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

**Date: 29 October 2020**

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**TRIAL CHAMBER X**

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

**SITUATION IN THE REPUBLIC OF MALI**

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

**Public**

**Public redacted version of ‘Decision on the Defence request to terminate the  
proceedings and related requests’**

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

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**TRIAL CHAMBER X** (the ‘Chamber’) of the International Criminal Court, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, issues this ‘Decision on the Defence request to terminate the proceedings and related requests’.

## **I. Procedural history**

1. On 16 June 2020, after having been granted an extension of time and page limit,<sup>1</sup> the Defence filed a request to terminate the proceedings (the ‘Termination Motion’), appending, *inter alia*, a 125-page-long ‘Timeline of the Prosecution investigation’ (‘Annex B’).<sup>2</sup> The Defence requests the Chamber to terminate the case, and ‘immediately release’ Mr Al Hassan,<sup>3</sup> on the basis that ‘[t]he 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’, ‘aggravated and compounded’ by the conduct of the Prosecution to such an extent that ‘the constituent elements of a fair trial cannot be pieced together’.<sup>4</sup>
2. On 6 July 2020, the Chamber rendered its ‘Decision on Prosecution requests concerning the Defence motion to terminate the proceedings’ (the ‘6 July 2020 Decision’),<sup>5</sup> in which it, *inter alia*: (i) granted the Prosecution’s request to strike Annex B from the record on the basis that it was filed in violation of Regulation 36(2) of the Regulations of the Court (the ‘Regulations’); and (ii) directed the

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<sup>1</sup> Decision on the Defence request for extension of the time limit and page limit for the filing of pre-trial motions, 29 May 2020, ICC-01/12-01/18-833 (reclassified public on 2 June 2020) (the ‘29 May 2020 Decision’).

<sup>2</sup> Defence Request to terminate the proceedings, ICC-01/12-01/18-885-Conf-Exp (confidential *ex parte*, available only to the Defence and Prosecution; with confidential Annexes A, B and G to I, confidential *ex parte* Annex C (available only to the Prosecution, Registry and Defence only), and confidential *ex parte* Annexes D to F and J (available only to the Prosecution and Defence); a confidential redacted version of the main filing was notified simultaneously, ICC-01/12-01/18-885-Conf-Red; these filings were all notified on 17 June 2020; a corrigendum of the main filing was later notified on 25 June 2020, ICC-01/12-01/18-885-Conf-Exp-Corr; two public redacted versions of the main filing were also later notified and subsequently reclassified confidential; a final public redacted version was notified on 29 July 2020, ICC-01/12-01/18-885-Corr-Red3).

<sup>3</sup> Termination Motion, ICC-01/12-01/18-885- Corr-Red3, para. 109.

<sup>4</sup> Termination Motion, ICC-01/12-01/18-885- Corr-Red3, paras 1-3.

<sup>5</sup> ICC-01/12-01/18-932-Conf (with two confidential Annexes; a corrigendum was notified on 8 July 2020, ICC-01/12-01/18-932-Conf-Corr; a public redacted version was filed on 18 August 2020, ICC-01/12-01/18-932-Corr-Red).

Defence to file any application for leave to refile Annex B in accordance with that decision, by 10 July 2020.<sup>6</sup>

3. On 6 July 2020, the Prosecution filed its 'Prosecution request for disclosure by the Defence' (the 'Prosecution Request for Disclosure'), seeking disclosure of certain material related to the Termination Motion.<sup>7</sup>
4. On 7 July 2020, the Defence filed a 'Defence request for disclosure of RFAs containing specific allegations regarding Mr. Al Hassan' (the 'Defence Request for Disclosure'), requesting that the Chamber order the Prosecution to disclose a number of requests for assistance submitted to [REDACTED] (the 'Requested RFAs').<sup>8</sup>
5. On 8 July 2020, the Chamber issued the 'Decision on Defence Adjournment Request', rejecting the Defence request to adjourn the proceedings, and thereby confirming that the trial would commence on 14 July 2020.<sup>9</sup>
6. On 14 July 2010, with leave of the Chamber,<sup>10</sup> the Defence filed an amended version of Annex B.<sup>11</sup>
7. On 16 July 2020, the Prosecution responded to the Defence Request for Disclosure (the 'Prosecution Response to the Defence Request for Disclosure').<sup>12</sup>
8. On 17 July 2020, the Defence responded to the Prosecution Request for Disclosure, requesting that it be rejected (the 'Defence Response to the Prosecution Request for Disclosure').<sup>13</sup>

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<sup>6</sup> 6 July 2020 Decision, ICC-01/12-01/18-932-Corr-Red, p. 15.

<sup>7</sup> ICC-01/12-01/18-929-Conf (with confidential *ex parte* Annex A, available only to the Prosecution and Defence).

<sup>8</sup> ICC-01/12-01/18-936-Conf (with confidential *ex parte* Annexes A and B, available only to the Prosecution and Defence).

<sup>9</sup> Decision on Defence Adjournment Request, ICC-01/12-01/18-940-Conf. *See also* Decision on Defence request for reconsideration and leave to appeal the Decision on the Defence Adjournment Request, 28 July 2020, ICC-01/12-01/18-983-Conf.

<sup>10</sup> Email from the Chamber to the parties and participants on 13 July 2020, at 9:24, granting the Defence's request in Defence request to refile Annex B to Defence Termination Request (ICC-01/1201/18-885-Conf-Exp-Corr), 10 July 2020, ICC-01/12-01/18-947-Conf.

<sup>11</sup> ICC-01/12-01/18-885-Conf-AnxB-Corr.

<sup>12</sup> Prosecution response to Defence request for disclosure of RFAs containing specific allegations regarding Mr. Al Hassan, ICC-01/12-01/18-936-Conf, ICC-01/12-01/18-959-Conf.

9. On 20 July 2020, the Defence sought leave to reply to the Prosecution Response to the Defence Request for Disclosure (the ‘Defence Request for leave to reply’).<sup>14</sup>
10. On 23 July 2020, the Prosecution sought leave to reply to the Defence Response to the Prosecution Request for Disclosure (the ‘Prosecution Request for leave to reply’).<sup>15</sup>
11. On 27 July 2020, in line with the extended time limit granted by the Chamber,<sup>16</sup> the LRVs responded to the Termination Motion, deferring the decision on the merits of the Termination Motion to the Chamber due to the lack of necessary resources and information in order to provide their views as to whether a stay of the proceedings for abuse of process would be justified.<sup>17</sup>
12. Also on 27 July 2020, in line with the extended time and page limit granted by the Chamber,<sup>18</sup> the Prosecution responded to the Termination Motion (the ‘Prosecution Response’).<sup>19</sup> The Prosecution requests that the Termination Motion be dismissed in its entirety on the basis that it lacks merit, and further seeks leave, pursuant to Regulation 35(2) of the Regulations, to add newly disclosed material relied upon in the Prosecution Response to its List of Evidence (the ‘LoE’).<sup>20</sup>

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<sup>13</sup> Defence response to “Prosecution request for disclosure by the Defence” (ICC-01/12-01/18-929-Conf), ICC-01/12-01/18-965-Conf (with confidential *ex parte* Annex A, available only to the Defence and Prosecution).

<sup>14</sup> Defence request for leave to reply to the ‘Prosecution response to Defence request for disclosure of RFAs containing specific allegations regarding Mr. Al Hassan, ICC-01/12-01/18-936-Conf’ - ICC-01/12-01/18-959-Conf, ICC-01/12-01/18-966-Conf.

<sup>15</sup> Prosecution’s request for leave to reply to the Defence response to the Prosecution disclosure request, ICC-01/12-01/18-929-Conf, ICC-01/12-01/18-969-Conf.

<sup>16</sup> 6 July 2020 Decision, ICC-01/12-01/18-932-Corr-Red, paras 25-26, p. 15.

<sup>17</sup> Réponse au «Corrigendum to «Defence Request to terminate the proceedings» » (ICC-01/12-01/18-885-Conf-Corr-Red), ICC-01/12-01/18-978-Conf, para. 31.

<sup>18</sup> 6 July 2020 Decision, ICC-01/12-01/18-932-Corr-Red, paras 25-26, p. 15.

<sup>19</sup> Prosecution Response to “Defence Request to terminate the proceedings” (ICC-01/12-01/18-885-Conf-Exp-Corr), ICC-01/12-01/18-982-Conf-Exp (confidential *ex parte* available only to the Prosecution, Defence and the Victims and Witnesses Unit; with two confidential Annexes; notified on 28 July 2020; a corrected version was filed on 30 July 2020, ICC-01/12-01/18-982-Conf-Exp-Corr).

<sup>20</sup> Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, paras 1, 167.

13. On 28 July 2020, the Defence responded to the Prosecution Request for leave to reply, arguing that it should be rejected.<sup>21</sup>
14. On 7 August 2020, pursuant to the Chamber's directions, the Defence submitted its reply (the 'Defence Reply').<sup>22</sup>
15. On 13 August 2020, the Prosecution filed its 'Prosecution's motion to strike portions of Defence filing ICC-01/12-01/18-991-Conf' (the 'Prosecution Request to strike submissions from the record').<sup>23</sup>

## II. Related requests

16. The Chamber will address a number of related procedural requests before turning to the Termination Motion itself.

### A. Prosecution Request for Disclosure and Prosecution Request for leave to reply

#### 1. Submissions

17. The Prosecution requests the Chamber, pursuant to Rule 79(4) of the Rules of Procedure and Evidence (the 'Rules'), to order 'immediate' disclosure of all pending material related to the reports of four Defence consultants relied upon in the Termination Motion (respectively 'Expert'<sup>24</sup> Reports' and 'Requested Material').<sup>25</sup>

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<sup>21</sup> Defence response to the "Prosecution's request for leave to reply to the Defence response to the Prosecution disclosure request, ICC-01/12-01/18-929-Conf", ICC-01/12-01/18-984-Conf, para. 1.

<sup>22</sup> Defence reply to "Corrigendum to the "Prosecution Response to "Defence Request to terminate the proceedings" (ICC-01/12-01/18-885-Conf-Exp-Corr)", 27 July 2020, ICC-01/12-01/18-982-Conf-Exp" - ICC-01/12-01/18-982-Conf-Exp-Corr, 7 August 2020 (notified on 10 August 2020), ICC-01/12-01/18-991-Conf (with confidential *ex parte* Annexes A and C, available only to the Prosecution and Defence, and confidential Annex B).

<sup>23</sup> Prosecution's motion to strike portions of Defence filing ICC-01/12-01/18-991-Conf, ICC-01/12-01/18-995-Conf.

<sup>24</sup> For the purpose of the present decision, the term 'expert' is used on the basis of the parties' submissions and does not imply any determination by the Chamber on the qualification of the relevant individuals.

<sup>25</sup> Prosecution Request for Disclosure, ICC-01/12-01/18-929-Conf, paras 1, 27. The Prosecution notably seeks disclosure of: 'Notes of contact, including on the first contact and any subsequent communications and meetings with the Defence; Mission letters/emails and any subsequent written or verbal instructions sent by the Defence; All the documents and other material provided to the Defence consultants for the purpose of their reports; All drafts of Defence consultants' reports sent to the Defence and any comments made by the Defence on those drafts; Any relevant consultations between Defence consultants; Information on the remunerations provided to each consultant; Curriculum Vitae

18. In support of its request, the Prosecution argues that despite various Prosecution requests, the Defence has only made partial disclosure of the material underlying the Expert Reports,<sup>26</sup> and that an order from the Chamber is necessary to enable the Prosecution to properly respond to the Defence's allegations and for the fair and expeditious conduct of the proceedings.<sup>27</sup> Specifically, the Prosecution argues that 'full and adequate' Defence disclosure is required: (i) for the Prosecution to respond to the 'very serious allegations' made in the Termination Motion;<sup>28</sup> and (ii) for the Prosecution experts to properly comment on the Expert Reports or for the Prosecution to properly assess these reports or their expertise.<sup>29</sup> The Prosecution further submits that the case law of this Court and the *ad hoc* tribunals supports the Defence's disclosure obligations in the present circumstances.<sup>30</sup> Moreover, the Prosecution avers that the Defence has disclosure obligations arising from its own burden of proof to establish a sound basis for its request to terminate the proceedings, which appears to be based on an alleged abuse of process.<sup>31</sup> As, according to the Prosecution, the Termination Motion relies mainly on the Experts Reports, the Prosecution argues that access to the Requested Material is crucial for the proper assessment of the reports in order to know the Defence's involvement in directing its experts and the potential impact of this.<sup>32</sup> Lastly, the Prosecution submits that the Requested Material is relevant to address the Defence's argument that the accused is unfit to stand trial.<sup>33</sup>
19. The Defence responds, for each category of the Requested Material, that the relevant information is overly broad, does not exist, has already been disclosed or will be disclosed, has been reproduced in one of the Expert Reports,

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of Dr Porterfield and Mr Sangaré; and With respect to Mr Sangaré, any letter or email sent to persons interviewed as well as information on the context and circumstances of those interviews, including the names of persons present, the date and duration'.

<sup>26</sup> Prosecution Request for Disclosure, ICC-01/12-01/18-929-Conf, para. 4.

<sup>27</sup> Prosecution Request for Disclosure, ICC-01/12-01/18-929-Conf, para. 5.

<sup>28</sup> Prosecution Request for Disclosure, ICC-01/12-01/18-929-Conf, para. 17.

<sup>29</sup> Prosecution Request for Disclosure, ICC-01/12-01/18-929-Conf, paras 18-19.

<sup>30</sup> Prosecution Request for Disclosure, ICC-01/12-01/18-929-Conf, para. 22.

<sup>31</sup> Prosecution Request for Disclosure, ICC-01/12-01/18-929-Conf, para. 23.

<sup>32</sup> Prosecution Request for Disclosure, ICC-01/12-01/18-929-Conf, para. 24.

<sup>33</sup> Prosecution Request for Disclosure, ICC-01/12-01/18-929-Conf, para. 25.



constitutes evidence filed by the Prosecution, or is not disclosable under the disclosure regime applicable to the Defence.<sup>34</sup>

20. In its Request for leave to reply, the Prosecution claims that the Defence's argument that all disclosable material sought in the Prosecution Request, which is in the possession of the Defence, has been disclosed to the Prosecution, is based on a series of mischaracterisations of facts and an erroneous interpretation of the scope of the Defence's disclosure obligations,<sup>35</sup> and seeks to 'correct such mischaracterisations' on eight points.<sup>36</sup>

## *2. Analysis*

### *i. Prosecution Request for leave to reply*

21. The Chamber considers that it would not be assisted by further submissions on any of the issues identified and therefore rejects the Prosecution Request for leave to reply.

### *ii. Prosecution Request for Disclosure*

22. The Chamber notes that the Requested Material covers a broad number and type of items which all relate to the Expert Reports relied upon in the Termination Motion. The Chamber also notes that when requesting an extension of three to

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<sup>34</sup> Defence Response to the Prosecution Request for Disclosure, ICC-01/12-01/18-965-Conf, paras 4-28.

<sup>35</sup> Prosecution Request for leave to reply, ICC-01/12-01/18-969-Conf, para. 3.

<sup>36</sup> Prosecution Request for leave to reply, ICC-01/12-01/18-969-Conf, para. 7. Specifically, the Prosecution seeks to address the following issues: 'A. The Defence claim that the Prosecution request for disclosure of the notes of contact, including the first contact and any subsequent communications and meeting with the Defence is overbroad and can be raised during the evidentiary hearing requested by the Defence; B. The Defence contention that there was no formal letter of instruction to Dr Cohen; C. The Defence's claim that the letter of instruction dated 4 March 2020 to Mr Sangaré and material provided to him by the Defence cannot be disclosed as these contain information identifying Defence witnesses and innocent third parties; D. The Defence allegation that "Dr Crosby's report sets out all the documents provided to her for the purpose of her report"; E. The Defence contention that the following materials are not subject to disclosure as they were not relied upon or addressed by Dr Porterfield in her report, their content was reproduced in her report, and/or they contain private information of AL HASSAN: "further chronology of detention of Mr. Al Hassan", "the transcription of Dr Porterfield's notes", "the consent form signed by Mr. Al Hassan", "[REDACTED]", "the overview of the detention conditions" and "a memorandum prepared by the Defence" regarding detention conditions [REDACTED]; F. The Defence claim that drafts of Defence experts' reports sent to them and any comments the Defence made on these drafts constitute "internal work product"; G. The Defence claim that the issue regarding details of interviews conducted by Mr Sangaré is moot, even though the mother tongue of the interviews remains unspecified; H. The Defence omission to provide the name and CV of persons who served as an interpreter during the examination of AL HASSAN by Drs Porterfield and Cohen'.

four months to file a ‘second response’ to the Termination Motion, the Prosecution explained that for the purposes of the second response, it intended Prosecution experts to review the Expert Reports and ‘related evidence, including key underlying material not yet disclosed by the Defence’.<sup>37</sup> The Chamber understands from these submissions that the Requested Material was mainly intended for the preparation of the second response, requested in order to provide Prosecution experts with the necessary time to review the Expert Reports together with the Requested Material.

23. In this regard, the Chamber recalls that in the 6 July 2020 Decision, which was notified after the Prosecution Request for Disclosure, it found that ‘without prejudice to any future assessment by the Chamber that further information from the Prosecution may be required at a later stage’, it was not convinced, at that stage, of the necessity of a second response as requested by the Prosecution.<sup>38</sup> Having now considered the material and submissions before it, the Chamber still considers that no second response is required for the Chamber to decide on the Termination Motion. In addition, noting the Prosecution’s submission that the Requested Material is relevant to address the Defence’s argument that the accused is unfit to stand trial, the Chamber recalls that this issue is being addressed by the Chamber in a separate context.<sup>39</sup>
24. In these circumstances, the Chamber considers that disclosure of the Requested Material is not warranted for the purpose of the present determination. Consequently, the Prosecution Request for Disclosure is rejected.

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<sup>37</sup> Prosecution’s urgent request to strike Confidential Annex B to the Defence Request to terminate the proceedings, and request for extensions of the page and time limits to respond to the Defence Request, 25 June 2020, ICC-01/12-01/18-906-Conf (notified on 26 June 2020; with two confidential Annexes), paras 3, 5, 22-27.

<sup>38</sup> 6 July 2020 Decision, ICC-01/12-01/18-932-Corr-Red, para.24.

<sup>39</sup> See Decision appointing experts for the purpose of a medical examination pursuant to Rule 135 of the Rules of Procedure and Evidence, 21 August 2020, ICC-01/12-01/18-1006-Conf. See also Decision on the Defence notice on Mr Al Hassan’s unfitness to stand trial, 13 July 2020, ICC-01/12-01/18-952-Conf.

## **B. Defence Request for Disclosure and Defence Request for leave to reply**

### *1. Submissions*

25. The Defence requests, pursuant to Articles 64(3)(c) and 67(2) of the Statute and Rules 77 and 84 of the Rules, that the Chamber order the Prosecution to disclose all requests for assistance submitted to [REDACTED] (respectively the ‘Allegations’ and the ‘Requested RFAs’).<sup>40</sup>
26. According to the Defence, the Requested RFAs are exculpatory and material to the preparation of the Defence, on the basis that they are relevant to Defence arguments concerning: (i) the impact and nexus between Mr Al Hassan’s domestic detention, and the current proceedings before the ICC;<sup>41</sup> and (ii) the application of the rule of specialty under Article 101 of the Statute to this case.<sup>42</sup> It further submits that there are ‘no discretionary grounds’ to decline the Defence Request for Disclosure, arguing that: (iii) the current request is not impermissible re-litigation of previous disclosure requests and/or impermissible expansion of the scope of the Termination Motion, because its scope and purpose is distinct from and ‘far more specific’ than previous requests;<sup>43</sup> (iv) previous disclosure decisions did not preclude the Defence’s right to this information;<sup>44</sup> and (v) the proposed disclosure will not prejudice State security or the protection of witnesses or victims.<sup>45</sup>
27. In relation to the first point, the Defence argues that the Requested RFAs may be evidence of concerted action between the Prosecution and [REDACTED], in as far as they demonstrate a link and ongoing connection between the factual basis for Mr Al Hassan’s arrest and detention at the Malian *Direction Générale*

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<sup>40</sup> Defence Request for Disclosure, ICC-01/12-01/18-936-Conf, para. 1.

<sup>41</sup> Defence Request for Disclosure, ICC-01/12-01/18-936-Conf, paras 2, 5-19 (as summarised further below).

<sup>42</sup> Defence Request for Disclosure, ICC-01/12-01/18-936-Conf, paras 2, 20-25 (as summarised further below).

<sup>43</sup> Defence Request for Disclosure, ICC-01/12-01/18-936-Conf, paras 3, 26-32.

<sup>44</sup> Defence Request for Disclosure, ICC-01/12-01/18-936-Conf, para. 3.

<sup>45</sup> Defence Request for Disclosure, ICC-01/12-01/18-936-Conf, paras 3, 33-40.

*de la Sécurité d'Etat* (the 'DGSE'), and the Prosecution's investigations against Mr Al Hassan.<sup>46</sup>

28. As for the second point, the Defence submits that the Requested RFAs may be evidence of failure to comply with 'rule of speciality' under Article 101(1) of the Statute,<sup>47</sup> which provides that '[a] person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.' In this respect, the Defence argues that the Allegations have been relied upon by the Prosecution for protective measures [REDACTED], shared by the Prosecution with the Registry, and relied on by the Registry and the Chamber, and as a result, Mr Al Hassan has been proceeded against in relation to the Allegations.<sup>48</sup> As these matters were not included in the arrest warrant or decision thereon, the Defence argues that the only way in which this could form the basis of the crimes for which Mr Al Hassan has been surrendered would be through the RFAs.<sup>49</sup> The Defence argues that it is relevant for its preparation to know the extent of the Prosecution's reliance on the Allegations in engaging with States parties.<sup>50</sup> Likewise, should the Prosecution have sought, pursuant to Article 101(2), a waiver of the Article 101(1) requirements, the Defence submits that this would be material to the Defence as evidence of concerted action between the Prosecution and national authorities.<sup>51</sup>
29. The Prosecution urges the Chamber to reject the Defence Request for Disclosure, on the basis that it lacks a proper basis and seeks to re-litigate issues that have already been litigated and decided.<sup>52</sup> First, the Prosecution argues that the Defence incorrectly relies on Article 101 of the Statute, noting that: (i) the principle of speciality relates to the cooperation between the Court and States and does not convey any rights to a suspect or accused; (ii) the 'course of

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<sup>46</sup> Defence Request for Disclosure, ICC-01/12-01/18-936-Conf, paras 13-19.

<sup>47</sup> Defence Request for Disclosure, ICC-01/12-01/18-936-Conf, p.11.

<sup>48</sup> Defence Request for Disclosure, ICC-01/12-01/18-936-Conf, paras 22-23.

<sup>49</sup> Defence Request for Disclosure, ICC-01/12-01/18-936-Conf, para. 23.

<sup>50</sup> Defence Request for Disclosure, ICC-01/12-01/18-936-Conf, para. 23.

<sup>51</sup> Defence Request for Disclosure, ICC-01/12-01/18-936-Conf, para. 25.

<sup>52</sup> Prosecution Response to the Defence Request for Disclosure, ICC-01/12-01/18-959-Conf, para. 1.

conduct’ referred to in Article 101 does not relate to ancillary matters such as protective measures [REDACTED]; (iii) the course of conduct for which Mr Al Hassan was arrested and transferred is the course of conduct for which he is being prosecuted; (iv) [REDACTED] are not part of the charges against Mr Al Hassan but are of relevance and use for requests for protective measures since the rule of speciality does not bar the use of information for the purposes of ‘ancillary procedural measures’.<sup>53</sup>

30. Second, the Prosecution submits that the Defence Request for Disclosure appears to be based on an ‘unfounded presumption of bad faith’ by assuming that exchanges between the Prosecution and requested States may prove collusion, and is, as such, speculative.<sup>54</sup>
31. Third, the Prosecution submits that it has fulfilled its disclosure obligations, that the Defence is conflating the *Al Hassan* case with the investigation in Mali which [REDACTED] and which is not new information, and that the Defence seeks disclosure of ‘a broad category of information’ which has previously been considered by the Single Judge as a mere ‘fishing expedition’.<sup>55</sup>
32. Lastly, the Prosecution questions how disclosing RFAs between the Court and [REDACTED] will advance the proceedings in relation to the impact and nexus between Mr Al Hassan’s detention in Mali and the ICC proceedings against him.<sup>56</sup>
33. In its Request for leave to reply, the Defence requests to make additional submissions in relation to two issues:

*First*, the interpretation of the phrase ‘proceeding against’ in Article 101(1) of the Statute, and the ability of Mr. Al Hassan, as a defendant, to assert certain procedural rights in light of the scope of investigative actions, [REDACTED], executed in this case (‘the First Issue’); and

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<sup>53</sup> Prosecution Response to the Defence Request for Disclosure, ICC-01/12-01/18-959-Conf, paras 11-18.

<sup>54</sup> Prosecution Response to the Defence Request for Disclosure, ICC-01/12-01/18-959-Conf, para. 19.

<sup>55</sup> Prosecution Response to the Defence Request for Disclosure, ICC-01/12-01/18-959-Conf, paras 23-26.

<sup>56</sup> Prosecution Response to the Defence Request for Disclosure, ICC-01/12-01/18-959-Conf, para. 27.

*Second*, the Prosecution's erroneous attempt to conflate criminal law aspects of collusion, with the objective standards that apply to the assessment of issues of responsibility, on the part of a State, organization or entity, to afford an effective remedy ('Second Issue').<sup>57</sup>

## 2. Analysis

### i. Defence Request for leave to reply

34. The Chamber considers that it would not be assisted by further submissions on any of the issues identified by the Defence. As for the First Issue, the Chamber notes that the alleged potential breach of the rule of speciality has been elaborated upon in some detail in the Defence Request for disclosure and the Prosecution's response on this aspect could thus reasonably have been anticipated when drafting the original request. Similarly, the Chamber considers that the submissions sought to be made on the Second Issue could have been, and to some extent have already been, addressed in the Defence request for disclosure as well as the Termination Motion and that this reply is not an appropriate context for the Defence to elaborate on its submissions in this regard. Accordingly, the Chamber rejects the Defence Request for leave to reply.

### ii. Defence Request for Disclosure

35. The Chamber recalls its previous finding that documents related to cooperation between the Prosecution and national authorities are not disclosable *per se*,<sup>58</sup> and that, when seizing the Chamber, the party making the request should be specific and demonstrate materiality of the information sought pursuant to Article 67(2) of the Statute or Rule 77 of the Rules, and particularly how the information has a direct connection to the charges or a live issue in the case.<sup>59</sup>
36. In the present case, the Chamber notes that the Defence seeks disclosure of requests for assistance [REDACTED]. While the Defence narrows down the category of material sought by specifying a time frame and relevant content, the Chamber notes that the Defence fails to identify any specific individualised items for the purpose of its request. Therefore, the Chamber is not convinced by

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<sup>57</sup> Defence Request for leave to reply, ICC-01/12-01/18-966-Conf, para. 1.

<sup>58</sup> [REDACTED].

<sup>59</sup> ICC-01/12-01/18-768-Conf, para. 6; ICC-01/12-01/18-859-Conf, para. 9.

the Defence's argument that the Request is sufficiently specific. That notwithstanding, the Chamber acknowledges that, in the circumstances underlying its request, the Defence might not be in a position to identify the requested material with more specificity and will therefore proceed to determine whether the other conditions for disclosure are satisfied.

37. Turning to the question whether the Defence has demonstrated materiality of the Requested RFAs, the Chamber notes the Defence's submission that the items sought 'may be evidence of concerted action between the Prosecution and the [REDACTED]', in as far as they 'demonstrate a link and ongoing connection between the factual basis for Mr. Al Hassan's arrest and detention at the DGSE, and the investigations conducted by the [...] Prosecution against Mr. Al Hassan' and that they 'may be evidence of failure to comply with "rule of speciality"' under Article 101(1) of the Statute. In the view of the Chamber, the suggested materiality is speculative and hypothetical. In addition, in respect of the Defence's attempt to establish materiality on the basis of a potential alleged violation of the rule of speciality under Article 101(1), the Chamber agrees with the Prosecution's submissions on the specific scope and purpose of this principle.
38. In view of the foregoing, the Chamber finds that the Defence has failed to demonstrate materiality pursuant to Article 67(2) of the Statute or Rule 77 of the Rules, and how the information has a direct connection to the charges or a live issue in the case.
39. The Chamber therefore rejects the Defence Request for Disclosure.

### **C. Prosecution Request to strike submissions from the record**

40. The Prosecution requests that the Chamber strike from the record selected portions of Part D of the Defence Reply (the 'Impugned Section'), on the basis that it is not limited to 'new issues raised in the response which the Defence

could not reasonably have anticipated’ as provided for in Regulation 24(5) and emphasised by the Chamber.<sup>60</sup>

41. The Chamber notes that in the Impugned Section, the Defence elaborates on its argument that ‘[t]he Prosecution’s conduct engages the responsibility of the ICC, as it satisfies the threshold for perpetration, collusion or complicity, under the Statute, rules of international law applying to international organisations and domestic practice’.<sup>61</sup> The Chamber further notes that submissions on the Prosecution’s alleged collusion or complicity in or acquiescence to torture and CIDT in relation to Mr Al Hassan [REDACTED] have already been included in the Termination Motion. As such, the Chamber agrees with the Prosecution that the Impugned Section is not in full compliance with Regulation 24(5) of the Regulations and the explicit direction by the Chamber that ‘any reply shall be limited to new issues raised in the response which the Defence could not reasonably have anticipated’.<sup>62</sup>
42. That notwithstanding, in the interest of expeditiousness and considering the seriousness of the Defence’s allegations, the Chamber is minded to consider the Defence’s additional submissions in the Impugned Section to the extent that they are considered relevant to assist the Chamber in its determination of the Termination Motion. The Chamber therefore rejects the Prosecution Request to strike submissions from the record. However, the Chamber emphasises that this decision is exceptional and cautions that it will not hesitate to disregard any future submissions which go beyond the scope authorised by the Chamber. Lastly, in light of its conclusion, and in order to allow for a timely resolution of the Termination Motion, the Chamber considered it appropriate to decide on the Prosecution Request to strike submissions from the record without a response from the Defence.

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<sup>60</sup> Prosecution Request to strike submissions from the record, ICC-01/12-01/18-995-Conf, paras 1, 3-9.

<sup>61</sup> Defence Reply, ICC-01/12-01/18-991-Conf, p. 17.

<sup>62</sup> 6 July 2020 Decision, ICC-01/12-01/18-932-Corr-Red, para. 25.



### III. Submissions and analysis

#### A. Preliminary matter: Timing of the Termination Motion

43. As a preliminary matter, the Chamber considers it appropriate to address the timing of the Termination Motion.
44. In this regard, the Chamber recalls the Appeals Chamber's finding that: (i) a trial chamber has discretion under Article 64(2) of the Statute to determine the timeliness of motions alleging pre-surrender unlawful arrest and detention and seeking a stay of proceedings; (ii) these motions must, as a general rule, be brought before the pre-trial chamber; and (iii) '[o]nly in circumstances where the accused person could not reasonably be expected to raise the matter at that stage will he or she be permitted to raise it at the trial stage'.<sup>63</sup> In line with these principles, and 'discern[ing] no error' in the relevant trial chamber's conclusion that the accused in that case relied on information that was already available to him at the pre-trial stage, the Appeals Chamber upheld a trial chamber's decision dismissing an application for stay of proceedings *in limine* on the basis that it was filed 'at too advanced a stage in the proceedings'.<sup>64</sup>
45. In the present case, the Termination Motion was filed on 16 June 2020, i.e. less than one month before the start of the trial and less than three months before the start of the presentation of evidence. The Chamber further notes that the Defence, already at the confirmation stage, referred to and requested a variation of deadline for filing a request to 'stay the proceedings' on grounds concerning the illegality of Mr Al Hassan's arrest and detention in Mali,<sup>65</sup> and, before this

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<sup>63</sup> Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings", 12 July 2010, ICC-01/04-01/07-2259 (OA10) ('*Katanga* OA10'), paras 1, 3, 48, 51.

<sup>64</sup> Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Public redacted version of the "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings" of 20 November 2009 (ICC-01/04-01/07-1666-Conf-Exp), 3 December 2009, ICC-01/04-01/07-1666-Red-tENG, para. 66; *Katanga* OA10, ICC-01/04-01/07-2259, paras 75, 86.

<sup>65</sup> Urgent request to vary a deadline for filing an application concerning Mr. Al Hassan's arrest, detention and interrogation in Mali, 31 May 2019, ICC-01/12-01/18-360 (with reference to this request, the Single Judge of Pre-Trial Chamber I held that he '[did] not see fit to predetermine the decision the Trial Chamber might take on the admissibility of the application': Decision on the Urgent Request of

Chamber, referred, on several occasions, to a pending motion to terminate proceedings due to violations during the investigation phase.<sup>66</sup> As such, the Chamber sees no indication that the accused could not reasonably have raised the matter before the Pre-Trial Chamber, or, at a minimum, at an earlier stage in the lead-up to the trial.

46. The Chamber is mindful that on 27 May 2020, the Defence requested an extension of time to file a ‘Termination Request concerning the Prosecution’s reliance on information and evidence that was tainted by torture’,<sup>67</sup> which was granted by the Chamber, on the basis of, *inter alia*: (i) extensions of deadlines granted to the Prosecution which had an effect on the Defence ability to finalise the ‘Forthcoming Pre-Trial Motion and other Rule 134 applications’; (ii) other competing deadlines and ongoing litigation, which ‘necessarily impacted on the Defence ability to respect the schedule initially set’; and (iii) the fact that it appeared that ‘certain information was disclosed at the eve of the final deadline for the Prosecution to complete its disclosure’.<sup>68</sup>
47. The Chamber recalls that when granting an extension of time, it specifically cautioned that ‘it is not foreseen that the extension of time granted will delay the start of trial’.<sup>69</sup> By submitting the Termination Motion less than one month before the start of the trial and less than three months before the start of the presentation of evidence, and requesting that the trial should not start before

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the Defence for Variation of the Deadline of an Application concerning the Arrest, Detention and Interrogation of Mr Al Hassan in Mali, 14 June 2019, ICC-01/12-01/18-375-tENG, para. 36).

<sup>66</sup> See for example, Annex A to the Submissions pursuant to ‘Order Scheduling First Status Conference’, 6 December 2019, ICC-01/12-01/18-519-Conf-Exp-AnxA (confidential *ex parte* available only to the Defence), para. 6; transcript of hearing on 13 December 2019, ICC-01/12-01/18-T-010-Conf-Exp, pp 8-9; [REDACTED].

<sup>67</sup> Defence request for extension of time and page limit, 27 May 2020, ICC-01/12-01/18-827-Conf, para. 1(a).

<sup>68</sup> 29 May 2020 Decision, ICC-01/12-01/18-833, paras 14-15.

<sup>69</sup> 29 May 2020 Decision, ICC-01/12-01/18-833, para. 16.

resolution of the request,<sup>70</sup> the Chamber considers, noting the scope of the Motion,<sup>71</sup> that the Defence essentially disregarded the Chamber's direction.

48. In these circumstances, the Chamber regrets that the Termination Motion was filed at such a late stage. While it would thus be open to the Chamber to reject the Termination Motion for untimeliness, the Chamber, considering the seriousness of the allegations and in line with its obligations under Article 21(3), 67 and 68 of the Statute, decides to proceed and analyse the Termination Motion on its merits.

## **B. Applicable law**

### *1. The remedy of a stay of proceedings for abuse of process*

49. The Chamber recalls that the Defence requests the Chamber to terminate the case, and 'immediately release' Mr Al Hassan,<sup>72</sup> on the basis that '[t]he 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', 'aggravated and compounded' by the conduct of the Prosecution to such an extent that 'the constituent elements of a fair trial cannot be pieced together.'<sup>73</sup> Further, and although not explicitly referred to in the Termination Motion itself, the Chamber notes that in other filings, including the Defence Reply, the Defence has framed its motion relying on the doctrine of 'abuse of process'.<sup>74</sup> Accordingly, the Chamber will entertain the Termination Motion in

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<sup>70</sup> See Defence response to "Prosecution's urgent request to strike Confidential Annex B to the Defence Request to terminate the proceedings, and request for extensions of the page and time limits to respond to the Defence Request" (ICC-01/12-01/18-906-Conf), 1 July 2020, ICC-01/12-01/18-915-Conf, paras 4(c), 26-36.

<sup>71</sup> The Chamber recalls that the Termination Motion comprises 52 pages, 10 annexes, and a substantial amount of supporting material, including multiple expert reports.

<sup>72</sup> Termination Motion, ICC-01/12-01/18-885-Corr-Red3, para. 109.

<sup>73</sup> Termination Motion, ICC-01/12-01/18-885-Corr-Red3, paras 1-3.

<sup>74</sup> Confidential redacted version of 'Defence submissions pursuant to Trial Chamber X's "Order to provide information on methods of work to minimise the impact of COVID-19 and related measures on the conduct of proceedings" - ICC-01/12-01/18-776', 20 May 2020, ICC-01/12-01/18-825-Conf-Red (notified on 22 May 2020; with six confidential or confidential *ex parte* Annexes), para. 11; Defence request for extension of time and page limit, 27 May 2020, ICC-01/12-01/18-827-Conf (with three confidential or confidential *ex parte* Annexes), paras 4, 13; Defence Reply, ICC-01/12-01/18-991-Conf, paras 2, 6-7, 19.

light of the power of the Chamber to permanently stay proceedings in case of abuse of process.<sup>75</sup>

50. In this regard, the Chamber recalls that, while not explicitly provided for in the Statute, various chambers of this Court have consistently confirmed the availability of the remedy of a permanent stay of proceedings where it would be ‘repugnant or odious to the administration of justice to allow the case to continue, or where the rights of the accused have been breached to such an extent that a fair trial has been rendered impossible’.<sup>76</sup> As the Appeals Chamber has underlined, ‘[w]here fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial.’<sup>77</sup>
51. As underlined by the Appeals Chamber, a permanent stay of proceedings is a remedy of an exceptional nature and not every infraction of the law or breach of the rights of the accused will give rise to a finding of abuse of process: ‘the

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<sup>75</sup> In this regard, *see also* Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, para. 54, and LRV Response, ICC-01/12-01/18-978-Conf, para. 12.

<sup>76</sup> Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on Defence request for stay of proceedings with prejudice to the Prosecution, 28 April 2017, ICC-01/04-02/06-1883 (the ‘*Ntaganda* 28 April 2017 Decision’), para. 20, citing to Trial Chamber V(B), *The Prosecutor v. Uhuru Muigai Kenyatta*, Public redacted version of Decision on Defence application for a permanent stay of the proceedings due to abuse of process, 5 December 2013, ICC-01/09-02/11-868-Red (the ‘*Kenyatta* 5 December 2013 Decision’), para. 14. *See also* generally Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772 (‘*Lubanga* OA4’); Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”, 21 October 2008, ICC-01/04-01/06-1486 (OA13) (‘*Lubanga* OA13’); Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on the “Defence Application Seeking a Permanent Stay of the Proceedings”, 7 March 2011, ICC-01/04-01/06-2690-Red2 (notified on 8 March 2011) (the ‘*Lubanga* 8 March 2011 Decision’); Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision on the ‘Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC02/11-01/11-129)’, 15 August 2012, ICC-02/11-01/11-212 (the ‘*Gbagbo* 15 August 2012 Decision’), para. 89; Trial Chamber V, *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on defence application pursuant to Article 64(4) and related requests, 26 April 2013, ICC-01/09-02/11-728 (the ‘*Kenyatta* 26 April 2013 Decision’), paras 74-77; Trial Chamber IV, *The Prosecutor v. Abdallah Banda Abakaer Nourain*, Public redacted “Decision on the ‘Defence Request for Termination of Proceedings’”, 30 January 2014, ICC-02/05-03/09-535-Red (the ‘*Banda* 30 January 2014 Decision’), para. 27.

<sup>77</sup> *Lubanga* OA4, ICC-01/04-01/06-772, para. 37; *Lubanga* 8 March 2011 Decision, ICC-01/04-01/06-2690-Red2, para. 165. *See also* *Gbagbo* 15 August 2012 Decision, ICC-02/11-01/11-212, para. 89; *Banda* 30 January 2014 Decision, ICC-02/05-03/09-535-Red, para. 27.

illegal conduct must be such as to make it otiose, repugnant to the rule of law to put the accused on trial’.<sup>78</sup>

52. With regard to the circumstances in which the Chamber may consider a permanent stay of proceedings as a result of abuse of process, the Appeals Chamber has held that this power can be exercised when ‘either the foundation of the prosecution or the bringing of the accused to justice is tainted with illegal action or gross violation of the rights of the individual making it unacceptable for justice to embark on its course’.<sup>79</sup>
53. According to the Court’s jurisprudence on stays of proceedings, it is not necessary to find that the Prosecution acted in bad faith. It is sufficient to show that: (i) the rights of the accused have been violated to such an extent that the essential preconditions of a fair trial are missing; and (ii) there is no sufficient indication that this will be resolved during the trial process.<sup>80</sup>
54. Accordingly, a permanent stay of proceedings may be ordered only when the breach of the suspect’s rights would make the fairness of the proceedings against him or her impossible.<sup>81</sup> This was considered to logically entail that the breach of his or her rights must be related to the process of bringing the person to justice for the crimes that form the subject-matter of the proceedings before the Court.<sup>82</sup>

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<sup>78</sup> *Lubanga* OA4, ICC-01/04-01/06-772, para. 30; *Lubanga* 8 March 2011 Decision, ICC-01/04-01/06-2690-Red2, para. 162; *See also* Pre-Trial Chamber I, *The Prosecutor v. Callixte Mbarushimana*, Decision on the “Defence request for permanent stay of proceedings”, 1 July 2011, ICC-01/04-01/10-264, pp. 4-5; *Gbagbo* 15 August 2012 Decision, ICC-02/11-01/11-212, para. 91; *Banda* 30 January 2014 Decision, ICC-02/05-03/09-535-Red, para. 27.

<sup>79</sup> *Lubanga* OA4, ICC-01/04-01/06-772, para. 31 cited in *Gbagbo* 15 August 2012 Decision, ICC-02/11-01/11-212, para. 91.

<sup>80</sup> *Ntaganda* 28 April 2017 Decision, ICC-01/04-02/06-1883, para. 21, citing to *Kenyatta* 5 December 2013 Decision, ICC-01/09-02/11-868-Red, para. 14. *See also* *Kenyatta* 26 April 2013 Decision, ICC-01/09-02/11-728, para. 76; Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01/04-01/06-1401, para. 91.

<sup>81</sup> *Lubanga* OA4, ICC-01/04-01/06-772, para. 37 cited in *Gbagbo* 15 August 2012 Decision, ICC-02/11-01/11-212, para. 92.

<sup>82</sup> *Lubanga* OA4, ICC-01/04-01/06-772, para. 44 cited in *Gbagbo* 15 August 2012 Decision, ICC-02/11-01/11-212, para. 92.

55. The Appeals Chamber set a high threshold for a Chamber to impose a stay of proceedings, requiring that it be ‘impossible to piece together the constituent element of a fair trial’.<sup>83</sup> The high threshold applicable to a stay of proceedings, defined as a ‘drastic’ and ‘exceptional’ remedy is, *a fortiori* applicable to a request for termination of proceedings, which in effect, if granted, puts a definitive end to a case.<sup>84</sup>
56. The Appeals Chamber has also emphasised that the power to stay proceedings is discretionary in nature and involves ‘an exercise of judicial assessment dependent on judgment rather than on any conclusion as to fact based on evidence’.<sup>85</sup> The Appeals Chamber has indicated that ‘[a] Trial Chamber ordering a stay of the proceedings enjoys a margin of appreciation, based on its intimate understanding of the process thus far, as to whether and when the threshold meriting a stay of proceedings has been reached’.<sup>86</sup>

## 2. Issues of attributability and obligations of the Prosecution

57. The Chamber notes the finding of PTC I in the *Gbagbo* case that violations of fundamental rights, however serious, can have the requisite impact on proceedings to constitute an abuse of process *only insofar as they can be attributed to the Court*.<sup>87</sup> Attribution in this sense means that the act of violation of fundamental rights is: (i) either directly perpetrated by persons associated with the Court; or (ii) perpetrated by third persons in collusion with the Court.<sup>88</sup>

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<sup>83</sup> Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled “Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU”, 8 October 2010, ICC-01/04-01/06-2582 (OA18) (hereinafter: ‘*Lubanga OA18*’), para. 55, citing *Lubanga OA4*, ICC-01/04-01/06-772, para. 39. See also *Kenyatta* 5 December 2013 Decision, ICC-01/09-02/11-868-Red, paras 14-15; Trial Chamber IV, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision on the defence request for a temporary stay of proceedings, 26 October 2012, ICC-02/05-03/09-410 (the ‘*Banda* 26 October 2012 Decision’), para. 80; *Banda* 30 January 2014 Decision, ICC-02/05-03/09-535-Red, para. 27.

<sup>84</sup> *Banda* 30 January 2014 Decision, ICC-02/05-03/09-535-Red, para. 28.

<sup>85</sup> *Lubanga OA4*, ICC-01/04-01/06-772, para. 28 cited in *Banda* 26 October 2012 Decision, ICC-02/05-03/09-410, para. 86.

<sup>86</sup> *Lubanga OA13*, ICC-01/04-01/06-1486, para. 84, cited in *Banda* 26 October 2012 Decision, ICC-02/05-03/09-410, para. 86. See also *Ntaganda* 28 April 2017 Decision, ICC-01/04-02/06-1883, para. 22.

<sup>87</sup> *Gbagbo* 15 August 2012 Decision, ICC-02/11-01/11-212, para. 92.

<sup>88</sup> Pre-Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute, 3 October 2006 (notified on

Conversely, when a violation of the suspect's fundamental rights, however grave, is established, but demonstrates no such link with the Court, the exceptional remedy of staying the proceedings is not available.<sup>89</sup> Relatedly, the Chamber also notes the Appeals Chamber's finding that '[m]ere knowledge on the part of the Prosecutor of the investigations carried out by the [national] authorities is no proof of involvement on his part in the way they were conducted or the means used for the purpose.'<sup>90</sup> The Chamber endorses these findings and will evaluate the Termination Motions against this standard.<sup>91</sup>

58. In this regard, the Chamber notes the Defence's reference to the jurisprudence from the *ad hoc* tribunals, providing that the special status of the prohibition of torture and CIDT militates in favour of declining jurisdiction over a defendant even where the organs of the tribunals were not involved in such acts.<sup>92</sup>
59. Concerning the applicability of the *ad hoc* tribunals' jurisprudence to the case at hand, the Chamber notes at the outset that contrary to the Court, which is treaty-based and relies on cooperation, the *ad hoc* tribunals were established and had authority pursuant to Chapter VII of the United Nations Charter. With this caveat in mind, among the examples cited by the Defence, the Chamber notes that in the *Barayagwiza* case, the invocation of the abuse of process doctrine was found to be justified due to the egregious and repeated violation of the fundamental rights of the accused and the Prosecutor's failure to diligently act which was considered to be tantamount to negligence.<sup>93</sup> Similarly, the ICTY trial chamber in *Nikolić* found that a situation where an accused is very seriously mistreated, maybe even subjected to inhuman, cruel or degrading treatment, or torture, before being handed over to the tribunal, may constitute a legal impediment to the exercise of jurisdiction over such an accused. Even without the prosecution's involvement in such treatment, it would be 'extremely

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4 October 2006), ICC-01/04-01/06-512, p. 9; *Lubanga* OA4, ICC-01/04-01/06-772, para. 42, cited in *Gbagbo* 15 August 2012 Decision, ICC-02/11-01/11-212, para. 92.

<sup>89</sup> *Gbagbo* Decision, 15 August 2012 ICC-02/11-01/11-212, para. 92.

<sup>90</sup> *Lubanga* OA4, ICC-01/04-01/06-772, para. 42.

<sup>91</sup> In this regard, *see also* Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, para. 60; LRV Response, ICC-01/12-01/18-978-Conf, paras 20, 27.

<sup>92</sup> Termination Motion, ICC-01/12-01/18-885-Corr-Red3, paras 99-100.

<sup>93</sup> ICTR, Appeals Chamber, *Jean-Bosco Barayagwiza v. The Prosecutor*, Decision, 3 November 1999 (the '*Barayagwiza* Decision'), paras 100-101, 106.

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.<sup>94</sup> The trial chamber emphasised that these decisions ‘depend [...] entirely on the facts of the case and cannot be decided in the abstract’ and that ‘the level of violence’ used against the accused must be assessed. In the circumstances of the case before it, the trial chamber observed that the assumed facts, while raising ‘some concerns’, did not show that the treatment of the accused by the unknown individuals was of ‘such an egregious nature’ to impede the exercise of jurisdiction<sup>95</sup>

60. The Chamber also notes the finding of the ICTY trial chamber in *Karadžić*, upheld in appeals,<sup>96</sup> which considered that ‘it could only be in exceptional circumstances that actions of a third party that is completely unconnected to the Tribunal or the proceedings could ever lead to those proceedings being stayed’ and that ‘[w]here an accused is seriously mistreated by such a third party, that mistreatment is unlikely to be a barrier to a fair trial which can be secured in various other ways, for example, by excluding any evidence obtained by torture at the hands of the third party.’<sup>97</sup> In this regard, the trial chamber noted that in the *Barayagwiza* case, the prosecution was stayed partly also because of the delays caused by the ICTR’s Prosecutor upon the transfer to the tribunal, which compounded the serious delays caused by the state authorities, and noted further that the state authorities in question were explicitly held to have been acting on behalf of the ICTR Prosecutor and thus were not completely unconnected to the tribunal.<sup>98</sup>

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<sup>94</sup> ICTY, Trial Chamber II, *The Prosecutor v. Dragan Nikolić*, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, IT-94-2PT (the ‘*Nikolić* Decision’), para. 114.

<sup>95</sup> *Nikolić* Decision, paras 114-115. This decision was upheld in appeals: ICTY, Appeals Chamber, *The Prosecutor v. Dragan Nikolić*, Decision on interlocutory appeal concerning legality of arrest, 5 June 2003, IT-94-2-AR73.

<sup>96</sup> ICTY, Appeals Chamber, *The Prosecutor v. Radovan Karadžić*, Decision on *Karadžić* Appeal Of Trial Chamber's Decision On Alleged Holbrooke Agreement, 12 October 2009, IT-95-5/18-AR73.4.

<sup>97</sup> ICTY, Trial Chamber, *The Prosecutor v. Radovan Karadžić*, Decision on the Accused’s Holbrooke Agreement Motion, 8 July 2009, IT-95-5/18-PT (the ‘*Karadžić* Trial Chamber Decision’), para. 85.

<sup>98</sup> *Karadžić* Trial Chamber Decision, para. 85, citing to *Barayagwiza* Decision, paras 35-37, 54, 61, 71.



61. In light of the foregoing, and contrary to the relevant submissions in the Defence Reply,<sup>99</sup> the Chamber considers that the approach of the *ad hoc* tribunals is consistent with the approach of PTC I in the *Gbagbo* case, envisaging, in exceptional cases, the invocation of the abuse of process doctrine in cases where serious violations of the right of the accused cannot be directly attributed to an organ of the Court.
62. The Chamber further notes the Defence's submissions on the Prosecution's 'positive obligation to avoid complicity in torture and CIDT'. Specifically, the Defence submits that Articles 55(1)(a), (b) and (d) of the Statute categorically establish the suspect's right not to be questioned in a coercive manner, subjected to torture or CIDT, or held in arbitrary detention.<sup>100</sup> The Defence further submits that it would be incompatible with the object and purposes of Article 55 and Rule 111(2) of the Rules 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 in a coercive environment.<sup>101</sup> According to the Defence, the *jus cogens* nature of the prohibition of torture further imposes a positive duty on public officials 'to suppress, prevent and discourage such practices'.<sup>102</sup> The Defence further refers to the 'Istanbul Protocol' promulgated by the United Nations Office of the High Commissioner for Human Rights which sets out such positive obligation when interviewing detained torture victims and Principle 6(d) of the African Guidelines on Fair Trial which stipulates that any confession or admission obtained during incommunicado detention shall be considered to have been obtained by coercion.<sup>103</sup> Two of the Expert Reports further rely on the United Nations Standard Minimum Rules for the Treatment of Prisoners (the 'Nelson

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<sup>99</sup> Defence Reply, ICC-01/12-01/18-991-Conf, para. 19, submitting that 'the Response fails to recognise the specific 'carve out', set out in decisions of the ICTY/ICTR, and *Lubanga*, establishing that where the violations are not attributable to the Prosecution, or brought about by concerted action between the Prosecution and the national authorities, the proceedings should be terminated, where instances of torture or CIDT are involved'.

<sup>100</sup> Termination Motion, ICC-01/12-01/18-885-Corr-Red3, para. 9.

<sup>101</sup> Termination Motion, ICC-01/12-01/18-885-Corr-Red3, para. 9.

<sup>102</sup> Termination Motion, ICC-01/12-01/18-885-Corr-Red3, para. 10.

<sup>103</sup> Termination Motion, ICC-01/12-01/18-885-Corr-Red3, para. 13, referring to 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 and African Union, Principles And Guidelines On The Right To A Fair Trial And Legal Assistance In Africa.

Mandela Rules’)<sup>104</sup> for their analysis of interviews and medical examinations conducted by the Prosecution.<sup>105</sup>

63. With regard to these submissions, the Chamber emphasises at the outset that in its determination of the present litigation, utmost attention is paid to the Chamber’s obligation under Article 21(3) of the Statute to interpret and apply the regulatory framework of the Court in accordance with internationally recognised human rights. That notwithstanding, concerning the relevance of these arguments to the issue under examination, the Chamber notes, first, with reference to the Defence’s arguments based on Article 55(1) of the Statute, that Article 55(1) is applicable ‘[i]n respect of an investigation under this Statute’. As noted by PTC I, ‘such expression must be understood to encompass any investigative steps that are taken either by the Prosecutor or by national authorities at his or her behest. Conversely, an investigation conducted by an entity other than the Prosecutor, and which is not related to proceedings before the Court, does not trigger the rights under Article 55 of the Statute’.<sup>106</sup>
64. With reference to the Defence’s argument that it has been recognised at the domestic and international level that 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’,<sup>107</sup> the Chamber notes that these considerations pertain to the obligations of State officials and, for the purpose of the present litigation, need to be assessed in light of the limited powers of the Court’s Prosecution office in its cooperation with public authorities at the national level.
65. Similarly, with reference to the Defence’s submissions on the Prosecution’s ‘positive obligations’ in the context of its investigations against Mr Al Hassan while he was detained by the Malian authorities and underlying references, the Chamber notes that the Istanbul Protocol sets out principles for the effective

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<sup>104</sup> United Nations, Resolution adopted by the General Assembly on 17 December 2015, A/RES/70/175.

<sup>105</sup> Second Cohen Report, MLI-D28-0003-0031 *see e.g.*, 0038, 0043, 0049, 0051, 0057, 0060, 0063; and Crosby Report, MLI-D28-0003-0315, *see e.g.*, 0333 to 0334, 0336.

<sup>106</sup> *Gbagbo* 15 August 2012 Decision, ICC-02/11-01/11-212, para. 96.

<sup>107</sup> Termination Motion, ICC-01/12-01/18-885-Corr-Red3, paras 10, 14.

investigation and documentation of torture and other cruel, inhuman or degrading treatment by State authorities; that the ‘Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa’ have been adopted by the African Commission on Human and Peoples’ Rights in order to be incorporated by States parties into their domestic legislation; and that the Nelson Mandela Rules provide guidance to Member States when they adopt minimum standards for the treatment of prisoners into their domestic legal system. As such, in addition to their non-binding nature,<sup>108</sup> and while mindful that they may provide useful guidance in other contexts,<sup>109</sup> the Chamber considers that they are of limited relevance for assessing the conduct and duties of the Prosecution in the context of an application for termination of the proceedings for abuse of process. Likewise, the jurisprudence of the European Court of Human Rights and the Human Rights Committee dealing with States’ complicity,<sup>110</sup> and the framework of and jurisprudence on inter-State mutual legal assistance,<sup>111</sup> are of limited relevance for this purpose.

66. Lastly, the Chamber considers that the Defence’s submissions based on the Court’s statutory framework and jurisprudence on individual criminal

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<sup>108</sup> The Chamber notes that the European Court on Human Rights referred to the Istanbul Protocol as providing ‘guidelines’ or ‘practical instructions’ when examining applications under Articles 3 and 13 of the European Convention on Human Rights against State authorities: ECHR, *Bati & others. v. Turkey*, Applications nos. 33097/96 and 57834/00, 3 June 2004, paras 100, 133. *See also Eren v. Turkey*, Application no. 32347/02, 14 October 2008, paras 41, 43; *El-Masri v. Macedonia*, Application no. 39630/09, 13 September 2012, para. 96. *See also* Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, para. 150.

<sup>109</sup> Noting the Defence’s submission that the Istanbul Protocol and Nelson Mandela Rules have been applied by this Court (Defence Reply, ICC-01/12-01/18-991-Conf, para. 7), the Chamber notes that the Nelson Mandela Rules have been referred to by the Single Judge of Trial Chamber IX in the context of a request for disclosure of family information (Decision on Request for Disclosure and Related Orders Concerning Mr Ongwen’s Family, 12 February 2019, ICC-02/04-01/15-1444, para. 23, n. 28), by the Presidency as a reference for the right to family visits (Public redacted version of “Decision on Defence ‘Request for review of the Registrar’s decision of 21 June 2019’ dated 5 July 2019 (ICC-RoR220-01/19-1-Conf-Exp)”, 17 September 2019, ICC-RoR220-01/19-2-Conf-Exp, 10 December 2019, ICC-RoR220-01/19-2-Red, para. 19, n. 24), and the Istanbul Protocol has been referred to by the Registry as a reference for the conduct of interviews by VPRS staff to the effect that individuals should not be forced to talk about torture and that interview teams of torture victims should be contain specialists of both genders (Public redacted version of ‘Report on the investigations pursuant to the Chamber’s Decision on the Registry’s “Report on issues concerning intermediaries involvement in completion of applications for participation” dated 28 November 2011 and registered on 29 November 2011, ICC-01/05-01/08-1960-Conf-Exp<sup>[1]</sup>, 6 April 2018, ICC-01/05-01/08-1960-Red, paras 18, n. 34, 20, n. 35).

<sup>110</sup> *See* Defence Reply, ICC-01/12-01/18-991-Conf, para. 22.

<sup>111</sup> *See* Defence Reply, ICC-01/12-01/18-991-Conf, paras 23-25.

responsibility, and in particular, the ‘common plan’,<sup>112</sup> and ‘organizational responsibility’<sup>113</sup> are of no relevance to the determination of attribution in the context of an abuse of process application for investigative conduct of the Prosecution in respect of a case at this Court.

67. In view of the above, when analysing the factual allegations underlying the Termination Motion, the Chamber will determine whether any violations of the rights of the accused [REDACTED] are attributable to the Prosecution.

### 3. *Burden and standard of proof*

68. The Defence submits that, in the context of the Termination Motion, the burden of argumentation must be interpreted and applied in a manner that is consistent with firstly, the Prosecution’s obligation to satisfy the Chamber that its 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. In this regard, the Defence submits that 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. Further, Article 69(7), restricting the admissibility of ‘evidence obtained by means of a violation of this Statute or internationally recognized human rights’ constitutes, according to the Defence, *lex specialis* of the reliability and prejudice components set out in Article 69(4) which requires the Prosecution to demonstrate that its evidence is reliable and that its probative value outweighs any prejudicial impact on the fairness of the proceedings. As a result, the Defence submits 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’.<sup>114</sup> In the view of the Defence, this approach is consistent with human rights law, the defendant’s right to an effective remedy

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<sup>112</sup> See Defence Reply, ICC-01/12-01/18-991-Conf, para. 19.

<sup>113</sup> See Defence Reply, ICC-01/12-01/18-991-Conf, paras 20-21.

<sup>114</sup> Termination Motion, ICC-01/12-01/18-885-Corr-Red3, para. 5.

and the obligation of public authorities to ensure that allegations of torture are investigated fully, and is particularly apposite in this case where the Prosecution, as opposed to the Defence, is in a privileged position to investigate the existence of torture and detention abuses.<sup>115</sup>

69. The Prosecution submits that, in line with the Court's case law, the burden of proof to show an abuse of process, and even for an application to exclude evidence under Article 69(7), lies with the challenging party, in this case the Defence.<sup>116</sup>
70. The LRVs also argue that the Defence inverses the burden of proof and that the Prosecution cannot be required to prove a negative fact.
71. The Chamber recalls that the Termination Motion seeks the termination of the proceedings and recalls its above considerations as to the high standard for such a drastic remedy. In this regard, the Chamber notes that other chambers of this Court adjudicating motions of similar nature determined, explicitly or implicitly, that the burden of proving the allegations underlying such a motion falls upon the Defence, and not the Prosecution.<sup>117</sup> The Chamber agrees with this approach. In the view of the Chamber, the Defence has failed to establish any reasons why, in the present case, a departure from this jurisprudence would be warranted. In this regard, noting the Defence's arguments based on the interplay between Article 69(4) and (7), the Chamber emphasises that a request seeking the termination of proceedings is fundamentally different in nature and

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<sup>115</sup> Termination Motion, ICC-01/12-01/18-885-Corr-Red3, para. 6.

<sup>116</sup> Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, paras 43-48.

<sup>117</sup> See Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010, ICC-01/05-01/08-802, para. 201 stating that: 'the compelling logic of the situation is that should an accused challenge the admissibility of the case under Article 19(2)(a) of the Statute or argue that its continuation amounts to an abuse of the process of the Court, it falls to him to establish the facts and other relevant matters that are said to support the argument. In both situations, the accused is arguing that the proposed trial before the ICC should not occur and the suggested terminal result is, therefore, the same.' See also *Banda* 26 October 2012 Decision, ICC-02/05-03/09-410, para. 90, explaining that the chamber needs to analyse whether the claim underlying a defence request to terminate the proceedings is 'sufficiently substantiated to meet the high threshold for a stay of proceedings'; *Ntaganda* 28 April 2017 Decision, ICC-01/04-02/06-1883, paras 25-59, where the Chamber addressed the arguments put forward by the Defence in support of its motion to terminate the proceedings, 'in order to determine whether any of them, in isolation or combination, reach the threshold warranting a stay of proceedings'; *Kenyatta* 5 December 2013 Decision, ICC-01/09-02/11-868-Red, paras 21-104, where the chamber analysed the allegations made by the defence in its request for a stay of proceedings has been met.

scope from a request concerning the admissibility of evidence and is therefore not governed by the same principles as to burden of proof. Accordingly, the additional arguments in the Reply are not relevant for the Chamber's determination in the present context.<sup>118</sup> Likewise, the Chamber is not persuaded by the Defence's argument that the burden of proof should fall on the Prosecution in line with the practice in human rights cases. Indeed, the Chamber emphasises that, while bearing in mind its obligations under Article 21(3), the nature of proceedings in front of this Court is fundamentally different from the proceedings against a State in human rights cases. Second, the purpose of the present application is not to establish any wrongdoing on behalf of a State, but to decide on a request for a stay of proceedings. Accordingly, the Chamber agrees with the Prosecution and LRVs that the burden to substantiate the allegations underpinning the Termination Motion rests with the Defence.

72. In line with this approach, for the purpose of its determination of the Termination Motion, the Chamber will, after determining how much weight, if any, to give to each of the Defence's allegations, provide an overall assessment on the totality of the Termination Motion to determine whether the threshold for a stay of proceedings for abuse of process has been reached.<sup>119</sup>

### **C. Analysis of factual allegations**

73. In order to determine whether, as suggested by the Defence, the Prosecution's conduct amounts to an abuse of process warranting a termination of proceedings, the Chamber will analyse, in line with the applicable law as set out above, whether any violations of the rights of the accused [REDACTED] are attributable to the Prosecution.

#### *1. Alleged torture and CIDT of Mr Al Hassan*

##### *i. Submissions*

74. The Defence alleges that Mr Al Hassan was tortured and subjected to CIDT by French and Malian authorities during interrogations over the course of a year, in

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<sup>118</sup> Defence Reply, ICC-01/12-01/18-991-Conf, paras 2-5.

<sup>119</sup> For a similar approach, see *Kenyatta* 5 December 2013 Decision, ICC-01/09-02/11-868-Red, para. 21.

three locations: (i) at a military base outside Timbuktu on the date of his arrest on [REDACTED] 2017; (ii) in Gao where he was detained for approximately 10 days from around [REDACTED] 2017; and (iii) at the DGSE in Bamako from his transfer there on around [REDACTED] 2017.<sup>120</sup>

75. The alleged acts of torture and CIDT include serious physical and psychological abuse, threats, being interrogated while hooded, being handcuffed continuously for almost five months, being deprived of adequate food and access to adequate medical care, and being held in prolonged incommunicado detention for approximately a year.<sup>121</sup>
76. In support of these allegations the Defence refers primarily to the reports of Dr Cohen and Dr Porterfield,<sup>122</sup> respectively a forensic physician specialising in examination of victims of torture, who examined Mr Al Hassan [REDACTED] in [REDACTED] 2020 and a clinical psychologist with specific expertise in evaluation and treatment of war trauma and torture survivors, who examined Mr Al Hassan [REDACTED] in [REDACTED] 2019, with [REDACTED] in [REDACTED] 2020, during which Mr Al Hassan recounted his version of events of his arrest and detention. It also refers to evidence of [REDACTED], evidence collected by the Defence, and reports from human rights bodies including the UN and NGOs in corroboration.<sup>123</sup> This evidence includes that of [REDACTED],<sup>124</sup> and [REDACTED].<sup>125</sup> The Defence submits that '[g]iven 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'.<sup>126</sup>

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<sup>120</sup> Termination Motion, ICC-01/12-01/18-885-Corr-Red3, para. 15; Porterfield Report, MLI-D28-0002-0535 from 0539 to 0565; ICC-01/12-01/18-885-Conf-AnxB-Corr, p. 17. The Chamber notes that Mr Al Hassan was surrendered to the Court on 31 March 2018.

<sup>121</sup> Termination Motion, ICC-01/12-01/18-885-Corr-Red3, para. 15; Porterfield Report, MLI-D28-0002-0535 from 0539 to 0565; First Cohen Report, MLI-D28-0002-0500.

<sup>122</sup> Termination Motion, ICC-01/12-01/18-885-Corr-Red3, paras 15-19; First Cohen Report, MLI-D28-0002-0500; Second Cohen Report, MLI-D28-0003-0031; Porterfield Report, MLI-D28-0002-0535. *See also* Crosby Report, MLI-D28-0003-0315 at 0349 and 0351.

<sup>123</sup> Termination Motion, ICC-01/12-01/18-885-Conf-Exp-Corr, paras 20-25.

<sup>124</sup> Termination Motion, ICC-01/12-01/18-885-Conf-Exp-Corr, para. 20.

<sup>125</sup> Termination Motion, ICC-01/12-01/18-885-Conf-Exp-Corr, paras 20-25.

<sup>126</sup> Termination Motion, ICC-01/12-01/18-885-Corr-Red3, para. 26.

77. The Prosecution submits that the Defence experts' reports are critically flawed in that Dr Porterfield lacks the relevant expertise for which she is being relied upon, that the experts use an unreliable methodology to base their conclusions, and that Dr Cohen's and Dr Porterfield's conclusions are contradicted respectively by Prosecution experts Dr [REDACTED], forensic doctor, and Dr [REDACTED], psychiatrist, forensic doctor, hospital practitioner and medical practitioner.<sup>127</sup> It also submits that the accused should not be entitled to give unsworn testimony, without cross examination, through the Defence experts' reports.<sup>128</sup>
78. It further submits that the Defence's contentions regarding alleged torture or CIDT of the accused [REDACTED] are based on a series of misrepresentations of the evidence on record and/or raised for the first time in the Termination Motion.<sup>129</sup> For example, the Prosecution points to contemporaneous medical certificates or reports suggesting that at the time of the accused's transfer from the French Barkhane forces to the Malian authorities in May 2017 he was in good general health,<sup>130</sup> and at the time of his surrender and transfer to the Court on 31 March 2018 that he had no obvious signs of ill treatment<sup>131</sup> and seemed to be in 'relatively good health'.<sup>132</sup>
79. In its reply, the Defence contests the Prosecution experts' critique of Dr Cohen's and Dr Porterfield's analysis as respectively wholly unsound and lacking legal and medical foundation.<sup>133</sup> It further submits that Dr [REDACTED]'s report is 'of highly dubious quality, and lacks an objective scientific foundation', and suggests the expert has a conflict of interest in this case, submitting however that in any event, his conclusions on substance do not

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<sup>127</sup> Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, paras 5, 104, 107, 130-134, 141-143, 146-149, 156-161; ICC-01/12-01/18-982-Conf-AnxA, p. 2; ICC-01/12-01/18-982-Conf-AnxB, p. 2.

<sup>128</sup> Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, para. 116.

<sup>129</sup> Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, paras 96-109.

<sup>130</sup> Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, paras 16, 97, [REDACTED].

<sup>131</sup> Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, para. 27, referring to ICC-01/12-01/18-13-Conf-Exp-AnxVIII-Red (see p. 4, item 4).

<sup>132</sup> Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, para. 28, referring to MLI-D28-0003-1334 from 1334 to 1336, *see also* 1338 to 1339.

<sup>133</sup> Defence Reply, ICC-01/12-01/18-991-Conf, paras 7-8, *see also* 11. *See also* ICC-01/12-01/18-991-Conf-AnxB.



displace the validity of Dr Porterfield's conclusions.<sup>134</sup> It further argues that the Prosecution's interpretation of its own evidence, including the Barkhane medical report, is manifestly unsound.<sup>135</sup>

*ii. Analysis*

80. For the purpose of the present decision only, noting that the key issue for the Chamber's consideration is the issue of attributability of alleged violations to the Prosecution, the Chamber will take the Defence's allegations of torture/CIDT at their highest and will analyse the remainder of the Defence allegations on this basis. This assumption approach is obviously without prejudice to any future determinations by the Chamber on these matters, and also any future determinations related to alleged acts of torture/CIDT [REDACTED]. This approach is also without prejudice to any future findings the Chamber might make as to admissibility of the abovementioned expert reports in a different context.

*2. Alleged conduct and involvement of the Prosecution*

*i. Overview*

81. The Defence's allegations relate to conduct and involvement of the Prosecution in respect of: (i) Mr Al Hassan; [REDACTED];<sup>136</sup> [REDACTED]<sup>137</sup> [REDACTED].
82. The Defence submits that the Prosecution knew or should have known that Mr Al Hassan [REDACTED] had been subjected to torture/CIDT and [REDACTED] vulnerable to the risk of ongoing torture/CIDT.<sup>138</sup>
83. Against this background of alleged knowledge, the Defence makes numerous interrelated and often overlapping allegations. At the core, the Defence submits that the Prosecution's conduct in relation to Mr Al Hassan [REDACTED]

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<sup>134</sup> Defence Reply, ICC-01/12-01/18-991-Conf, para. 9.

<sup>135</sup> Defence Reply, ICC-01/12-01/18-991-Conf, para. 16, *see also* 18.

<sup>136</sup> [REDACTED], Termination Motion, ICC-01/12-01/18-885-Conf-Exp-Corr, para. 73.

<sup>137</sup> [REDACTED].

<sup>138</sup> Termination Motion, ICC-01/12-01/18-885-Conf-Exp-Corr, paras 1, 29, 31-33, 66, 68-69, 71, 75, 79.

amounts to complicity in and/or acquiescence to torture and CIDT, through: (i) alleged direct actions, notably: (a) knowingly interrogating Mr Al Hassan [REDACTED] while [REDACTED] held in illegal, incommunicado detention, and subjected to ongoing forms of torture and/or CIDT<sup>139</sup> and reliance on the DGSE as a source of [REDACTED] evidence and on information obtained from DGSE interviews;<sup>140</sup> and (b) being aware and objectively exploiting the fact that the physical and mental torture inflicted on Mr Al Hassan dominated his mind during interrogations,<sup>141</sup> and exploiting the frailty and dependence [REDACTED];<sup>142</sup> and (ii) alleged omissions, including notably failure to erect safeguards, seek assurances, or take measures to ensure that the Prosecution's reliance on the DGSE did not condone, assist, or otherwise benefit from torture and CIDT committed by the DGSE,<sup>143</sup> and failure to obtain informed consent, and/or to conduct full and effective independent examinations as to fitness to be interviewed, for Mr Al Hassan [REDACTED].<sup>144</sup> In its reply, the Defence alleges that the Prosecution Response reinforces the evidential foundation for terminating the case.<sup>145</sup> It also expands its characterisation of the Prosecution's conduct and involvement, and asserts that it rises to the level of concerted action/collusion.<sup>146</sup>

84. As set out above, the relevant inquiry for the Chamber is whether the violations of fundamental rights allegedly committed against Mr Al Hassan [REDACTED] by national authorities are attributable to the Court, i.e. were the acts of violation of fundamental rights: (i) directly perpetrated by persons associated

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<sup>139</sup> Termination Motion, ICC-01/12-01/18-885-Conf-Exp-Corr, paras 27-32, 65, 67, 71, 73.

<sup>140</sup> Termination Motion, ICC-01/12-01/18-885-Conf-Exp-Corr, paras 27-29, 64-65, 70-72, 74, 76, 78-81, 88.

<sup>141</sup> Termination Motion, ICC-01/12-01/18-885-Conf-Exp-Corr, paras 27(b), 34-42.

<sup>142</sup> Termination Motion, ICC-01/12-01/18-885-Conf-Exp-Corr, paras 77, 86-87, 89.

<sup>143</sup> Termination Motion, ICC-01/12-01/18-885-Conf-Exp-Corr, paras 1, 27-28, 31, 44, 47, 63, 67.

<sup>144</sup> Termination Motion, ICC-01/12-01/18-885-Conf-Exp-Corr, paras 1, 31, 41-43, 48, 69, 76, 82, 84-86.

<sup>145</sup> Defence Reply, ICC-01/12-01/18-991-Conf, paras 12-18.

<sup>146</sup> Defence Reply, ICC-01/12-01/18-991-Conf, para. 19 and generally 20-25.

with the Court; or (ii) perpetrated by third persons in collusion with the Court.

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85. The Chamber will consider the core allegations in turn. The Chamber will then consider whether any of the allegations, individually or cumulatively, reach the standard of an abuse of process warranting the termination of the proceedings.

**First allegation: Complicity/acquiescence/concerted action/collusion through interviewing Mr Al Hassan [REDACTED] held in detention and reliance on the DGSE as a source of [REDACTED] evidence and reliance on information obtained from DGSE interviews**

*i. Submissions*

86. The Defence alleges that the Prosecution's decision to interview Mr Al Hassan while he was detained in illegal, incommunicado detention and subjected to ongoing forms of torture and CIDT was fundamentally incompatible with Articles 54(1)(c) and 55(1) of the Statute, and the duty to avoid complicity in torture and CIDT.<sup>148</sup> The Defence similarly alleges that the Prosecution's decision to interview [REDACTED] was incompatible with the Prosecution's obligation not to condone, acquiesce or rely on a situation amounting to arbitrary detention, torture or CIDT.<sup>149</sup>
87. As part of the former allegation, the Defence notably asserts that the Prosecution exercised 'direct responsibility' for Mr Al Hassan's custody for a period of at least 19 days and thus bears a degree of shared responsibility for Mr Al Hassan's deprivation of liberty.<sup>150</sup> This assertion appears to be based primarily on the fact that the Prosecution made an application under Article 56 of the Statute 'in which it requested the Malian authorities to obtain and secure Mr Al Hassan's presence for the purpose of participating in ICC interviews',

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<sup>147</sup> In this regard, *see also* LRV Response, ICC-01/12-01/18-978-Conf, paras 27-18, submitting that in the case at hand, it does not appear from the information at their disposal that any of the two hypotheses was applicable.

<sup>148</sup> Termination Motion, ICC-01/12-01/18-885-Corr-Red3, paras 27-32.

<sup>149</sup> Termination Motion, ICC-01/12-01/18-885-Conf-Exp-Corr, paras 65, 67, 71, 73.

<sup>150</sup> Termination Motion, ICC-01/12-01/18-885-Corr-Red3, para. 30.

and because the Prosecution then interviewed Mr Al Hassan on 19 days between July 2017 and January 2018.<sup>151</sup>

88. The Defence further argues that the Prosecution's reliance on the DGSE as a source of [REDACTED] evidence and on information obtained from DGSE interviews amounts to complicity in torture and CIDT.<sup>152</sup>
89. The Prosecution responds that the alleged torture or CIDT is in no way attributable to the Prosecution, submitting that: (a) there was no connection between any alleged illegal conduct of the French and/or Malian authorities and the accused's arrest or surrender to the Court, or the process of bringing him to justice for crimes that form the subject-matter of the proceedings before the ICC and he was not arrested or detained by the French or Malian authorities at the ICC's request or behest;<sup>153</sup> (b) the alleged torture and/or CIDT of the accused was not perpetrated by the Prosecution or done at its request;<sup>154</sup> and (c) there was no concerted action or collusion between the Prosecution and any national authorities in the alleged torture or CIDT of the accused.<sup>155</sup>
90. The Prosecution further submits that interviewing the accused whilst he was in detention with the Malian authorities does not give rise to any responsibility from it for his custody at that time.<sup>156</sup>
91. In its reply, the Defence submits that the Prosecution Response reinforces the evidential foundation for terminating the case,<sup>157</sup> referring *inter alia*, to allegations which it says the Prosecution has either expressly or impliedly conceded to, and to assertions of fact which it says are either contradicted by the Prosecution's own evidence or unsupported by evidence.<sup>158</sup> The Defence further asserts that the Prosecution's conduct amounts to a form of

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<sup>151</sup> Termination Motion, ICC-01/12-01/18-885-Corr-Red3, para. 30. The Chamber notes that the interviews took place on [REDACTED].

<sup>152</sup> Termination Motion, ICC-01/12-01/18-885-Conf-Exp-Corr, paras 27-29, 64-65, 70-72, 74, 76, 78-81, 88.

<sup>153</sup> Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, paras 2, 59, 61-68.

<sup>154</sup> Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, paras 2, 59, 69-70.

<sup>155</sup> Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, paras 2, 59, 71-75.

<sup>156</sup> Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, paras 2, 59, 71-75.

<sup>157</sup> Defence Reply, ICC-01/12-01/18-991-Conf, paras 12-18.

<sup>158</sup> Defence Reply, ICC-01/12-01/18-991-Conf, paras 12-14, *see also* 15-18; *see also* [REDACTED].

complicity/concerted action/collusion,<sup>159</sup> submitting, *inter alia*, that the Prosecution's continued reliance on the assistance of the DGSE to execute its agreement to investigate, and, failure 'to investigate or condemn acts of torture perpetrated by the DGSE', 'facilitated their ability to maintain an illegal system of detention and interrogation'.<sup>160</sup>

*ii. Analysis*

92. The Chamber will address first the Defence contention that the Prosecution bears a degree of shared responsibility for Mr Al Hassan's deprivation of liberty. The Chamber is entirely unconvinced by this submission. Nothing in the supporting material, including the investigation note referring to a request for assistance to the Malian authorities to interview [REDACTED],<sup>161</sup> the Article 56 application referred to by the Defence,<sup>162</sup> or the subsequent Article 56 decision of the PTC I Single Judge,<sup>163</sup> in any way indicates that Mr Al Hassan was being detained at the behest of the Prosecution or the Court, at least prior to the notification to the competent Malian authorities of the request for provisional arrest of Mr Al Hassan on 28 March 2018.<sup>164</sup>
93. Contrarily, the information before the Chamber indicates that the accused was arrested and detained by the French Barkhane forces and the Malian authorities separately to the proceedings before the Court.<sup>165</sup> Indeed, the record does not indicate any prior knowledge of the Prosecution or the Court of the accused's arrest.<sup>166</sup> In addition, the Chamber considers it clear from the record that at all times, Mr Al Hassan [REDACTED] detained by the national authorities, and the

<sup>159</sup> Defence Reply, ICC-01/12-01/18-991-Conf, para. 19 and generally 20-25.

<sup>160</sup> Defence Reply, ICC-01/12-01/18-991-Conf, para. 19.

<sup>161</sup> MLI-OTP-0078-1919 at 1919.

<sup>162</sup> [REDACTED].

<sup>163</sup> [REDACTED].

<sup>164</sup> See Confidential redacted version of 'Report of the Registry on the Arrest and Surrender of Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmud' dated 4 April 2018, ICC-01/12-01/18-13-US-Exp, 12 May 2020, ICC-01/12-01/18-13-Conf-Exp-Red4 (confidential *ex parte*, available only to the Registry and Defence), para. 5. See also Mandat d'arrêt à l'encontre d'Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 27 March 2018, ICC-01/12-01/18-2 (reclassified as public on 28 March 2018). The Chamber recalls that Mr Al Hassan was surrendered to the Court and placed in custody in the Court's Detention Centre in The Hague on 31 March 2018: ICC-01/12-01/18-13-Conf-Exp-Red4, paras 13-14.

<sup>165</sup> [REDACTED]. See also Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, para. 63.

<sup>166</sup> MLI-OTP-0078-1919 at 1919. See also Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, para. 63.

conditions of [REDACTED] detention were completely within their competence.<sup>167</sup> The mere fact that the Prosecution was in contact with the Malian authorities or had made requests for assistance pursuant to the Court's cooperation regime to interview [REDACTED] does not suggest that there was any involvement of the Prosecution in the continued detention of Mr Al Hassan [REDACTED].<sup>168</sup>

94. In addition, in the Chamber's view nothing in the fact that the Prosecution made a request and was granted measures under Article 56 of the Statute in any way indicates that the continued detention of the accused by national authorities was at the Court's behest. The Chamber recalls that the purpose of Article 56 of the Statute is for the pre-trial chamber to take measures where there exists a unique opportunity to take testimony or a statement from a witness or to examine collect or test evidence, which may not be available subsequently for the purposes of a trial. In the Article 56 application referred to by the Defence, the measure that was requested was for the Single Judge to appoint counsel pursuant to Article 56(2)(d) to attend the Prosecution's interview of Mr Al Hassan, in order to represent the interests of a future defendant. This was the measure granted by the PTC I Single Judge. Further, as submitted by the Prosecution,<sup>169</sup> at no stage did the Prosecution request the French or the Malian authorities to arrest or detain Mr Al Hassan, prolong his detention, or to question the accused on its behalf. Indeed, the Prosecution notes that [REDACTED].<sup>170</sup>

95. The Chamber will next address the remainder of this allegation. At this juncture, the Chamber recalls that the cooperation regime under the Statute is integral to the effective functioning of the Court. The Chamber reiterates that the mere fact that the Prosecution had an agreement with the Malian authorities to investigate the events of 2012 including by interviewing [REDACTED], was in contact with the Malian authorities, and made requests for assistance pursuant to the

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<sup>167</sup> [REDACTED]. *See also* footnote 173 below. *See also* Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, para. 155.

<sup>168</sup> [REDACTED].

<sup>169</sup> Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, para. 62.

<sup>170</sup> Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, para. 65, [REDACTED].

Court's cooperation regime for interviews and information [REDACTED] does not, in the Chamber's view, establish collusion on the part of the Prosecution in alleged acts of torture/CIDT by French or Malian authorities.

96. In particular, contrary to the Defence's contentions, the Chamber notes that a number of safeguards were taken by the Prosecution, within its competence, in its interviews of Mr Al Hassan [REDACTED]. Notably: (i) at the start of his interviews and consistently throughout, Mr Al Hassan was clearly informed of the separate nature of the ICC proceedings and national proceedings;<sup>171</sup> (ii) the Prosecution systematically asked the accused [REDACTED] whether [REDACTED] had anything to raise regarding [REDACTED] detention;<sup>172</sup> (iii) the Prosecution systematically explained to the accused [REDACTED] that [REDACTED] conditions and place of detention were the responsibility of the national Malian authorities, and explained what was the capacity of the Prosecution in this context, which was to inform relevant authorities of any complaints [REDACTED] might have and to request that any necessary and possible measures be taken to address them;<sup>173</sup> and (iv) Prosecution investigators asked Mr Al Hassan detailed questions about his health, security and conditions of detention [REDACTED],<sup>174</sup> consistently enquired with Mr Al Hassan about his health and willingness to proceed with the interviews, and encouraged him to raise issues.<sup>175</sup> The Prosecution also explained to Mr Al Hassan that if he had any injury because of ill-treatment or if he was sick, the Prosecution would not proceed with an interview and would seek to ensure that he could receive treatment, and explained that if anything abnormal had happened and they were made aware of it, they would intervene and speak to the authorities.<sup>176</sup>
97. Further, the Chamber notes that the materials before it indicate that the Prosecution did take certain steps when Mr Al Hassan [REDACTED]

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<sup>171</sup> [REDACTED].

<sup>172</sup> [REDACTED].

<sup>173</sup> [REDACTED].

<sup>174</sup> [REDACTED].

<sup>175</sup> [REDACTED].

<sup>176</sup> [REDACTED].

complained about conditions of detention and alleged violations of rights by the Malian authorities: (i) the Prosecution indicated that it would inform the relevant Malian authorities, in particular the [REDACTED], so that they could take any appropriate measures;<sup>177</sup> (ii) the Prosecution informed the Malian authorities of the accused's complaints and concerns, and the accused had the occasion to raise his concerns in person with the [REDACTED].<sup>178</sup> In this regard - and recalling again that the conduct of the Prosecution in this context must be assessed in light of its limited powers in its cooperation with public authorities at the national level - the Chamber finds the Defence's assertion that the Prosecution somehow exploited [REDACTED] fears by 'holding out the vague promise that [it] would speak to persons [...], and attempt to intervene with the Malian authorities',<sup>179</sup> and Dr Crosby's conclusion that [REDACTED] 'is given vague statements [...] like dangling a carrot in front of a starving person',<sup>180</sup> a clear mischaracterisation of the record.

98. In addition, the Chamber notes the indications that safeguards were put in place by the Prosecution as required by Article 55(2) of the Statute and Rule 112 of the Rules. Specifically in this regard, the record indicates that the accused [REDACTED] repeatedly informed of the voluntary nature of [REDACTED] interviews and [REDACTED] rights in this context, and notably the right of the accused to remain silent, to have legal assistance and to be questioned in the presence of counsel.<sup>181</sup> In particular, the Chamber notes that Mr Al Hassan confirmed that he understood all the questions of procedure and his rights as explained by the investigators and that he decided to proceed with the interview.<sup>182</sup> The record also shows that Prosecution investigators consistently reminded Mr Al Hassan of his right to consult with his lawyer<sup>183</sup> and that Mr Al Hassan regularly consulted with his counsel throughout the course of the 19 days of interviews by the Prosecution.<sup>184</sup> In addition, the Chamber notes that Mr

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<sup>177</sup> [REDACTED].

<sup>178</sup> [REDACTED].

<sup>179</sup> Termination Motion, ICC-01/12-01/18-885-Conf-Exp-Corr, para. 89.

<sup>180</sup> Crosby Report, MLI-D28-0003-0315 at 0322, [REDACTED].

<sup>181</sup> [REDACTED].

<sup>182</sup> [REDACTED].

<sup>183</sup> [REDACTED].

<sup>184</sup> [REDACTED].



Al Hassan also consistently confirmed that he answered the questions of his own free will,<sup>185</sup> was given the opportunity to exercise his right to clarify or add to his statements,<sup>186</sup> and stated in his last interview session that he was treated very well.<sup>187</sup>

99. Finally, as noted by the Prosecution, the Chamber observes that Dr Crosby and Dr Cohen use the Istanbul Protocol as the relevant benchmark for their assessments of interviews and medical examination conducted by the Prosecution.<sup>188</sup> The Chamber recalls its earlier finding on the relevance of this guideline,<sup>189</sup> and as a result has afforded limited weight to the experts' conclusions in this regard.
100. Noting the Chamber's findings above, including on the safeguards and steps that were taken by the Prosecution in its interviews of Mr Al Hassan [REDACTED], the Chamber considers that the Prosecution's conduct cannot in any way be said to amount to collusion in the alleged actions of the national authorities, or indeed any acquiescence, complicity or concerted action.

**Second allegation: Complicity/acquiescence/concerted action/collusion through the Prosecution exploiting the situation of Mr Al Hassan [REDACTED]**

*i. Submissions*

101. The Defence makes allegations to the effect that the Prosecution exploited the vulnerable situation of Mr Al Hassan [REDACTED] during [REDACTED] interviews, including exploiting the 'groundwork done by the DGSE', re-traumatising and engaging in coercive questioning of Mr Al Hassan, and exploiting the dependence [REDACTED] on the Prosecution.<sup>190</sup> In particular,

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<sup>185</sup> [REDACTED].

<sup>186</sup> [REDACTED].

<sup>187</sup> [REDACTED]. The Chamber finds Dr Porterfield's interpretation of this statement, namely that for Mr Al Hassan 'the absence of abuse has become "good treatment," a reaction rooted in his past torture' to be a mischaracterisation of the record. *See* Porterfield Report, MLI-D28-0002-0535 at 0600.

<sup>188</sup> Crosby Report, MLI-D28-0003-0315, *e.g.*, at 0315, para. 1, 0319, 0320; Second Cohen Report, MLI-D28-0003-0031.

<sup>189</sup> *See* paragraph 65.

<sup>190</sup> Termination Motion, ICC-01/12-01/18-885-Conf-Exp-Corr, paras 27(b), 34-42, 86-87, 89.

the Defence alleges that Mr Al Hassan's right to exercise his privilege against self-incrimination was vitiated by the fact that at the outset of the interviews, the Prosecution emphasised that he was only being interviewed as a witness, and not a suspect/accused.<sup>191</sup>

102. The supporting material for this allegation is primarily the commentary of the Prosecution's actions from the Defence, and/or Defence experts Dr Crosby, Dr Cohen and Dr Porterfield, based on their interpretation of interview transcripts and other materials.
103. The Prosecution responds that rather than being oppressive, all interviews with the accused [REDACTED] were based on voluntary and informed consent and in full conformity with the Court's legal framework, and, in particular, Article 55(2) and Rule 112.<sup>192</sup> The Prosecution also refers to the conclusion of its own expert to the effect that there is no indication that the accused was under pressure to say the contrary of what he was thinking.<sup>193</sup> In addition, the Prosecution challenges the reliability of the Defence experts' reports, questioning the qualification of Dr Porterfield,<sup>194</sup> and submitting that they are based on an incomplete or partial record of the information relevant to the issues at stake.<sup>195</sup> The Prosecution further submits that Dr Porterfield's opinions are contradicted by the conclusion of its own expert Dr [REDACTED],<sup>196</sup> and that her approach and methodology have been criticised by Dr [REDACTED].<sup>197</sup>
104. In its reply, as noted above, the Defence expands its characterisation of the Prosecution's conduct and involvement, and asserts that it rises to the level of concerted action/collusion.<sup>198</sup> Further, as noted above, the Defence criticises the analysis conducted by Dr [REDACTED] and Dr [REDACTED]. In addition, the Defence asserts that no weight should be given to the Prosecution's argument

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<sup>191</sup> Termination Motion, ICC-01/12-01/18-885-Corr-Red3, paras 41-42; *see also* Porterfield Report, MLI-D28-0002-0535 at 0559.

<sup>192</sup> Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, para. 76, *see also generally* 77-91.

<sup>193</sup> Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, paras 87, 108.

<sup>194</sup> Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, paras 131-134.

<sup>195</sup> Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, paras 141-149.

<sup>196</sup> Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, paras 82, 87, 108-109, 161.

<sup>197</sup> Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, paras 107, 160-161.

<sup>198</sup> Defence Reply, ICC-01/12-01/18-991-Conf, para. 19 and generally 20-25.

regarding the partial nature of the record reviewed by the Defence experts, *inter alia*, submitting, that: (i) the Prosecution's own experts have not cited all the material which the Defence identified as being relevant; and (ii) the Defence experts were provided the materials which the Prosecution identified as relevant to the Termination Motion in disclosure litigation, and pointing to late disclosure [REDACTED], and the Prosecution's 'awareness of Defence complaints concerning the resulting impact on the ability of the Defence experts to review all relevant materials'.<sup>199</sup>

*ii. Analysis*

105. First, the Chamber notes that, as stated above, much of the support for this allegation is the commentary of the Prosecution's actions from the Defence, and/or Defence experts Dr Porterfield, Dr Crosby and Dr Cohen, based on their interpretation of interview transcripts and other materials.

106. At the outset the Chamber observes, as noted by the Prosecution, that Dr Porterfield's<sup>200</sup> and Dr Crosby's<sup>201</sup> reports and Dr Cohen's second report<sup>202</sup> appear, on the information available, to be based in part on extracts of transcripts of interviews with the accused [REDACTED], which were selected by the Defence, rather than on the entire record as disclosed to the Defence, which the Chamber considers to impact on their reliability. In particular, this concern applies to Dr Porterfield's analysis which concludes that there was a dynamic of 'learned helplessness' between Mr Al Hassan and Prosecution investigators,<sup>203</sup> and that Mr Al Hassan's reports of mistreatment were

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<sup>199</sup> Defence Reply, ICC-01/12-01/18-991-Conf, para. 10.

<sup>200</sup> See Prosecution Response, ICC-01/12-01/18-982-Conf-Red, paras 141-142; Porterfield Report, MLI-D28-0002-0535 from 0535 to 0536, 0586, and 0611; Defence Response to the Prosecution Request for Disclosure, ICC-01/12-01/18-965-Conf, para. 16(b); ICC-01/12-01/18-915-Conf, para. 20; and MLI-D28-0003-0843.

<sup>201</sup> See Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, para. 144; Crosby Report, MLI-D28-0003-0315 from 0355 to 0358, *see also* 0359 to 0415; Defence Response to the Prosecution Request for Disclosure, ICC-01/12-01/18-965-Conf, para. 15, n. 11 and 25; [REDACTED].

<sup>202</sup> See Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, para. 143; Second Cohen Report MLI-D28-0003-0031 at 0032, para. 1, 0039, para. 34, 0045, para. 82, 0050, para. 129, 0053, para. 152, 0058, para. 193, and 0061, para. 216; Defence Response to the Prosecution Request for Disclosure, ICC-01/12-01/18-965-Conf, para. 19, n. 11 and 25; [REDACTED].

<sup>203</sup> Termination Motion, ICC-01/12-01/18-885-Conf-Exp-Corr, paras 34-39, 45; Porterfield Report, MLI-D28-0002-0535 from 0585 to 0602.

‘disregarded, ignored, or used to further his cooperation’.<sup>204</sup> In relation to the accused’s interviews for example, it appears that not all of the interview transcripts were provided to the experts and there appear to be significant gaps in this respect.<sup>205</sup> Further, based on the information available it appears to the Chamber that the extracts provided to the experts excluded key sections. Such sections include, for example, where Prosecution investigators: (i) explained to Mr Al Hassan at the first day of interviews the context of the interview, including the distinction between ICC and national proceedings, the Prosecution’s obligations and Mr Al Hassan’s rights in this context and Mr Al Hassan confirmed his understanding of those rights;<sup>206</sup> (ii) went through, consistently throughout the interview process, Mr Al Hassan’s rights under Article 55(2) of the Statute;<sup>207</sup> (iii) confirmed that Mr Al Hassan had had the opportunity to confer with his counsel;<sup>208</sup> and (iv) asked him about the conditions of his detention.<sup>209</sup> In the Chamber’s view, these extracts are critical to assessing the dynamic that existed between Mr Al Hassan and the Prosecution during the interview process.

107. In addition, the Chamber finds parts of this commentary to be based on speculation or mischaracterisation of the record. For example, in assessing statements by Prosecution investigators to Mr Al Hassan about their understanding of their duties and obligations in interviewing him, including that their obligation was such that if anything happened that seemed abnormal they would need to intervene and do something, and that their obligations do not allow them to ignore a problem if there is one, Dr Porterfield’s conclusion is that with this exchange the investigator ‘sufficiently shut down Mr. Al Hassan’s entreaties for help’ and ‘makes clear to the prisoner that he will not be protected

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<sup>204</sup> Porterfield Report, MLI-D28-0002-0535 at 0586.

<sup>205</sup> In particular, the Chamber notes that MLI-D28-0003-0843 appears not to include a large number of interview transcripts, including, among others, some of the transcripts of interviews on *e.g.*, [REDACTED].

<sup>206</sup> [REDACTED].

<sup>207</sup> [REDACTED]. The Chamber notes the Defence statement that material concerning Article 55(2) was before the experts (Defence Reply, ICC-01/12-01/18-991-Conf, n. 52) but considers the extracts insufficient in the circumstances.

<sup>208</sup> [REDACTED].

<sup>209</sup> [REDACTED].

from abuse [...]’.<sup>210</sup> Further, Dr Porterfield characterises an exchange between Mr Al Hassan and the Prosecution on 18 January 2018 as part of a dynamic that ‘fostered learned helplessness’ yet neglects to note that after the extract of the interview quoted in the report, the interview continued, including with Mr Al Hassan making a clarification, and the Prosecution investigators reminding him that it was his absolute right not to incriminate himself.<sup>211</sup>

108. Further, in assessing statements by the Prosecution investigators where they sought to emphasise the distinction between the national proceedings and the ICC process, Dr Porterfield’s conclusion is that ‘the message to Mr. Al Hassan is clear: the ICC investigators are not interested in addressing his fears about his safety’ and that by telling Mr Al Hassan that he may be able to raise issues with the domestic prosecutor ‘next time’, the investigators were ‘signalling 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’.<sup>212</sup> In addition, the Chamber also notes that in Dr Porterfield’s analysis of the Article 56 counsel’s intervention on 14 July 2017, she neglects to note that the Article 56 counsel also commented during this intervention that the procedure was being conducted in accordance with the Rome Statue, and that Mr Al Hassan had interviews with his lawyer at the beginning and during the interview.<sup>213</sup> The Chamber recalls also in this regard its conclusions in paragraph 97.

109. In light of these observations the Chamber has afforded little weight to the experts’ reports and conclusion as well as the related commentary of the Defence.

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<sup>210</sup> Porterfield Report, MLI-D28-0002-0535 at 0592 and generally 0590 to 0592. The Chamber similarly considers speculative some of the conclusions in Dr Porterfield’s report, based on excerpts from interview transcripts, such as that the Prosecution’s failure to intervene ‘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’, Porterfield Report, MLI-D28-0002-0535 at 0586. *See also* Termination Motion, ICC-01/12-01/18-885-Corr-Red3, para. 34.

<sup>211</sup> Porterfield Report, MLI-D28-0002-0535 from 0596 to 0598; [REDACTED].

<sup>212</sup> Porterfield Report, MLI-D28-0002-0535 at 0593; [REDACTED]. *See similarly* Dr Cohen’s conclusion that ‘interviewers are in effect contributing to the psychological pressure [REDACTED], [REDACTED] to assume that the interviewers have the power to relieve [REDACTED] conditions’: Second Cohen Report, MLI-D28-0003-0031 at 0032, para. 3.

<sup>213</sup> Porterfield Report, MLI-D28-0002-0535 at 0587; [REDACTED]; *See also* Termination Motion, ICC-01/12-01/18-885-Corr-Red3, para. 36.

110. Further, contrary to the Defence's allegation,<sup>214</sup> the Chamber notes that the record indicates that whereas the Prosecution initially indicated to Mr Al Hassan that he was being interviewed as a witness, it also duly informed him that the interview was conducted in particular pursuant to Article 55(2) of the Statute, considering that there were grounds to believe that he had committed crimes under the Statute.<sup>215</sup> The material before the Chamber indicates that this was raised by the Prosecution investigators consistently throughout subsequent sessions.<sup>216</sup> The Chamber therefore rejects the Defence's assertion that Mr Al Hassan was under 'evident confusion' as to his status and rejects the Defence's submission that the Prosecution exploited that alleged state of confusion.
111. Finally, the Chamber recalls the steps and safeguards taken by the Prosecution as set out in paragraphs 96 to 98, in particular those required by Article 55(2) and Rule 112 of the Rules.
112. In light of all of the above, the Chamber considers that the Prosecution's direct conduct cannot in any way be said to amount to collusion in the alleged actions of the national authorities, or indeed any acquiescence, complicity or concerted action.

**Third allegation: Complicity/acquiescence/concerted action/collusion through omissions, including failure to take safeguards and other measures, and to ascertain voluntariness and fitness**

*i. Submissions*

113. The Defence submits that the Prosecution is complicit in and/or acquiesced to alleged torture and CIDT by national authorities through its alleged omissions, notably failure to erect safeguards, seek assurances, or take measures to ensure that the Prosecution's reliance on the DGSE did not condone, assist, or otherwise benefit from torture and CIDT committed by the DGSE,<sup>217</sup> and failure to obtain informed consent, and/or to conduct full and effective independent

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<sup>214</sup> Termination Motion, ICC-01/12-01/18-885-Corr-Red3, paras 41-42.

<sup>215</sup> [REDACTED].

<sup>216</sup> [REDACTED].

<sup>217</sup> Termination Motion, ICC-01/12-01/18-885-Conf-Exp-Corr, paras 1, 27-28, 31, 44, 47, 63, 67.

examinations as to fitness to be interviewed, for Mr Al Hassan [REDACTED].<sup>218</sup> A range of other omissions are also alleged by the Defence, including failure by the Prosecution to take sufficient steps to create an effective barrier between [REDACTED] constant fear of ongoing torture and abuse, and [REDACTED] interviews with the Prosecution;<sup>219</sup> failure to exercise due diligence as concerns reliance on evidence that the Prosecution knew or should have known was tainted by torture;<sup>220</sup> failure to take steps to ensure that Mr Al Hassan's concerns regarding ongoing threats and mistreatment were addressed in an effective manner;<sup>221</sup> and failure to conduct enquiries regarding and document mistreatment of Mr Al Hassan<sup>222</sup> [REDACTED].<sup>223</sup>

114. The Prosecution submits that its interviews with the accused [REDACTED] were based on voluntary and informed consent and in full conformity with the Statute and the Rules, in particular, Article 55(2) and Rule 112.<sup>224</sup> It stresses that trained and experienced investigators of the OTP routinely interview traumatised and vulnerable victims and witnesses of serious crimes, including rape and torture – as has been done in this case.<sup>225</sup> It further submits that there was no indication that the accused [REDACTED] lacked the ability required to be interviewed.<sup>226</sup>

115. In its reply, as noted above, the Defence expands its characterisation of the Prosecution's conduct and involvement, and asserts that it rises to the level of concerted action/collusion.<sup>227</sup> The Defence further alleges that the Prosecution failed to comply with its 'power and [...] duty' to 'firstly, request Mr Al Hassan's transfer to a detention facility, that would allow full compliance with

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<sup>218</sup> Termination Motion, ICC-01/12-01/18-885-Conf-Exp-Corr, paras 1, 31, 41-43, 48, 69, 76, 82, 84-86.

<sup>219</sup> Termination Motion, ICC-01/12-01/18-885-Conf-Exp-Corr, para. 89.

<sup>220</sup> Termination Motion, ICC-01/12-01/18-885-Conf-Exp-Corr, paras 63.

<sup>221</sup> Termination Motion, ICC-01/12-01/18-885-Corr-Red3, para. 44.

<sup>222</sup> Termination Motion, ICC-01/12-01/18-885-Conf-Exp-Corr, paras 34, 43, 48, 62-63, and generally paras 44-47.

<sup>223</sup> Termination Motion, ICC-01/12-01/18-885-Conf-Exp-Corr, para. 76.

<sup>224</sup> Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, para. 76.

<sup>225</sup> Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, para. 94.

<sup>226</sup> Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, paras 94-109.

<sup>227</sup> Defence Reply, ICC-01/12-01/18-991-Conf, para. 19 and generally 20-25.

his Statutory rights; and secondly, refrain from conducting the interviews until such cooperation was implemented'.<sup>228</sup>

*ii. Analysis*

116. Recalling its findings above, in particular the steps and safeguards taken by the Prosecution as set out in paragraphs 96 to 98, the Chamber considers that none of the alleged omissions of the Prosecution can in any way be said to amount to collusion in the alleged actions of the national authorities, or indeed any acquiescence, complicity or concerted action.

**D. Conclusion on whether the threshold for a stay of proceedings has been met**

117. Having considered the totality of the submissions made in relation to the allegations, and the supporting material, the Chamber considers that it cannot be established that alleged torture and CIDT committed by national authorities can in any way be attributed to the Prosecution. This is the Chamber's conclusion in respect of each allegation individually, and taken together. It is, therefore, unnecessary to address the remaining requirements for abuse of process as identified above. The high threshold required to justify a stay of proceedings has not been met.

118. The Chamber moreover considers that the issues raised by the Defence regarding [REDACTED]<sup>229</sup> can, as the Prosecution suggests,<sup>230</sup> be dealt with during the course of the trial. In relation to the issue of Mr Al Hassan's fitness to stand trial,<sup>231</sup> the Chamber recalls that these matters are being dealt with by the Chamber separately.

**E. Exclusion of evidence and other remedies**

119. As set out above, the Chamber has found the relevant acts not to be attributable to the Prosecution, and therefore that the high threshold required to justify

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<sup>228</sup> Defence Reply, ICC-01/12-01/18-991-Conf, para. 25.

<sup>229</sup> Termination Motion, ICC-01/12-01/18-885-Conf-Exp-Corr, paras 88-90.

<sup>230</sup> Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, paras 110-111.

<sup>231</sup> Termination Motion, ICC-01/12-01/18-885-Corr-Red3, paras 106-107; Defence Reply, ICC-01/12-01/18-991-Conf, para. 6. *See also* Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, paras 112-113.



termination of proceedings has not been met. This does not mean, however, that the alleged treatment of Mr Al Hassan [REDACTED] while detained in Mali does not concern the Chamber or preclude that an alternative remedy may be warranted. Indeed, a consistent theme running through the jurisprudence of this Court is the availability of alternative remedies to address abuse of process allegations and resulting demonstrated prejudice to the defence, short of ordering a stay. Such remedies relevantly include ruling certain testimony and other materials inadmissible or determining that certain evidence be given little to no weight at the end of the trial.<sup>232</sup>

120. In this respect, the Chamber notes that Article 69(7) of the Statute specifically provides for the remedy of inadmissibility where evidence is obtained in breach of internationally recognised human rights and ‘[t]he violation casts substantial doubt on the reliability of the evidence; or (b) [t]he admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings’.
121. The Defence submits that exclusion of evidence would not be an appropriate remedy.<sup>233</sup> The Prosecution opposes this view, and submits in any event that there is no basis for an exclusion of evidence.<sup>234</sup> Contrary to the submissions of the Defence, the Chamber considers that in these circumstances, Article 69(7) presents one of the appropriate statutory mechanisms to adjudicate the issues raised by the Termination Motion.
122. The Chamber recalls that pursuant to the system of evidence adopted in this case, although generally deferring its assessment of admissibility of evidence to its Article 74 judgment, the Chamber will rule upfront on certain issues related to the admissibility of evidence, notably when it is a procedural requirement

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<sup>232</sup> *Kenyatta* 5 December 2013 Decision, ICC-01/09-02/11-868-Red, para. 101; Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the release of Thomas Lubanga Dyilo”, 21 October 2008, ICC-01/04-01/06-1487 (OA12), para. 44; *Lubanga* OA18, ICC-01/04-01/06-2582, para. 59; *Banda* 30 January 2014 Decision, ICC-02/05-03/09-535-Red, paras 57, 59-63.

<sup>233</sup> Termination Motion, ICC-01/12-01/18-885-Conf-Exp-Corr, paras 103-108.

<sup>234</sup> Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, paras 92-93.

under the statutory framework.<sup>235</sup> As noted by the Chamber, rulings on the potential application of exclusionary rules must be rendered separately from, and preliminarily to, the assessment of evidence for its Article 74 judgment.<sup>236</sup> The findings in this decision are therefore without prejudice to any challenges to the admissibility of evidence the Defence may decide to bring pursuant to Article 69(7) of the Statute.

#### **F. Other requests**

123. With reference to the Defence request for a public evidentiary hearing, in advance of the commencement of substantive testimony, to allow for testimony from its four proposed experts and the introduction and authentication of their expert reports, and the related request for guidance Chamber's guidance as to whether Rule 68 applies to applications of this nature,<sup>237</sup> the Chamber recalls that in its 6 July 2020 Decision, it found it 'premature to address that issue at [that] stage prior to the submission of full pleadings on the Motion.'<sup>238</sup> The Chamber further finds it appropriate to note that, for the purpose of the present litigation, the expert reports do not constitute evidence but supporting material for a procedural motion, which do not need to meet the same admissibility criteria as evidence being considered in a trial judgment.<sup>239</sup> As such, the Chamber still does not consider that an evidentiary hearing would be warranted. The Defence request for an evidentiary hearing is therefore rejected. For the same reasons, the Chamber sees no need, in this context and at the present time, for the Prosecution to add the reports of its own expert and related and other material to the LoE.<sup>240</sup> The Prosecution request in this regard is therefore also rejected. However, this is without prejudice for future requests by the parties on this matter.

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<sup>235</sup> Directions on the conduct of proceedings, 6 May 2020, ICC-01/12-01/18-789-AnxA, para. 34 (vii).

<sup>236</sup> Directions on the conduct of proceedings, 6 May 2020, ICC-01/12-01/18-789-AnxA, para. 32.

<sup>237</sup> Termination Motion, ICC-01/12-01/18-885-Corr-Red3, para. 8.

<sup>238</sup> 6 July 2020 Decision, ICC-01/12-01/18- 932-Conf-Corr, para. 32.

<sup>239</sup> For a similar approach, see TC VII in *Bemba et al.* ICC-01/05-01/13-1753, para. 11.

<sup>240</sup> See Prosecution Response, ICC-01/12-01/18-982-Conf-Exp-Corr, paras 162-165 and 167.

**FOR THESE REASONS, THE CHAMBER HEREBY**

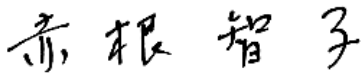
**REJECTS** the Termination Motion; and

**REJECTS** all other requests.

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



**Judge Antoine Kesia-Mbe Mindua**  
**Presiding Judge**



**Judge Tomoko Akane**



**Judge Kimberly Prost**

Dated this 24 August 2020

At The Hague, The Netherlands