACTED], and then invite Mr. Al Hassan to make 'spontaneous declarations' (i.e. admissions of culpability),[117] or, otherwise continue with the substantive interviews.[118] And, if Mr. Al Hassan attempts to exercise any form of control over the modalities of his participation, the Prosecution remind him of the information provided during the July 2017 sessions, and/or cut-off the interview sessions.[119] By 2018, he is broken. In January 2018, he repeatedly uses the phrase 'c'est vrai' to respond to the Prosecution's questions,[120] and in March 2018, he even signed a document concerning food choices, that he knows not to be true, simply because the Prosecution asks him to.[121] Dr. Porterfield observes in this connection that Mr. Al Hassan's perspective on his treatment appears to have been radically impacted by his environment:[122]

> a simple human right, such as adequate food, had been used as a punishment in the DGSE for Mr. Al Hassan. In his meetings with the ICC investigators, he notes that he has not been maltreated, saying "Regarding the interview, I think treatment is a very good treatment." For Mr. Al Hassan the absence of abuse has become "good treatment," a reaction rooted in his past torture. The ICC investigators cultivate this dynamic. They are aware he has been severely abused—such as having been denied food for three days in December 2017—and they operate as if his treatment in the confines of their interview space is an adequate relief for this and is all they are able and willing to attend to.

40. Dr. Porterfield's findings are also consistent with the caution, set out in the OSCE Manual on Human Rights in Counter-Terrorism Investigations, that:[123]

> There is the potential that extended periods of confinement will give rise to "Stockholm Syndrome". The detainee may come to depend on the investigators as the only regular contact they have with people other than their lawyer. Often investigators authorize and/or dictate the level and frequency of contact with the lawyer. This will especially be the case when a detainee is frightened, anxious or feels powerless and believes that the investigator is solely responsible for his or her basic needs and well-being. He or she may feel indebted to the investigators whenever some small favour is done, such as the granting of an extended exercise period or the supply of reading material, and feel the need to comply with their wishes. **Where this happens, the reliability of any confession or information obtained must be in doubt** (emphasis added).

41. In line with these considerations, Mr. Al Hassan's ability to effectively exercise his privilege against self-incrimination was vitiated by the fact that at the outset of the interviews, the Prosecution emphasized that he was only being interviewed as a witness, and not a suspect/accused.[124] The Prosecution further dangled the scenario that if he were to be a witness with security concerns, Mr. Al Hassan [REDACTED] could be

[117] [REDACTED].
[118] [REDACTED].
[119] [REDACTED].
[120] [REDACTED]..
[121] [REDACTED].
[122] MLI-D28-0002-0535 at 0600.
[123] Manual on Human Rights In Counter-Terrorism Investigations, 2013, p. 115.
[124] [REDACTED].

[REDACTED].[125] And, throughout the process, the Prosecution directly associated the 'voluntariness' of the process, and the prospect of witness protection, if, as a witness, his name were to be disclosed to other parties.[126] In later interviews, Mr. Al Hassan also introduces himself as the witness, and the Prosecution does not correct him.[127] Even if discussions concerning witness protection are of a routine nature, the Prosecution should have been aware that such discussions were likely to have a disproportionate impact on a vulnerable individual, who had developed a situation of dependency with the Prosecution.[128]

42. Mr. Al Hassan's evident confusion as to his status is consistent with Dr. Crosby's assessment, based on her evaluations of relevant transcripts of interviews with detained individuals, that "critical aspects of voluntary and informed consent were not met".[129] As further explained by Dr. Crosby, "[t]here are special considerations for obtaining informed consent for interviews (medical or legal) with prisoners, who are vulnerable to harm or coercion. They may suffer from psychological or medical sequelae of torture that are untreated, and the interviewers have the obligation to investigate the potential influence of trauma on the witness's ability to provide informed consent in this situation."[130] Nonetheless, although Mr. Al Hassan communicated clear indicia that that the conditions of his detention were severely affecting his health, mental well-being, and capacity to participate in the interview, the Prosecution pressed on regardless. Specifically, as set out in Dr. Cohen's report, Mr. Al Hassan communicated 11 different elements amounting to CIDT, and which should have prompted the Prosecution to conduct a full medical examination in light of impact on his fitness to be interviewed.[131] This included complaints of fever, migraines, severe tooth pain, psychological depression, memory difficulties, tremors, and lack of access to medical treatment.[132]

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[125] [REDACTED].
[126] [REDACTED].
[127] [REDACTED].
[128] MLI-D28-0003-0031 at 0035. See also *Prosecutor v. Sesay*, 'Written Reasons - Decision on the admissibility of certain prior statements of the Accused given to the Prosecution', 30 June 2008, para. 52 regarding inadmissibility of custodial statements made from "fear of prejudice and hope of advantage"; *Prosecutor v. Halilovic*, 'Decision on Interlocutory Appeal Concerning Admission of Record Of Interview of the Accused from the Bar Table', para. 38: "Prosecutorial offers that serve as inducements to the accused's cooperation may, if the inducement is sufficiently powerful, render statements made pursuant to that cooperation involuntary".
[129] MLI-D28-0003-0315 at 0321.
[130] MLI-D28-0003-0315 at 0320.
[131] MLI-D28-0003-0031 at 0038.
[132] MLI-D28-0003-0031 at 0036-0037.

Memory loss and memory distortion are symptoms of torture and CIDT.[133] According to Dr. Cohen's evaluation, the Prosecution's responses (and indeed, non-responses) to these indicia were contrary to the obligations under the Istanbul Protocol: to "promote and protect human rights' (paragraph 50), 'promptly and effectively investigate complaints and reports of torture or ill-treatment' (paragraph 79), and protect alleged victims from 'violence, threats of violence and any other form of intimidation' (paragraph 88)."[134]

43. Mr. Al Hassan's capacity to provide informed consent was further vitiated by the Prosecution's avowal, in the face of his complaints that he had requested medications but not received them, that it could not intervene directly in medical issues concerning him.[135] Furthermore, later when Mr. Al Hassan explained that the doctor at the DGSE did not carry out examinations of the detainees,[136] the Prosecution failed to organize its own examination. Rule 113(1) empowers the Prosecution to seize the Pre-Trial Chamber with a request to organize a medical, physical or psychological examination for [REDACTED].[137] Articles 55 and 56, as interpreted through the lens of human rights law, also required the Prosecution to take such steps, in order to assess Mr. Al Hassan's capacity to provide informed consent,[138] and document any signs of abuse and mistreatment in a timely manner. The Prosecution's failure to apply the Rule 113(1) procedure to Mr. Al Hassan was arbitrary and discriminatory, and inconsistent with basic standards of Prosecutorial ethics as concerns interrogations with vulnerable torture victims. It also deprived the Defence and Mr. Al Hassan of key evidence concerning contemporaneous physical and psychological manifestations of his abuse.

44. As soon as Mr. Al Hassan communicated indicia of CIDT and torture, the Prosecution's duties to protect and investigate were triggered. By failing to take steps to ensure that Mr. Al Hassan's concerns regarding ongoing threats and mistreatment were addressed in an effective manner, the Prosecution exposed Mr. Al Hassan to a real risk of ongoing forms of torture and CIDT. This is exemplified in particular by their interactions with Mr. Al Hassan in October 2017.

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[133] MLI-D28-0003-0031 at 0034.
[134] MLI-D28-0003-0031 at 0038.
[135] [REDACTED].
[136] [REDACTED].
[137] See for example, [REDACTED].
[138] MLI-D28-0003-0315 at 0319-0321.

45. On 2 October 2017, after noting the oppressive atmosphere of torture and coercion at the DGSE, Mr. Al Hassan directly queried as to whether it was lawful to interview him in such conditions, rather than waiting for him to be transferred to a secure and lawful custodial environment.[139] Mr. Al Hassan's question went to the heart of the matter: given that he was being held in a legal black hole – where he could be tortured or killed at any time, or permanently disappeared – it was unlawful to interview him. The very fact that he was expressing this concern showed the extent to which his thoughts were dominated by the fear of torture and retaliation – he was manifesting symptoms of psychological torture during the interview itself. The Prosecution ignored his cry for help, and effectively shut down the line of inquiry, claiming that judges at the ICC had authorized the interviews, with full knowledge of these conditions.[140] According to Dr. Porterfield, the Prosecution's actions add "another level of impunity to the actions of the Malians", and further bring the "dynamic of learned helplessness in stark relief: the investigator makes clear to the prisoner that he will not be protected from abuse and then directs the prisoner to say he is speaking voluntarily. Mr. Al Hassan acquiesces."[141]

46. On 6 October 2017, Mr. Al Hassan also specifically requested the Prosecution to intercede, so that he could be transferred to a lawful detention facility. Mr. Al Hassan - a victim of torture, arbitrary detention and enforced disappearance - was turning to the Prosecution for help, but rather than doing so:[142]

> The ICC investigators inform Mr. Al Hassan that the Malians have their procedures, "over which we have no control" and they elaborate, "It is a procedure which concerns the Malians which *does not concern us*." (Italics added) The ICC investigators elaborate that "it is not up to the person in detention to decide or even to wish to go somewhere." Here, the message to Mr. Al Hassan is clear: the ICC investigators are not interested in addressing his fears about his safety. In fact, they tell him that he may be able to raise this with [REDACTED], "next time", signaling to Mr. Al Hassan that any potential remedy to his conditions of unsafe confinement would be attached to his participation in further meetings with the ICC. The ICC investigators did not see Mr. Al Hassan for two months after this, leaving these matters of grave concern to him completely unaddressed.

47. In the face of no other option, Mr. Al Hassan raised this issue with the only authorities he had access to – the guards at the DGSE. This resulted in him being severely beaten,[143] and deprived of food for several days.[144] The Prosecution's acquiescence and

[139] [REDACTED].
[140] MLI-D28-0002-0535 at 0591-0592.
[141] MLI-D28-0002-0535 at 0592.
[142] MLI-D28-0002-0535 at 0593.
[143] [REDACTED].
[144] [REDACTED].

failure to act in October 2017, thus paved the way for Mr. Al Hassan's abuse and mistreatment in November 2017.

48. Mr. Al Hassan informed the Prosecution that this beating had taken place when he met them in December 2017, and it is clear from recorded exchanges with his Counsel that the Prosecution was aware that Mr. Al Hassan had been denied access to food for three days, and the conditions were "like Guantanamo".[145] As noted above, [REDACTED] and [REDACTED].[146] Under the terms of Articles 54(1)(a), 54(1)(c) and 68(1) of the Rome Statute, and paragraph 79 of the Istanbul Protocol, the Prosecution had a clear duty to document the mistreatment, and inquire as to the identity of the perpetrators. But rather than doing so, the Prosecution nonetheless discouraged Mr. Al Hassan's Counsel from raising such issues. After noting that "*il fait ce qu'il veut… il fait ce qu'il veut*",[147] one of the Prosecution investigators informed the Article 55 Counsel that such matters had no 'impact' for them.[148] When Mr. Al Hassan returned to the room, the Article 55 Counsel gave him ibuprofen, and the interview continued.[149] As Dr. Cohen notes, Mr. Al Hassan is "not asked if he has any outstanding injuries from [the beating] or offered a medical examination to document them. A medical examination to investigate this report, and any impact this might have on his fitness for interview, is indicated."[150]

49. The right to effective, and independent legal representation is of critical importance in relation to detention interrogations. Conversely, the absence, or irregularity of access to such effective representation can contribute to a detainee's susceptibility to torture and mistreatment, [151] and This right is not, however, satisfied by the mere appointment or presence of a lawyer, [152] and "the appointment of a defense counsel for the sole purpose of complying with a procedural formality would be tantamount to not having a technical legal representation; therefore, it is imperative that the defense counsel act diligently in

[145] [REDACTED].
[146] [REDACTED].
[147] [REDACTED].
[148] [REDACTED].
[149] [REDACTED].
[150] MLI-D28-0003-0031 at 0037.
[151] Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt (Communication No. 323/2006) [2011] ACHPR 85 (16 December 2011), paras. 179, and 184 citing UN Resolution 61/153 of 2007, and the Robben Island Principles, in support of the nexus between a detainee's right to prompt and regular access to a lawyer, and torture prevention.
[152] Cabrera García and Montiel Flores v. Mexico, Case 12,449, para. 155.

order to protect the procedural guarantees of the accused and thereby prevent his rights from being violated".[153]

50. The appointment of Mr. Al Hassan's Article 55 Counsel was "tantamount to not having a technical legal representation", due to the Prosecution's insistence that it was not the role or duty of Article 55 Counsel to raise issues concerning the conditions of Mr. Al Hassan's detention. It is significant, in this regard, that the December 2017 exchange with the Prosecution (where the Prosecution advised him that Mr. Al Hassan's beating and deprivation of food were not relevant for them), the Article 55 Counsel never raised such matters on Mr. Al Hassan's behalf, and Mr. Al Hassan was forced to shoulder the burden of doing so himself. Given his vulnerable situation, he was also patently ill-equipped to do so in an effective manner, as reflected by the fact that he would abandon such issues as soon as the Prosecution dangled any promise to intercede with [REDACTED].[154]

51. Given the importance of the issues at stake, the right to a lawyer is a right to a lawyer of one's choice[155] and a right to unrestricted access to a lawyer.[156] And, as noted in the OSCE Manual, restricted access to a lawyer tied to the suspect's participation in interviews may engender a form of "Stockholm Syndrome", where the suspect feels indebted to the interviewers.[157] Mr. Al Hassan was not, however, able to avail himself of unrestricted legal representation. Before his interview with the Prosecution, he had no access to a lawyer (or ability to secure one). His right to access a lawyer was tied to, and circumscribed by, his willingness to participate in the interviews with the Prosecution. The fact that the Article 55 and 56 lawyers were chosen by the Registry and effectively imposed rather than freely selected from a list, or with the family's assistance, also had a critical impact as concerns Mr. Al Hassan's perception of the process, his rights within this process, and his ability to establish an effective representation relationship with this lawyer. At this juncture, Mr. Al Hassan had been subjected to multiple interrogations, with multiple persons and entities, in highly disorienting circumstances. As Dr. Porterfield describes:[158]

[153] Cabrera García and Montiel Flores v. Mexico, Case 12,449, para. 155.
[154] MLI-D28-0002-0535 at 0594-0596; [REDACTED]..
[155] Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt, para. 182.
[156] Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt, para. 209.
[157] OSCE, Manual on Human Rights In Counter-Terrorism Investigations, 2013, p. 115.
[158] MLI-D28-0002-0535 at 0558.

> Mr. Al Hassan noted that, when he realized he still was not being provided basic rights—such as contacting his family or being held in humane conditions—he made the determination that these people were intelligence officers, lying about their affiliation with the [ICC]. Mr. Al Hassan noted that he knew there were "court prisons," where basic human rights were upheld for prisoners who faced charges. His imprisonment in the DSGE was clearly different than this and, so, when the personnel from the ICC told him they were from this court, he did not believe them.

52. Mr. Al Hassan's subjective fears concerning the independence of the Court-appointed lawyers were objectively reinforced by the role they played in the interrogation process. From the outset, the Article 56 Counsel expressed her satisfaction that the Article 55 Counsel had not acted 'unethically' by interrupting or preventing Mr. Al Hassan from answering questions.[159] Although the mandate of the Article 56 lawyer was to represent the interests of a future defendant (which was in fact, Mr. Al Hassan), it would appear that she assumed that such a defendant would have interests that were opposed to Mr. Al Hassan. Consequently, she questioned Mr. Al Hassan in a manner that was similar to an adjunct prosecutor.[160] This would have served to blur the line between the role of 'Counsel', and that of the Prosecution, and undermined the utility of their presence.

53. Mr. Al Hassan's ability to exercise his right to silence, in an effective manner, was further controverted by the Prosecution's reliance on the BSQ sessions to obtain incriminating evidence, and further investigative leads to build its case concerning Mr. Al Hassan. The Istanbul Protocol specifies that when an investigator collects information concerning the health or private situation of a torture victim, the purpose of doing so must be clear, and it should not be used in a manner that is inconsistent with this purpose.[161] The effective application of the principle of self-incrimination also turns on the extent to which a suspect-witness is aware that the information can be used against him, and speaks nonetheless. The Prosecution ran roughshod over these principles by conveying the impression that the information was being collected for the specific purpose of assisting them to identify an appropriate protection and security response to his torture concerns (that is, that the information would be used *for* him rather than *against* him). Under the guise of doing so, the Prosecution obtained information concerning Mr. Al Hassan's social media accounts,[162] and [REDACTED].[163]

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[159] [REDACTED].
[160] [REDACTED].
[161] MLI-D28-0003-0315 at 0320.
[162] [REDACTED].
[163] [REDACTED].

54. The Prosecution then used this information to further its investigation *against* Mr. Al Hassan. [REDACTED].[164] Whereas the Prosecution had advised Mr. Al Hassan that this information had been collected for his safety, the Prosecution has included the records on its list of incriminating evidence.[165] The Prosecution also relied upon the BSQ information concerning [REDACTED] to identify potential witnesses, and question them, on the basis of this information.[166] Of particular concern, during the first BSQ session, after asking Mr. Al Hassan for [REDACTED] (which included [REDACTED]), the Prosecution then inquired [REDACTED].[167] After Mr. Al Hassan was transferred to the ICC (and his Counsel affirmed that he had been mistreated), the Prosecution interviewed [REDACTED] in order to elicit evidence [REDACTED].[168]

55. Finally, the element of complicity in torture is further fulfilled by the Prosecution's knowing reliance on the DGSE to obtain DGSE statements that the Prosecution must have known to be tainted by torture, and subsequent reliance on both the DGSE statements, and the Prosecution interviews with Mr. Al Hassan, for proscribed purposes.

56. Article 16 of the UN Guidelines on the Role of Prosecutors specifies that:[169]

> When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or [CIDT], or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

57. The ambit of this obligation extends to evidence that can be considered to be the 'fruits of torture', including subsequent, seemingly 'clean' confessions:[170]

> where there is compelling evidence that a person has been subjected to ill-treatment, including physical violence and threats, the fact that this person confessed – or confirmed a coerced confession in his later statements – to an authority other than the one responsible for this ill-treatment should not automatically lead to the conclusion that such confession or later statements were not made as a consequence of the ill-treatment and the fear that a person may experience thereafter.

58. The IACHR has also endorsed a broad interpretation of the exclusionary rule in relation to evidence that derived directly or indirectly from torture or cruel treatment.[171]

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[164] [REDACTED].
[165] ICC-01/12-01/18-740-Conf-AnxC at p. 320, rows 5432, 5433; p. 326 row 5538; P. 469, row 7915; P.709, row 12119; P. 710 rows 12121, 12122, 12123, 12124, 12125, 12126, 12127, 12128, 12129.
[166] [REDACTED].
[167] [REDACTED].
[168] [REDACTED]
[169] The Havana Guidelines, 1990
[170] *Harutyunyan v. Armenia*, 36549/03, 23 June 2007, para. 65.
[171] Cabrera García and Montiel Flores v. Mexico, Case 12,449**,** paras. 167, 174.

59. In considering the potential impact of 'continuing effects of torture' on subsequent confessions, US Courts have taken into account the length of time between confessions, changes in location, changes in personnel, the length of detention, the repeated and prolonged nature of questioning, and the use of possible forms of retaliation (such as deprivation of food or sleep),[172] but at the same time, have emphasized that "when considering the amount of time which has elapsed between the coerced confession and the subsequent one, courts have never insisted that a specific amount of time must pass before the taint of earlier mistreatment has dissipated".[173] In her report, Dr. Crosby further emphasized that:[174]

> interrogation is not an event, it is a process. There is no such thing as a "clean team," once an individual has suffered torture. One interrogator cannot be separated from another once torture has occurred and biopsychological damage has been inflicted- the same biological responses will be triggered by subsequent groups of interrogators, resulting in the same psychological distress and fear. Thus, even though the prisoners were not directly tortured by ICC interrogators, their reaction to these interviewers would be the same as to previous groups of interrogators.

60. In the present case, the Prosecution was aware of, or willfully blind to temporal and sensory links between Mr. Al Hassan's torture by the DGSE and his interrogations with the Prosecution, which irreversibly tainted the entire process. When Mr. Al Hassan informed the Prosecution on 13 July 2017 that his life was in the hands of the DGSE, and they had threatened him with death unless he told the 'truth' to them, this was a manifest and unequivocal expression of ongoing coercion: any information received from this point should have been treated as the fruits of torture. If the Prosecution had asked follow up questions (as required by Article 15 of CAT, Article 16 of the Havana Guidelines, and the Istanbul Protocol), with a view to eliciting information concerning the nature of these threats and the perpetrators, they may have learned that the same person that tortured Mr. Al Hassan [REDACTED] brought him to and from the ICC interviews. He also interrupted the interviews, and by coming into the room, inserted his presence into Mr. Al Hassan's mind, and the interview process.

61. In July 2017, Mr. Al Hassan explicitly mentioned that he was handcuffed 24/7:[175] the Prosecution were thus aware that his only respite was the ICC interviews, and that he would be kept in inhumane restraints in the interim hours. The December interviews were also preceded by severe beatings and food deprivation, which were designed to

[172] Mohammed v. Obama, at 60.
[173] Mohammed v. Obama, Civil Action No. 05-1347 (GK), at 66 (D.D.C. Dec. 16, 2009).
[174] MLI-D28-0003-0315 at 0350.
[175] [REDACTED].

cower Mr. Al Hassan, and to retaliate against an attempt by the detainees to express their rights. [REDACTED] mentioned the involvement of [REDACTED] in this incident,[176] but there is no indication that the Prosecution considered, and took steps in relation to the implications of his ongoing involvement in Mr. Al Hassan's transfer to and from interviews. Mr. Al Hassan also informed the Prosecution that he continued to be subjected to coercive (i.e blindfolded) interrogations throughout the course of 2017 and 2018.[177] When viewed in connection with Mr. Al Hassan's complaints of depression, memory loss, and sense of oppression and fear, the Prosecution had clear grounds to be aware that their interviews fell within the four corners of the above case law concerning the tainted 'fruits of torture'.

62. The exception to Article 15 of CAT concerns the reliance on torture evidence for the purpose of documenting torture. It is nonetheless clear from the limited nature of inquiries on these issues, that the Prosecution was not conducting investigations for the purpose of documenting the existence of torture and CIDT at the DGSE. This is further reflected by the Prosecution's disregard for relevant evidence that may have substantiated the effects of torture on the content of Mr. Al Hassan's testimony. For example, although Mr. Al Hassan informed the Prosecution in March 2018 that [REDACTED] appeared to have exculpatory information concerning the circumstances of Mr. Al Hassan's arrest,[178] the Prosecution has never interviewed [REDACTED].[179] [REDACTED] also informed the Prosecution that, in contrast to the coerced script that Mr. Al Hassan had been forced to recount to the Prosecution, Mr. Al Hassan had never [REDACTED]: indeed, [REDACTED]'s surprise upon hearing this claim speaks for itself.[180] [REDACTED] also informed the Prosecution that Mr. Al Hassan told him [REDACTED].[181]

63. All evidence produced through interviews at the DGSE is inadmissible and unreliable, but even if the Prosecution failed to appreciate this over-arching legal point, the existence of such discrepancies, when viewed in connection with Mr. Al Hassan's indication that the DGSE had threatened him with death as concerns the content of his

[176] [REDACTED].
[177] [REDACTED].
[178] [REDACTED].
[179] ICC-01/12-01/18-857-Conf, para. 19.
[180] [REDACTED].
[181] [REDACTED].

testimony, should have highlighted the fundamentally unreliable and coerced nature of Mr. Al Hassan's 'confessions'. According to open sources, there is also a case file before Malian courts concerning the attack against FAMA and Barkhane at Gourma-Rharous ([REDACTED]).[182] Notwithstanding its "positive" relationship with the Malian judiciary,[183] the Prosecution has never obtained access to this case file or interviewed the individual/s involved. The Prosecution thus failed to exercise any degree of due diligence as concerns reliance on evidence that it knew, or should have known was tainted by torture.

64. At the point at which the Prosecution submitted the RFA to obtain formal access to the DGSE statements (November 2017) the Prosecution had received an extensive array of corroboratory information concerning torture, CIDT, and coercion at the hands of the DGSE.[184] And yet, even though Mr. Al Hassan's Counsel announced during his initial appearance that Mr. Al Hassan had been tortured,[185] the Prosecution continued to rely on the assistance of the DGSE, and took follow up steps to access Mr. Al Hassan's DGSE statements,[186] which it subsequently introduced as evidence against Mr. Al Hassan. The use of torture evidence constituted a direct affront to the dignity of Mr. Al Hassan, and re-traumatised him. The Prosecution also added insult to injury by implying that complaints concerning torture and mistreatment in the DGSE were somehow conjured up from an Al Qaeda handbook for detainees.[187] This is the same tactic that was adopted by the Pentagon in response to allegations of abuse arising from detainees at Guantanamo Bay,[188] and it was unfair and improper for the Prosecution to advance such a claim, at a time when it was in possession of a substantial body of undisclosed materials, which corroborated Mr. Al Hassan's complaints of torture. Denying his experience in such an arbitrary manner also contributed to his ongoing trauma.

Part 2.3 The evidential record of this case is further contaminated by information and evidence obtained [REDACTED]

65. The Prosecution's conduct towards Mr. Al Hassan is alarming, but it is not unique. Both before, and after its interviews with Mr. Al Hassan, the Prosecution [REDACTED], and

[182] Biographies de la Radicalisation: Des messages cachés du changement social: 219. De Bruijn, M. 2018.
[183] [REDACTED].
[184] Annex B.
[185] ICC-01/12-01/18-T-001-CONF-ENG ET 04-04-2018 1-11 NB PT, p. 8.
[186] [REDACTED].
[187] ICC-01/12-01/18-505-Conf-Exp-Red, fn. 92.
[188] See ICC-01/12-01/18-791-Conf-Exp,fn.3.

collected information from the DGSE in circumstances that amounts to complicity in torture and CIDT. This conduct has irreversibly tainted the evidential foundation of this case, and completely undermined the prospects of a fair and impartial trial.

66. At the time that the Prosecution commenced its investigations in 2013, there were multiple credible reports concerning the existence of torture and extra-judicial killings in detention facilities in Mali, particularly those run by military or security forces,[189] and use of excessive force and torture during the initial arrest in the North of Mali.[190] As set out above, where there are reasonable grounds to suspect a State engages in systematic human rights abuses or torture against specific categories of individuals (including detainees), prosecuting bodies have a positive duty to ensure that any requested forms of cooperation do not condone, acquiesce or contribute to such practices.

67. [REDACTED],[191] [REDACTED]. To the contrary, the Prosecution repeatedly acknowledged that it did not have the means or capacity to [REDACTED].[192] As set out above and in expert reports, the Prosecution's decision to [REDACTED] was therefore incompatible with the preventative obligations arising under CAT and the Istanbul Protocol.[193]

68. After the Prosecution [REDACTED], it received concrete information that: DGSE 'debriefings' [REDACTED] were not conducted in accordance with established legal procedures (24 February 2015);[194] Barkhane had interrogated individuals in circumstances that could amount to torture or CIDT (5 September 2015);[195] the conditions of detention at Camp 1 amounted to CIDT (from [REDACTED]);[196] [REDACTED] at the DGSE were held in incommunicado detention, the conditions of detention at the DGSE amounted to torture or CIDT, detainees there were threatened, and felt like they could be tortured at any time ([REDACTED]);[197] and notwithstanding

[189] [REDACTED].
[190] A/HRC/23/57, paras. 40-41.
[191] See A/71/298, para. 8: "Questioning, in particular of suspects, is inherently associated with risks of intimidation, coercion and mistreatment. The risks are heightened for vulnerable persons and for persons questioned in detention."
[192] [REDACTED].
[193] See paras. 13, 15, 34, 44, 54, 62-66 above; See e.g. MLI-D28-0003-0315 at 0319; MLI-D28-0003-0031 at 0038, 0044, 0049, 0052, 0057, 0060, 0063.
[194] [REDACTED].
[195] [REDACTED].
[196] [REDACTED]. (no ability to leave cell); [REDACTED]. (no ability to communicate with family).
[197] [REDACTED].

the above, the Malian authorities did not intend to move [REDACTED] from the DGSE to a different facility (25 November 2016).[198]

69. By the end of 2016, based on the detention conditions (including its incommunicado nature) and [REDACTED] amounting to psychological torture, the Prosecution must have known that individuals in the DGSE, were at risk of ongoing torture and CIDT. The Prosecution was aware that the DGSE employed cruel and degrading methods [REDACTED].[199] The Prosecution also knew that the Malian [REDACTED] was either unwilling or unable to intervene to secure the [REDACTED].[200] Although the Prosecution was aware of the vulnerability [REDACTED], it failed to follow the necessary steps [REDACTED],[201] or to conduct full and effective independent examinations [REDACTED].[202] And, [REDACTED], the [REDACTED] appeared only interested in hearing accounts of either actual or threatened physical violence, or signs of recent physical injury. The extent of other methods of ill-treatment were not explored".[203]

70. In accordance with the obligations set out in CAT and the Istanbul Protocol, there is a "duty to investigate and report complaints of CIDT and torture, and to escalate concern where individuals remain in conditions where their health is likely to deteriorate further".[204] The Prosecution also knew or should have known that any evidence collected in this environment would be contaminated by the effects of torture and CIDT, since, as Dr. Cohen states:[205]

> Such practices weaken, disorient and confuse subjects, distort their sense of time and render them prone to fabricate memories, even if they are otherwise willing to answer questions. They are also detrimental to the establishment of trust and rapport, and compromise the interviewer's ability to understand a person's values, motivations and knowledge — elements required for a successful interview.

71. But, rather than disengaging or re-evaluating its reliance on the DGSE, the Prosecution also escalated its reliance on the DGSE as a source of potential evidence [REDACTED] in this case, and continued to [REDACTED] the Prosecution knew, or should have

198 [REDACTED].
199 Chains: [REDACTED]; handcuffs: [REDACTED].
200 [REDACTED].
201 MLI-D28-0003-0315 at 0319-0332.
202 MLI-D28-0003-0315 at 0333-0340; MLI-D28-0003-0031 at 0034.
203 MLI-D28-0003-0031 at 0033.
204 MLI-D28-0003-0031 at 0034.
205 MLI-D28-0003-0031 at 0034, citing the UN Special Rapporteur on Torture, A/71/298, para. 18.

known, had been subjected to torture or CIDT. Its decision to do so amounted to a form of complicity.

72. The Defence has constructed a time line concerning the Prosecution's knowing collection of contaminated evidence and ongoing reliance on the DGSE, notwithstanding [REDACTED] systematic acts of torture and CIDT.[206] As noted by Dr. Cohen, given the lack of systematic inquiry on these issues, it is possible that the actual number of instances of torture and CIDT "is much higher".[207][REDACTED].

73. [REDACTED]. As with Mr. Al Hassan, the Prosecution's [REDACTED] and held incommunicado, was incompatible with the Prosecution's obligation not to condone, acquiesce, or rely on a situation amounting to arbitrary detention, torture or CIDT. Indeed, it is striking that although the Prosecution's request [REDACTED] triggered Article 55, the Prosecution never read [REDACTED] the rights set out in Article 55(1)(b) and (d) of the Statute. To the contrary, as with Mr. Al Hassan, the Prosecution either conveyed the impression that such matters were irrelevant to the interview, or engendered a dynamic of learned helplessness, as Dr. Crosby describes:[208]

> [REDACTED] This would effectively leave them in the same state of dysregulated arousal (e.g. fear and dissociation), impaired cognitive capacity and vulnerability to learned helplessness that they had been in from their experiences [REDACTED].

74. The foundation for this dynamic of acquiescence and apparent complicity was laid by the Prosecution's interactions with the DGSE [REDACTED], and reliance on information obtained from DGSE interrogations. [REDACTED].[209] The DGSE nonetheless provided the Prosecution with access to its '*Synthèse de debriefing*' of [REDACTED]. It appears that it identified [REDACTED] as [REDACTED] on the basis of the content of [REDACTED]'s '*Synthèse de debriefing*'.[210] As noted *infra*, the Prosecution was aware at this point that DGSE interrogations were not conducted in accordance with any established legal procedure. When [REDACTED] .[211] By acting on the information in the '*Synthèse de debriefing*', the Prosecution had relied on torture evidence to further its investigations.

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[206] Annex B.
[207] MLI-D28-0003-0031 at 0032; see also Dr. Crosby's report at MLI-D28-0003-0315 at 0349: "[REDACTED]".
[208] MLI-D28-0003-0315 at 0349-0350.
[209] [REDACTED].
[210] [REDACTED].
[211] [REDACTED].

75. In November 2015, the Prosecution accessed UN human rights reports documenting instances of torture and incommunicado detention in prisons run by FAMA and the DGSE in Bamako, including the use of electrocution during interrogations.[212] Tuaregs and persons arrested in the North of Mali were a particular target for such abuse.[213]

76. Notwithstanding these reports, the Prosecution [REDACTED].[214] [REDACTED].[215] The Prosecution failed to explore such issues with a view to documenting physical or psychological symptoms of torture. Nor did they demand that he be given a medical examination in advance [REDACTED]. Instead, [REDACTED].[216] The Prosecution then [REDACTED] the very next day [REDACTED].[217]

77. For [REDACTED].[218] [REDACTED],[219] [REDACTED][220] The ICC Prosecution recognized that his conditions were 'deplorable',[221] and noted [REDACTED], but nonetheless underscored that the notions of 'security', for their purposes, was restricted to risks from [REDACTED], and 'threats' was restricted to 'physical' threats.[222] By making such distinctions, the Prosecution effectively dissuaded [REDACTED] from providing highly relevant information concerning the coercive nature of his environment, and the existence of psychological forms of torture: they turned a blind eye to torture, and asked [REDACTED] to do the same, and in so doing, entrenched the learned helplessness [REDACTED].[223]

78. Although there was no sign that the conditions at the DGSE had improved,[224] the Prosecution nonetheless continued to view the DGSE [REDACTED], and maintained their working relationship. Yet, on 16 June 2017, the Prosecution met with the DGSE in order to discuss their intention to interview Mr. Al Hassan [REDACTED].[225] And, even though Mr. Al Hassan explicitly informed the Prosecution, on 13 July 2017, that he had been physically beaten during interrogations with the DGSE, the Prosecution continued

[212] [REDACTED].
[213] [REDACTED].
[214] Chain of custody for [REDACTED].
[215] MLI-D28-0003-0031 at 0040.
[216] [REDACTED].
[217] [REDACTED].
[218] [REDACTED].
[219] [REDACTED].
[220][REDACTED].
[221] [REDACTED].
[222] [REDACTED].
[223] MLI-D28-0003-0315 at 0341-0343, 0349-0352.
[224] [REDACTED].
[225] [REDACTED].

to request the DGSE to collect information, and transmit it to them. Thus, on 25 August 2017, the Prosecution asked the DGSE for information concerning [REDACTED], and the DGSE promised in turn, to convey this information.[226] On 5 September 2017, [REDACTED] [REDACTED],[227] and on 13 September 2017, Mr. Al Hassan told the Prosecution that since their July interviews, he had been interrogated by Malians (*inter alia*).[228] On 9 September 2017, the DGSE informed the Prosecution that its information concerning [REDACTED] potential location was 4 ½ to 5 months old[229] (a date which corresponded with Mr. Al Hassan's arrest). Given that the Prosecution knew that the DGSE 'debriefed' [REDACTED],[230] it knew, or should have known, that its request for information concerning [REDACTED] would likely have implications for [REDACTED] believed to know [REDACTED], and that the request would therefore create a serious risk for them.

79. Throughout 2017 and 2018, the Prosecution received a crescendo of [REDACTED] concerning the conditions of detention at the DGSE, the coercive atmosphere, and the corresponding impact on the reliability of the interviews:

a. [REDACTED] Mr. Al Hassan refer to special forces and/or guards severely beating detainees (including Mr. Al Hassan) at the DGSE in retaliation for complaints concerning the conditions of detention;[231]

b. [REDACTED] ;[232]

c. [REDACTED] ;[233]

d. On [REDACTED] 2018, had been threatened with electrocution during interrogations if the interrogators didn't believe,[234] and had signed interview statements at the DGSE without reading them.[235] [REDACTED] 6 jihadists had "lost their minds" in detention [REDACTED];[236]

[226] [REDACTED].
[227] [REDACTED].
[228] [REDACTED].
[229] [REDACTED].
[230] [REDACTED].
[231] [REDACTED].
[232] [REDACTED].
[233] [REDACTED].
[234] [REDACTED].
[235] [REDACTED].
[236] [REDACTED].

e. On [REDACTED] 2018 [REDACTED] had "lost his mind" while detained at the DGSE; [REDACTED];[237]

f. On [REDACTED] 2018, [REDACTED] conditions of detention amounting to torture/CIDT, the existence of verbal threats of torture, [REDACTED] more pain if [REDACTED] complained";[238]

g. On [REDACTED] 2018, [REDACTED] has lost interest and motivation in life, [REDACTED] easily forgets even recent events;[239] and

h. On [REDACTED] 2018, [REDACTED] during interrogations by the DGSE, detainees were beaten, insulted and threatened; [REDACTED] interrogators were hooded, as was [REDACTED] ; [REDACTED] was not beaten but that others were; [REDACTED] heard screaming, [REDACTED] they had been beaten; [REDACTED] made to sign a document [REDACTED] without being given the opportunity to read it, [REDACTED].[240]

80. Notwithstanding these mutually reinforcing [REDACTED] of coercion and torture, the Prosecution continued [REDACTED], to include [REDACTED],[241] [REDACTED].

81. [REDACTED].[242] [REDACTED],[243] [REDACTED].[244] [REDACTED],[245] [REDACTED], and the likely impact on [REDACTED]. And yet, in October 2018, the Prosecution continued to follow up on its request to obtain the DGSE interviews of Mr. Al Hassan,[246] and to [REDACTED].[247] This included expanding the Prosecution's investigations to encompass [REDACTED],[248] and in circumstances where [REDACTED] expressed a lack of understanding as concerns his rights, and the potential implications [REDACTED] could have for his protection.[249]

82. Given the detention circumstances he described, the piecemeal parceling out of information on protection processes was "like dangling a carrot in front of a starving

[237] [REDACTED].
[238] [REDACTED].
[239] [REDACTED].
[240] [REDACTED].
[241] Interviewed in May 2018: [REDACTED].
[242] [REDACTED].
[243] See also 2019 request that was not addressed: [REDACTED].
[244] ECHR: *Al-Skeini v United Kingdom,* 55721/07, para. 166; *Salman v. Turkey*, 21986/93, para. 103.
[245] [REDACTED].
[246] [REDACTED].
[247] [REDACTED].
[248] [REDACTED].
[249] MLI-D28-0003-0315 at 0321.

person (…) The prisoner … may consent to the interview on the false hope that the interviewers will improve his condition or gain him access to his family. The prisoner's conditions of confinement may be so dire that he is using the opportunity to escape from his cell, even if he does not want to participate".[250] Various "red flags" concerning indicia of trauma and psychological impairment were ignored, or glossed over,[251] with the result that like Mr. Al Hassan, [REDACTED] shuts down, and appears to "not feel comfortable sharing more information about his health and conditions".[252] Dr. Cohen further observed that based on the (limited) information conveyed by [REDACTED], there were grounds to conclude that "[h]e may have difficulty with his memory and concentration as a result of prolonged solitary confinement and his detention conditions that could affect his fitness [REDACTED]. He may feel pressure to comply with the [REDACTED] requests to say he is well, if he believes they are going to help relieve his detention conditions".[253]

83. Contemporaneously, the Prosecution filed several [REDACTED] requests to preserve the tainted evidence of [REDACTED].[254] The requests did not refer to the vulnerability of [REDACTED] to coercion from the Malian authorities (even though such an issue impacted on the reliability of [REDACTED], and was disclosable under Article 67(2)). Nor did the requests refer to the risk of torture or CIDT. Instead, the Prosecution motivated the requests by the risk that [REDACTED], claiming that [REDACTED],[255] even though [REDACTED] had informed the Prosecution [REDACTED].[256]

84. In November 2018, the Prosecution asked its [REDACTED] doctor [REDACTED] to examine [REDACTED],[257] [REDACTED],[258] and [REDACTED]:[259] it is not apparent as to why examinations were requested for these individuals, but not any of [REDACTED]. In any case, as observed by Dr. Cohen, the terms of reference were not sufficiently detailed to comply with the requirements set out in the Istanbul Protocol,[260]

[250] MLI-D28-0003-0315 at 0322, 0324.
[251] MLI-D28-0003-0315 at 0325-0332.
[252] MLI-D28-0003-0315 at 0332.
[253] MLI-D28-0003-0031 at 0054
[254] [REDACTED]: ICC-01/12-01/18-164-Conf-Red2; [REDACTED].
[255] ICC-01/12-01/18-164-Conf-Red2, para. 24.
[256] [REDACTED].
[257] [REDACTED].
[258] [REDACTED].
[259] [REDACTED].
[260] MLI-D28-0003-0031 at 0034, 0041-0044 [REDACTED]; 0046-0049 [REDACTED]; 0051-0052 [REDACTED].

and effectively excluded consideration of psychological torture and trauma.[261] After reviewing [REDACTED]'s evaluations, and focusing in particular on [REDACTED], Dr. Crosby concluded that:[262]

> [REDACTED]. did not evaluate or even consider the effects of [torture or CIDT] on prisoners despite evidence by his own documentation and the fact that [REDACTED]. He repeatedly documented malnutrition and dehydration in [REDACTED], however no inquiry of conditions [REDACTED] were made. These appear to be purposeful omissions. Furthermore, [REDACTED] is not an independent physician, but is [REDACTED], and is legitimizing their agenda of completing the interviews at any cost. It appears that these evaluations were performed for the sole purpose of falsely "clearing" [REDACTED], ie declaring that they were healthy enough for [REDACTED] to proceed, and providing a veneer of cover [REDACTED]. The doctor was not working in the best interest of the patient, in violation of his ethical obligations.

85. The Prosecution has not disclosed the medical examination of [REDACTED] conducted at this point. [REDACTED]'s findings, limited in scope as they were due to the failure to conduct sufficient inquiry,[263] nonetheless, presented further indicia as concerns the unfitness of [REDACTED] to be [REDACTED] further.[264] Nonetheless, after receiving these reports, the Prosecution continued to conduct [REDACTED], and to expand its investigations to encompass [REDACTED], such as [REDACTED]. Throughout the course of these [REDACTED] displayed indicia of torture, and severe mental frailty, that would impact on fitness [REDACTED].[265] After describing debilitating [REDACTED],[266] and violations of his rights, [REDACTED] even begged the Prosecution to "see the situation with 2 eyes, not with 1 eye alone".[267]

86. The Prosecution's decision to interview [REDACTED] amounting to torture and CIDT exploited their frailty and dependence. As Dr. Cohen observes,[268]

> The effect of [CIDT] and torture … physical or psychological, is debility, degradation, disorientation, dread and fear. The impact ... can be increased compliance, suggestibility and a seeking to please those in authority. Where individuals are also subjected to unpredictability and to perceptions of the omnipotence of those in authority, these effects are increased … Systematic, repetitive infliction of psychological trauma in the context of a highly controlled interrogation environment exploit helplessness and vulnerability, deny autonomy and engender dependency on interrogator.

87. This dependency is reflected by the record of the exchanges between the Prosecution and [REDACTED]. [REDACTED], upon seeing the Prosecution (and thus accessing

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[261] MLI-D28-0003-0031 at 0033-0034.
[262] MLI-D28-0003-0315 at 0336, 0340.
[263] MLI-D28-0003-0031 at 0032, para. 2.
[264] MLI-D28-0003-0031 at 0047 [REDACTED]; at 0050-0051 [REDACTED]; at 0042 [REDACTED].
[265] See e.g. [REDACTED]: MLI-D28-0003-0031 at 0055-0056; [REDACTED]: MLI-D28-0003-0031 at 0043-44; [REDACTED].
[266] MLI-D28-0003-0031 at 0062.
[267] [REDACTED].
[268] MLI-D28-0003-0031 at 0034-0035.

the outside world), range from extreme gratitude to utter despair.[269] There are also clear links between the [REDACTED] participation in [REDACTED] (through access to [REDACTED]),[270] [REDACTED].[271] For example, [REDACTED] initially flatly refused [REDACTED] unless he could do so after being [REDACTED].[272] It appears, however, that [REDACTED] relented after the Prosecution intimate that they would have several opportunities to intervene on his behalf with the Malian [REDACTED].[273] As remarked by Dr. Cohen, the Prosecution offering to raise [REDACTED] with the authorities "raise a concern that despite efforts to follow an evident protocol, interviewers are in fact contributing to the psychological pressure on the witnesses, who appear to assume that [REDACTED]."[274] Indeed, the situation of dependency is illustrated by the prescription of [REDACTED] (an addictive substance, that causes withdrawal) to [REDACTED], to address, in a superficial manner, symptoms of depression, caused by his underlying trauma as a victim of torture and CIDT,[275] and the Prosecution's decision to continue to collect evidence from him subsequent to this.[276]

88. Of those who are [REDACTED], and [REDACTED]. [REDACTED] continue to experience fear and coercion, to be [REDACTED] amount at the very least to CIDT, and to exhibit signs of trauma and CIDT.[277] The Prosecution continues to rely on [REDACTED], who, rather than investigating allegations of torture, has sought to deflect them, by claiming that certain measures amounting to torture (such as the prolonged isolation of [REDACTED]) were justified.[278] [REDACTED] are also aware that the DGSE will [REDACTED] who have tortured witnesses, will be "looking out for them" (ostensibly to protect them against other [REDACTED]).[279]

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[269] See gratitude: [REDACTED]; despair: [REDACTED].
[270] [REDACTED].
[271] See e.g. regarding transfer to [REDACTED] another prison: [REDACTED].; regarding access to a judge: [REDACTED]; and regarding access to medications: [REDACTED].
[272] [REDACTED].
[273] [REDACTED].
[274] MLI-D28-0003-0031 at 0032.
[275] A/HRC/43/49, para. 34: "intentionality does not require proactive conduct, but may also involve purposeful omissions, such as the exposure of substance-addicted detainees to severe withdrawal symptoms by making the replacement medication or therapy dependent on a confession, testimony or other cooperation ..."
[276] Following the provision of [REDACTED], [REDACTED] was subsequently interviewed on [REDACTED] ([REDACTED]), [REDACTED] ([REDACTED]) and [REDACTED] ([REDACTED]).
[277] [REDACTED].; MLI-D28-0003-0031 at 0043, 0051, 0060.
[278] [REDACTED]
[279] [REDACTED].

89. In this case, the dynamics of [REDACTED], and the system for interrogations were such that reactions, induced by interrogations accompanied by torture, bled into [REDACTED]. The Prosecution did not take sufficient steps to create an effective barrier between [REDACTED] constant fear of ongoing torture and abuse, and [REDACTED] with the Prosecution. If anything, by holding out the vague promise that the Prosecution [REDACTED]. DGSE guards were also omnipresent: bringing [REDACTED] hooded or shackled to [REDACTED], standing outside and intruding into the process itself. And [REDACTED] continued to be interrogated by the Malians, and subjected to various forms of punishment (solitary, cell 4, denial of food or access to light, beatings, threats) during [REDACTED]. [REDACTED] is ineliminably tainted due to the continuing effects of torture, and the use of [REDACTED], is inconsistent with the integrity of the proceedings.

90. These men have an immediate need for full protection and full rehabilitation, which has not been met by the Prosecution's apparent policy of acquiescence. It is clear that the [REDACTED] are grateful for the limited access they have been given to the Malian Prosecutor and [REDACTED], but these limited prophylactic measures manifestly fail to comply with the full extent of the Prosecution's obligations under the Istanbul Protocol,[280] the CAT, and internationally recognized human rights obligations.[281]

91. The Prosecution has a mandate to investigate and prosecute acts of torture. As an institution set up to eliminate torture, it is imperative that the Court demonstrates that it is willing and able to take effective steps to prevent further harm, and it cannot do that, while condoning and remaining complicit in the actions of the DGSE.

Part 2.4 The Prosecution relied on evidence that it knew, or should have known, was tainted by torture, to substantiate Mr. Al Hassan's arrest warrant, the charges, its trial brief, and key procedural applications that substantially impacted Mr. Al Hassan's rights

92. As set out above, at the time the Prosecution sought Mr. Al Hassan's arrest warrant, it had received a significant body of evidence concerning the existence of torture and CIDT at the DGSE, and the impact [REDACTED]. The application and resultant decision nonetheless rely heavily on Mr. Al Hassan's statements.[282] During the initial

[280] MLI-D28-0003-0031 at 0031-0034; MLI-D28-0003-0315 at 0319.
[281] *Djamel Ameziane v. United States of America*, Case 12,865, paras. 57-58 (access to medical care cannot be made contingent on cooperation with interviewers, and must diagnose and address the full impact of PTSD caused by the detention environment).
[282] Annexes E and F.

appearance, his Counsel announced that he had been tortured[283] and the Defence has unequivocally and repeatedly denied the allegations that Mr. Al Hassan was working with Iyad Ag Ghaly [REDACTED] in 2017, or was involved in attacks on French forces or peacekeepers.[284] The Defence has also unequivocally and repeatedly stated that the information extracted from Mr. Al Hassan in Mali constitutes the fruits of torture.[285] Nonetheless, in subsequent hearings and filings, the Prosecution nonetheless continued to rely on allegations that Mr. Al Hassan worked with [REDACTED] in 2017 and was responsible for attacks on FAMA, Barkhane, and peacekeeping forces[286] despite the fact that it has affirmed to the Defence that it does not possess any independent evidence of these allegations.[287]

93. In particular, the Prosecution has relied on DGSE torture evidence to substantiate these highly prejudicial allegations of involvement in extreme terrorist activity in its submissions in the DCC,[288] procedural submissions concerning the imposition of monitoring measures, [289] and its most recent response to Mr. Al Hassan's request for interim release, [290] which was filed after the Prosecution received medical reports, referring to Mr. Al Hassan's PTSD caused by his torture in the DGSE.[291]

94. These submissions were relied upon the Pre-Trial Chamber, in monitoring decisions, and the Decision Confirming the Charges, as concerns the common plan, and Mr. Al Hassan's alleged involvement.[292] The Trial Chamber also expressly relied on the DGSE statement in order to substantiate findings that Mr. Al Hassan had collaborated with Iyad Ag Ghaly [REDACTED] in terrorist activities from 2014 until 2017, in its decision

[283] ICC-01/12-01/18-T-001-CONF-ENG ET 04-04-2018 1-11 NB PT, pp. 8-9.
[284] [REDACTED].
[285] See e.g. ICC-01/12-01/18-737-Conf, paras. 4-12; ICC-01/12-01/18-712-Conf-Corr, paras. 4-7; ICC-01/12-01/18-520-Conf-Exp, para. 2.
[286] Annex C.
[287] Annex D.
[288] The Prosecution also relied upon the DGSE statements of [REDACTED]. in support of the charges [REDACTED]..
[289] [REDACTED]. used in ICC-01/12-01/18-223-Conf-Corr, ICC-01/12-01/18-223-271-Conf-Exp-Red, para 39, [REDACTED]. , ICC-01/12-01/18-335-Conf-Corr para 34).
[290] ICC-01/12-01/18-697-Conf-Red, fn. 20 states: "See the references cited in ICC-01/12-01/18-335-Conf-Corr, para.32-34" (i.e. [REDACTED], which was cited in ICC-01/12-01/18-335-Conf-Corr para 34).
[291] ICC-01/12-01/18-680-Conf-Exp; ICC-01/12-01/18-680-Conf-AnxK.
[292] ICC-01/12-01/18-461-Conf, fn. 1975, citing [REDACTED] at 0453; fn. 2206, citing [REDACTED].

on interim release,[293] and then applied these findings in its most recent decision on monitoring measures.[294]

95. Apart from the tainted evidence derived from Mr. Al Hassan, the arrest warrant application, charges, and Trial Brief are also based predominantly on tainted evidence from [REDACTED];[295] this evidence also formed the predominant basis of the decision to confirm the charges.[296] As underscored in *Saifi v Brixton Prison*, evidence obtained in a bad faith manner from accomplices is particularly problematic in the context of committal (i.e. confirmation) proceedings if there is no opportunity to cross-examine, and thus avoid a trial based on flawed evidence.[297]

96. It is also impossible to identify and fully isolate the taint given the extent to which prejudicial allegations (which acted as shorthand for the content of DGSE torture evidence) were woven into written filings and oral submissions. Even if filings or decisions do not refer directly to tainted evidence, the fact that protective measures filings and decisions routinely cite the risks emanating from [REDACTED] attacks on peacekeepers,[298] demonstrates the extent to which torture evidence has been normalized, and embedded into the foundation of this case.

97. The prohibition on the use of torture evidence, as set out in Article 15 of CAT, applies to all proceedings. The IACHR has thus affirmed that the exclusionary rule applies to investigations, and all decisions issued by domestic courts.[299] The right of *habeas corpus* is an essential protection against torture, and the protection against forced confessions, is, in turn, an effective element of the right of *habeas corpus*. For this reason, the UN WGAD has explicitly found that "the fact that the detention was ordered on the basis of evidence obtained from a confession extracted under torture confers on it an arbitrary

[293] ICC-01/12-01/18-786-Conf, fn. 136.
[294] ICC-01/12-01/18-871-Conf-Exp-Red, para. 30.
[295] Annexes E, F, G, H, I, J. The fairness of the proceedings is equally obliterated through reliance on tainted torture evidence obtained [REDACTED]: *Othman v. United Kingdom*, paras. 266-267.
[296] Annex H.
[297] [2020] EWHC Admin 437, para. 9
[298] Annex C.
[299] Cabrera García v. Mexico, Application, para. 166: To accord "probative value to extrajudicial statements or statements made during the investigative stage of criminal proceedings merely encourages the practice of torture, insofar as the police prefer to expend less effort in the investigation and to seek instead the confession of the accused person". Judgment, para. 177: "the Court concludes that the domestic courts, which heard the case at all stages of the proceeding, should have completely excluded the statements (…), given that the existence [CIDT] disqualified the use of such evidence, according to the international standards previously mentioned".

character".[300] Given the special status of the prohibition on torture, and the automatic exclusion it attracts, the introduction of such information is not analogous to evidence obtained through breaches of privacy rights.[301] To the extent that its use condones the torture that produced this evidence, its use also undermines the integrity of ICC proceedings. The discretion that is normally afforded to judges to evaluate and exclude evidence does not apply in cases of torture or CIDT.[302] This is because "no legal system based upon the rule of law can countenance the admission of evidence – however reliable – which has been obtained by such a barbaric practice as torture." [303] Accordingly, as will be elaborated in the next section, the use of such evidence in the investigations phase and to make findings of fact in this case, irreversible violated the prospect of a fair trial in this case.

Part 3. Terminating the proceedings is the only suitable remedy

98. Mr. Al Hassan's right to a fair trial before the ICC has been eliminated, since use of information tainted by torture or CIDT "as evidence to establish the relevant facts in criminal proceedings renders the proceedings as a whole unfair, irrespective of the probative value of the statements and irrespective of whether their use was decisive in securing the defendant's conviction." [304] The gravity of the charges against him do not qualify this conclusion, since "[t]here can be no question of watering down fair trial rights for the sole reason that the [defendant is] suspected of involvement in terrorism."[305] The constituent elements of a fair trial were destroyed by the use of highly inflammatory tainted evidence during the investigations phase, the arrest warrant, and in relation to acts that impact on the future rights and standing of Mr. Al Hassan in the proceedings.[306] Improper conduct during the investigations stage, and the use of

[300] Opinion 34/1994, E/CN.4/1996/40/Add.1, p. 15. See also WGAD Guideline 12, A/HRC/30/37, pp. 17-18.
[301] Cf ICC-01/05-01/13-560, para. 73. In a subsequent judgment, the Appeals Chamber confirmed that Article 60 must be interpreted and applied in a manner which is consistent with internationally recognized human rights law: ICC-01/05-01/13-970, para. 1.
[302] *Ibrahim & ors v. United Kingdom*, para. 254. Cabrera García and Montiel Flores v. Mexico, Case 12,449, **para. 165: "**the Court considers that this rule is absolute and irrevocable".
[303] *Othman v. United Kingdom*, para. 264.
[304] *Ibrahim & ors v. United Kingdom,* para. 254 (emphasis added).
[305] *Ibrahim & ors v. United Kingdom,* para. 252.
[306] *Ibrahim & ors v. United Kingdom,* para. 253: "… the guarantees of Article 6 are applicable from the moment that a "criminal charge" exists … and may therefore be relevant during pre-trial proceedings if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them ... The investigation stage may be of particular importance for the preparation of the criminal proceedings: the evidence obtained during this stage often determines the framework in which the offence charged will be considered at the trial and national laws may attach consequences to the attitude of an accused at the initial stages of police

evidence resulting from such improper conduct, has, from the very outset of the proceedings, deprive the defendant of the right to a fair trial.[307]

99. Where torture evidence has been relied upon during the investigation stage, the Court has a positive duty to provide appropriate and sufficient redress, including "measures of restitution addressing the issue of the continuing impact of that prohibited method of investigation on the trial".[308] According to the IACHR, "the annulment of procedural documents resulting from torture or cruel treatment is an effective measure to halt the consequences of a violation of judicial guarantees".[309] The special status concerning the prohibition on torture and CIDT also militates in favour of declining jurisdiction over a defendant, even if the organs of the Court were not involved in the acts of torture. Thus, in the *Dragan Nikolic* case, the ICTY Trial Chamber found that:[310]

> where an accused is very seriously mistreated, maybe even subjected to [CIDT or torture], before being handed over to the Tribunal, this may constitute a legal impediment to the exercise of jurisdiction (...) This would certainly be the case where persons acting for SFOR or the Prosecution were involved in such very serious mistreatment. But even without such involvement this Chamber finds it extremely difficult to justify the exercise of jurisdiction over a person if that person was brought into the jurisdiction of the Tribunal after having been seriously mistreated.

100. The ICTY Appeals Chamber subsequently endorsed this standard and underlined that "certain human rights violations are of such a serious nature that they require that jurisdiction be declined".[311] The ICC Prosecution has accepted this standard in its submissions before the Court.[312] It is also not necessary to establish *mala fides*, to justify a stay of the proceedings at the ICC, if the constituent elements of a fair trial are not met.[313] Words such as "collusion" or "connivance" should be not be defined in an overly rigid manner: rather, the lodestar for the Court should be "the basic proposition that the end of criminal prosecution does not justify the adoption of any and every means for securing the presence of the accused."[314] This consideration can encompass both

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interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings...."; See also Niyonzima v. Burundi, Communication No.514/2012, 21 November 2014, paras. 3.8, 8.07**;** *Evloev v. Kazakhstan***,** Communication No. 441/2010, 17 December 2013.

[307] ICC-01/04-01/06-772, para. 38.

[308] *Gafgen v. Germany*, para. 128.

[309] Cabrera García and Montiel Flores v. Mexico, Case 12,449, **para. 166.**

[310] *Prosecutor v. Dragan Nikolic.* 'Decision On Defence Motion Challenging The Exercise Of Jurisdiction By The Tribunal, para. 114.

[311] *Prosecutor v. Dragan Nikolic*, Decision on Interlocutory Appeal Concerning Illegality of Arrest, 5 June 2003, paras. 28-30.

[312] "While torture or serious mistreatment of the suspect that is "in some way related to the process of arrest and transfer of the person" to the Court might – if sufficiently outrageous – justify the non-assumption of the jurisdiction in any given case": ICC-01/04-01/07-1381, para. 25.

[313] *Prosecutor v. Lubanga*, ICC-01/04-01/06-1401, para. 90.

[314] Moti v The Queen [2011] HCA 50 7 December 2011 B19/2011, para. 60.

positive actions, and omissions,[315] and knowing participation in illegal act/actions, that led to the Court assuming jurisdiction over the case.[316] The UK House of Lords has further underscored that:[317]

> the courts will not shut their eyes to the way the accused was brought before the court or the evidence of his guilt was obtained. Those methods may be such that it would compromise the integrity of the judicial process, dishonour the administration of justice, if the proceedings were to be entertained or the evidence admitted.

101. In line with these conclusions, the factual matrix of this application, which includes the collection and use of information and evidence tainted by torture, satisfies the threshold for terminating the proceedings. As set out in section 2, Mr. Al Hassan was brought before this Court on the basis of investigations constructed on information, evidence, and assistance, tainted by torture. If not for the collection and use of this tainted evidence, the Court would not have exercised jurisdiction over him. Seminal decisions concerning the content of the charges, his deprivation of liberty, and fundamental liberty rights in detention, are based on evidence obtained from torture extracted from Mr. Al Hassan [REDACTED].[318] The use of any torture evidence to establish the facts and circumstances of the case is insufficient to undermine the overall fairness of the proceedings, but here, it is particularly pertinent that torture evidence forms the predominant basis of the charges, and the trial brief.

102. Exclusion of evidence is also not an appropriate remedy for the following reasons.

103. *First*, exclusion at trial does not cure, or remedy the harm caused by the fact that the investigations, arrest warrant, and charges were based and confirmed predominantly on contaminated evidence, including the DGSE interrogations of Mr. Al Hassan. The introduction of new evidence, in *lieu* of tainted evidence would result in a fundamental mutation of the case, and violate Mr. Al Hassan's right to prompt notification of the content of the charges (including the underlying materials relied upon to support the tainted allegations), and his right to expeditious proceedings.[319]

104. *Second*, exclusion does not cure the harm caused to the fairness and impartiality of this case by the highly prejudicial claims of Mr. Al Hassan's alleged involvement in crimes

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[315] Moti v The Queen [2011] HCA 50 7 December 2011 B19/2011, para. 60.
[316] Moti v The Queen, [2011] HCA 50 7 December 2011 B19/2011, para. 65.
[317] *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) (2004)* A and others (Appellants) (FC) and others v. Secretary of State for the Home Department (Respondent) (Conjoined Appeals), House of Lords (2005), per Lord Hoffman, para 87.
[318] Annexes C, E, F, G, H, I.
[319] ICC-01/09-02/11-728, paras. 117-123.

committed by [REDACTED], and reliance on tainted confessions. As noted by the Special Rapporteur on Torture, "[s]tudies reveal that the more coercive the questioning, the higher the probability that it will result in a false confession, and … defendants who falsely confess and plead "not guilty" at trial are nonetheless convicted 81 per cent of the time, often on the basis of their confessions alone".[320] The Trial Chamber's citation of the DGSE statement in corroboration of the Prosecution's interviews with Mr. Al Hassan demonstrates the real risk of false positives based on torture evidence and the extent to which torture evidence impacts the Chamber's assessment of other evidence.

105. *Third,* as [REDACTED] in a position to provide exculpatory evidence that would have been directly relevant to the Chamber's determination of the charges, and the "heart of the case".[321] This includes not only the [REDACTED]. But, as noted by *Ambos,* "[t]o ensure the integrity of the proceedings, [the prohibition on use] should apply to all torture evidence independent of its source or its effect in favor or against the accused."[322] Apart from the impossibility of separating out tainted from untainted memories, "use of torture evidence would re-victimize the torture victim again attacking [his] dignity".[323] DGSE torture has thus directly impacted on Mr. Al Hassan's right to a fair trial by effectively depriving him of access to uncontaminated evidence in his favour.

106. *Fourth,* Mr. Al Hassan himself is not able to testify in his Defence, without risking significant trauma, and the production of impacted memories. Whether a defendant is able to testify in his defence is a fundamental component of fitness to stand trial,[324] including not only "the ability of the accused to make such a statement but also the ability to make an informed decision whether he wishes to do so or not."[325] Nonetheless, as described by Dr. Porterfield:[326]

> Mr. Al Hassan continues to manifest a similar pattern of posttraumatic physical and cognitive reactions to being questioned. That is, he becomes anxious and sometimes dissociates … then becomes focused on ending or avoiding the conversations that have triggered these feelings. (…) It is my opinion that interviews and questioning of Mr. Al Hassan are highly triggering of his PTSD and capable of worsening his clinical condition.

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[320] A/71/298, para. 19.
[321] See ICC-02/05-03/09-410, para. 92, concerning the adoption of the 'heart of the case' standard for the purpose of assessing whether a lack of access to exculpatory evidence warrants a stay of the proceedings.
[322] K. Ambos, The Transnational Use Of Torture Evidence, p. 375.
[323] K. Ambos, The Transnational Use Of Torture Evidence, pp. 388-389.
[324] *Gbagbo*, ICC-02/11-01/15-349, para. 35; ICC-02/04-01/15-1622, para. 14.
[325] ICC-02/04-01/15-1622, para. 14.
[326] MLI-D28-0002-0535 at 0606.

107. Dr. Crosby reached a similar conclusion in her report regarding the likely consequences of such experiences on future testimony.[327] The Prosecution's decision to interrogate Mr. Al Hassan on 19 occasions, over the period of 8 months, contributed to his current psychological reaction to questioning. It would be contrary to basic tenets of fairness to permit a trial, where Mr. Al Hassan has been denied the basic right to confront his accusers, by virtue of the conduct of his accusers.

108. *Fifth*, it would be repugnant to the notion of justice, and the principles that this Court is founded on, to continue proceedings that derive from the fruits of torture. The ICC does not exist in a legal vacuum. The prohibition on condoning or acquiescing to torture is a peremptory norm of international law, and as an international organization, the ICC has a positive obligation to interpret its Statute to ensure compliance with this obligation, and the core legal principle of *ex injuria jus non oritur*.[328] Put simply, the ICC cannot prosecute torture by making use of torture, nor can it fulfil its mandate by turning a blind eye to systematic acts of physical and psychological torture, that produced Mr. Al Hassan's presence before this Court, and the evidential record in this case.[329]

Relief sought

109. The Defence for Mr. Al Hassan requests the Trial Chamber to **TERMINATE** the case, and **IMMEDIATELY RELEASE** Mr. Al Hassan.

Melinda Taylor Counsel for Mr Al Hassan

Dated this 16th Day of June 2020
At The Hague, The Netherlands

[327] MLI-D28-0003-0315 at 0350.
[328] Unjust acts cannot create law.
[329] *R v Horseferry Road Magistrates Court ex p Bennett* [1994] 1 AC 42 at 67F-H.