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TRIAL CHAMBER X

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

SITUATION IN THE REPUBLIC OF MALI

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

Public

**With Confidential Annexes A to C and Confidential *ex parte* Annex D [Prosecution
and Defence only]**

Public redacted version of “Article 69(7) Application”

Source: **Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud**

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

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1. The ICC ‘embodies our collective commitment to fight impunity for the most serious crimes under international law.’¹ This includes torture and cruel, inhuman or degrading treatment (CIDT) arising from arbitrary detention and detainee interrogations. It is in light of the ICC’s significant progress and effort to serve the interests of justice for survivors that Mr Al Hassan requests the Court to exclude evidence obtained in circumstances that violated key Statutory protections, the internationally recognised prohibition on torture and CIDT, and the ICC’s stated mission to contribute to the prevention of crimes of this nature.

A. The Prosecution bears the burden for excluding the application of Article 69(7) to Prosecution evidence

2. Article 69(7) is *lex specialis* as concerns the reliability and prejudice components of Article 69(4).² Given the mandatory nature of Article 69(7), the Chamber has an independent duty to ensure that its judgment is not tainted through reliance on evidence that falls foul of this provision.³ Once the Defence raises admissibility issues under Article 69(7), the Prosecution must establish that those issues do not preclude the submission of its evidence.⁴ This is particularly true when the evidence is alleged to be the product of coercion.⁵ For suspect interviews, the burden falls squarely on the Prosecution to demonstrate ‘convincingly and beyond a reasonable doubt’ that the procedural requirements were fulfilled, and explain or justify any deficiencies.⁶ The Prosecution must exercise a particularly high standard of diligence to safeguard custodial interviews against issues of undue influence or improper or

¹ [Statement by Ambassador Christoph Heusgen on behalf of 74 States Parties to the Rome Statute in Support of the ICC on the occasion of the ICC Report to the General Assembly](#) (2 November 2020).

² [ICC-01/04-01/06-1981](#), para. 34; [ICC-01/04-01/07-2635](#), para. 39.

³ [ICC-01/04-01/06-1981](#), para. 8. See also [ICC-01/05-01/08-424](#), para. 46, referring to independent power and duty of the Chamber to detect whether there are grounds for determining that evidence is inadmissible (see also para. 49), and [ICC-01/09-01/11-373](#), para. 62 referring to the same.

⁴ [ICC-01/09-01/11-1753](#), paras. 25-26, 29-30; [ICC-01/04-01/07-2635](#), paras 55-65. See also [ICC-01/05-01/08-1386](#), para. 73; [ICC-01/04-01/06-1399-Corr](#), para. 25: ‘If a challenge is made to the admissibility of evidence, it appears logical that the burden rests with the party seeking to introduce the evidence.’

⁵ See *Prosecutor v. Mucic*, ‘[Decision on Zdravko Mucic’s Motion for the Exclusion of Evidence](#)’, 2 Sep 1997, paras 41-42 (*Mucic*); *Prosecutor v. Martić*, [Annex A: Guidelines on the Standards Governing the Admission of Evidence](#), 19 Jan 2006, para. 9; *Prosecutor v. Oric*, ‘[Order Concerning Guidelines on Evidence and the Conduct of Parties During Trial Proceedings](#)’, 21 Oct 2004, Section III, para (x); *Co-Prosecutors v. Samphan & Chea*, [Decision on Evidence Obtained Through Torture](#), para. 36. U.S. courts examining CAT art. 15 have also found: ‘It is the [submitting party’s] burden to demonstrate that a particular statement was not the product of coercion, and that it has other indicia of reliability’: *Salahi v. Obama*, 710 F.Supp.2d1, 6 (D.D.C. Mar. 2, 2010).

⁶ *Prosecutor v. Bagasora*, [Decision on the Prosecutor’s Motion for the Admission of Certain Materials under Rule 89\(c\)](#), para. 17 (*Bagasora*); *Mucic*, para. 42: ‘[T]he Prosecution claiming voluntariness on the part of the Accused/suspect, or absence of oppressive conduct, is required to prove it convincingly and beyond reasonable doubt.’ See also [ICC-01/09-01/11-1753](#), paras 25-26, 29-30 (finding averments of OTP investigators insufficient); *Prosecutor v. Sesay*, [Decision on the Admissibility of Certain Prior Statements of the Accused given to the Prosecution](#), paras 42-43 (‘*Sesay*’).

equivocal waiver of rights; in the absence of proof that this high standard was adhered to, the evidence should be excluded.⁷ The Prosecution cannot discharge this burden in this case.

3. Article 15 of UNCAT obliges States to ‘ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings’.⁸ Compliance requires that ‘all evidence obtained directly or indirectly by torture be strictly prevented from reaching the cognizance of the deciding Judges in all judicial proceedings’.⁹ Article 15 is to be interpreted in favour of the ‘broad exclusion of information obtained through torture, based on fundamental precepts of rights-based ethics.’¹⁰ For this reason, the CAT Committee,¹¹ the UN Human Rights Committee,¹² the Special Rapporteurs on Torture,¹³ and regional human rights courts¹⁴ have underlined that provided the applicant raises a plausible or *prima facie* allegation of torture, the burden rests with the prosecuting authorities to establish that the evidence was not tainted by or secured through torture or coercive conduct.

4. A *prima facie* presumption of torture will arise if the applicant has been held in prolonged incommunicado detention, defined as any period beyond 24 to 48 hours.¹⁵ This presumption applies to interviews conducted with individuals held in arbitrary, secret or incommunicado detention, even if there is no direct evidence or knowledge substantiating the existence of physical abuse.¹⁶ In the absence of an independent and impartial investigation, the *prima facie* presumption stands.¹⁷

B. Mr Al Hassan’s statements were obtained while he was subjected to continuous torture and CIDT

i. Mr Al Hassan’s treatment constituted torture and CIDT under international law

5. Over the course of the year between his apprehension by Operation Barkhane and his transfer to The Hague, Mr Al Hassan was subjected to continuous psychological torture and

⁷ [Sesay](#), paras 6, 38, 43, 46; [Bagosora](#), paras 17, 19. An additional layer of caution applies in relation to detained accomplice witnesses: *Prosecutor v. Nzabonimana*, [Trial Judgment](#), para. 81.

⁸ [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#).

⁹ 1998 CAT Report, Concluding Observations on Germany, [A/53/44](#), para. 193. The Committee made similar observations and recommendations with regard to Georgia and Poland, and Finland; see [CAT/C/SR.279](#), p. 3, para. 15; [CAT/C/SR.250](#), p. 7, para. 18. See also ECtHR, *Jalloh v. Germany*, [54810/00](#), Concurring Opinion of Judge Zupančič, 11 July 2006, p. 43.

¹⁰ *Co-Prosecutors v. Samphan & Chea*, [Decision on Objections to Document Lists Full Reasons](#), para. 43.

¹¹ [Kitti v. Morocco](#), Comm. No. 419/2010, para. 8.8.

¹² [General Comment No. 32 on Article 14](#), para. 41.

¹³ [A/HRC/25/60](#), para. 33; [A/61/259](#), para. 65.

¹⁴ Int.Am.CtHR, [Cabrera García and Montiel Flores v. Mexico](#), Case 12,449, paras 176-177 (*‘Cabrera García’*); ECtHR, *El Haski v. Belgium*, [649/08](#), 25 September 2012, paras 86-88 (*‘El Haski’*).

¹⁵ ACHPR, [Comm. No. 306/05 - Samuel T. Muzerengwa and 110 Others](#), para. 55; [E/CN.4/1999/61](#), p. 182.

¹⁶ [A/63/223](#), paras 33, 45(d).

¹⁷ [REDACTED].

CIDT, interspersed with incidents of physical torture and CIDT.¹⁸ At least three elements of torture, as defined by UNCAT, rise to the level of customary international law: severe pain and suffering, intentional infliction of such pain, and for impermissible purposes.¹⁹ All three of these elements were met and exceeded in Mr Al Hassan's treatment. Following his arrest by Barkhane and transfer to the military base outside of Timbuktu, Mr Al Hassan was kept in a 1m by 0.5m room, waterboarded, threatened with electrocution, and mock executions, interrogated while hooded and subjected to additional techniques in combination (loud music, smoke, heat, being forced to stand in confined space, and beaten when he fell).²⁰ These techniques have long been categorized as torture, potentially requiring aggressive medical attention for physical injuries²¹, as well as causing intense psychological suffering.²² He was subsequently transferred to Gao, where he was arbitrarily detained and threatened with further torture.²³ Although this treatment pre-dates his interactions with the DGSE and ICC Prosecution, these techniques generate long-term psychological consequences, which are relevant to the degree of Mr Al Hassan's vulnerability and learned helplessness, and his stress responses to later interrogations.²⁴

6. Upon transfer to the DGSE, Mr Al Hassan was repeatedly beaten, to such a degree of severity that he lost consciousness.²⁵ During concurrent interrogations, Mr Al Hassan was told that his family [REDACTED] had been killed, [REDACTED], and was threatened with death himself, *should he fail to answer questions to the satisfaction of his DGSE torturers*.²⁶

¹⁸ [MLI-D28-0002-0500](#) at 0503-0509; [MLI-D28-0002-0535](#) at 0540-0566.

¹⁹ UNCAT, art. 1; *Prosecutor v. Kunarac*, [IT 96 23 & IT 96 23/1-A](#) (ICTY) 12 June 2002. See also *Price v. Socialist People's Libyan Arab Jamahariya*, [294 F. 3d 82](#) (D.C. Cir. 2002) ('Price'); *Warmbier v. Democratic People's Republic of Korea*, [356 F. Supp. 3d 40, 46](#) (D.D.C. 2018) ('To establish torture, the plaintiffs must show that the conduct was sufficiently severe and purposeful'); *Akkoç v Turkey* (2002) 34 EHRR 51 (Section I, ECHR) [115]; *Gäfgen v Germany*, Grand Chamber Judgment, [22978/05](#), 1 June 2010.

²⁰ [MLI-D28-0002-0535](#) at 0539-0542; [MLI-D28-0002-0500](#) at 0503-0504, paras 12-16.

²¹ Evan Wallach, *Drop By Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM.J. TRANSAT'L L. 468 (2007). See, e.g., HRC, *Arhuacos v. Colombia*, [CCPR/C/60/D/612/1995](#), 29 July 1997) [8.4]-[8.5]; *Estrella v. Uruguay*, [Comm. No. 74/1980](#), 29 March 1983, [1.6] and [10].

²² Scientific American, '[Does Waterboarding Have Long-Term Physical Effects?](#)' 1 May, 2009 (Waterboarding releases the 'stress hormones called catecholamines that can cause heart rate and blood pressure to soar . . . it is a profoundly traumatic event.')

²³ [MLI-D28-0002-0535](#) at 0543-0545; [MLI-D28-0002-0500](#) at 0504-0505, paras 17-19.

²⁴ [MLI-D28-0003-0315](#) at 0342, 0350; L. Neergard, [Torture can affect the brain, leaving long-term psychological scars](#), 23 December 2014.

²⁵ [MLI-D28-0002-0535](#) at 0546-0554; [MLI-D28-0002-0500](#) at 0505-0508, paras 20-33.

²⁶ [MLI-D28-0002-0535](#) at 0550, 0551, 0553-0554, 0555, 0580, 0586; [MLI-D28-0002-0500](#) at 0510, para 41; 0523, para 98; [MLI-D28-0003-0031](#) at 0036, para 4. See [A/HRC/43/49](#), para. 46: 'Withholding or misrepresenting information about the fate of the victims or their loved ones, mock executions, witnessing the real or purported killing or torture of others', as being potential forms of psychological torture. See also [Gäfgen v Germany](#), para. 108: 'a threat of torture can amount to torture, as the nature of torture covers both physical pain and mental suffering. In particular, the fear of physical torture may itself constitute mental torture, and this may produce continuing effects.'

Mr Al Hassan [REDACTED] endured the highly painful torture technique known as *falaka*.²⁷ He was subjected to stress positions – either being forced to stand for hours or end or by being suspended by his wrists from a metal rod for prolonged periods of time.²⁸ On several occasions, Mr Al Hassan was subjected to death threats and mock executions.²⁹ He was handcuffed, day and night, for 4 months and 20 days,³⁰ and on several occasions, forced to relieve himself in his clothing or in buckets.³¹ Apart from techniques like [REDACTED] and mock executions that ‘shock the conscience,’³² the use of stress positions including ‘tying up or hanging in positions that cause extreme pain,’ and ‘sustained systematic beatings’ is categorised as torture or CIDT.³³

7. Throughout, Mr Al Hassan was detained incommunicado – in conditions amounting to arbitrary and enforced disappearance.³⁴ Witness D28-8,[REDACTED], affirmed that ‘*il n’y a aucun rapport entre la Sécurité d’Etat et la Justice au sens du code procédure pénale*’ ; as a result: ‘*tout interrogatoire d’un détenu de la Sécurité d’Etat, même si ce détenu est provisoirement transféré à un établissement judiciaire, serait un interrogatoire non conforme à la loi.*’³⁵ 72 days after Mr Al Hassan’s apprehension, the [REDACTED] conceded that he was unaware of Mr Al Hassan’s arrest and detention.³⁶ The Prosecution confirmed in its March 2018 arrest warrant application that there were no judicial proceedings against Mr Al Hassan – nearly one year into his detention.³⁷ Mr Al Hassan himself continuously affirmed that he had no access to the outside world and was held outside the judicial system.³⁸ Mr Al Hassan’s unlawful and incommunicado detention at the

²⁷ [MLI-D28-0002-0535](#) at 0549; [MLI-D28-0002-0500](#) at 0505-0506, paras 21-23; 0507, para 28.

²⁸ [MLI-D28-0002-0535](#) at 0549; [MLI-D28-0002-0500](#) at 0505, para 20; 0506, para. 23.

²⁹ [MLI-D28-0002-0535](#) at 0550; [MLI-D28-0002-0500](#) at 0508, para 32.

³⁰ [MLI-D28-0002-0535](#) at 0555; [MLI-D28-0002-0500](#) at 0506, para. 24; [MLI-D28-0003-0031](#) at 0036, para. 6.

³¹ [MLI-D28-0002-0535](#) at 0548, 0555; [MLI-D28-0002-0500](#) at 0509, para. 34; *I.I. v. Bulgarie*, [44082/98](#), para. 75: ‘subjecting a detainee to the humiliation of having to relieve himself in a bucket in the presence of his cellmates and of being present while the same bucket was being used by them’ can equate to CIDT.

³² *Whitley v. Albers*, 475 U.S. 312, 326-27 (1986) (citing *Rochin v. California*, 342 U.S. 165, 172, 173 (1952)).

³³ *Price*, 92-93; *Fritz v. Islamic Republic of Iran*, [320 F. Supp. 3d 48](#), 80 (D.D.C. 2018); *Allan v. Islamic Republic of Iran*, [2019 U.S. Dist. LEXIS 49541](#) (D.D.C. Mar. 25, 2019); *Ramishvili and Kokhraidze v Georgia*, [1704/06](#), para 87 (finding that lack of sufficient personal space, insufficient sanitary conditions and insufficient food provision by the State for a four-day period amounted to inhumane and degrading treatment).

³⁴ WGAD, [A/HRC/WGAD/2017/21](#), para. 34: ‘secret or incommunicado detention may put individuals under pressure to confess to a crime and infringe their right not to be compelled to testify against oneself, contrary to article 11 of the Universal Declaration of Human Rights.’

³⁵ [MLI-D28-0003-0675](#) at 0676-0677, at 0678.

³⁶ [MLI-OTP-0078-1919](#) at 1920.

³⁷ ICC-01/12-01/18-1-Conf-Exp-Red, para. 300, which acknowledged the absence of any judicial proceedings against him, and para 311, where the Prosecution acknowledged that it was unaware of any factual or legal basis for his detention at the DGSE.

³⁸ See e.g. lack of access to the outside world: [MLI-OTP-0051-0376](#) at 0381, 0382; [MLI-OTP-0051-0798](#) at 0805, 0806 ; [MLI-OTP-0060-1298](#) at 1299; outside the Malian legal system: [MLI-OTP-0051-0798](#) at 0806.

DGSE amounts to enforced disappearance. The ongoing psychological and physical effects of torture³⁹ (including enforced disappearance and prolonged incommunicado detention)⁴⁰ and the substantive overlap between the DGSE and Prosecution questions, irrevocably tainted Mr Al Hassan's statements to the Prosecution.⁴¹

ii. Mr Al Hassan's torture is supported by consistent self-reports, expert analysis, witnesses and credible public reports

8. Mr Al Hassan's accounts are corroborated by multiple independent sources, including the Panel of Experts, which observed that: they had 'no reason not to believe Mr Al Hassan's account of [claims of torture and CIDT], which has been fairly consistent over time',⁴² they found the 'account given in the expert reports to be credible and consistent with observations made during the POE's assessment of Mr Al-Hassan',⁴³ and, Mr Al Hassan 'did not appear to be prone to exaggeration of distress or fabrication of symptoms'.⁴⁴

9. Mr Al Hassan repeatedly reported to the ICC Prosecution that he had been subjected to physical and psychological torture during DGSE interrogations,⁴⁵ and ongoing torture, arising from beatings, threats, the modalities employed in connection with ongoing interrogations (handcuffing, blind-folding) and the incommunicado and degrading nature of the conditions of detention.⁴⁶ Mr Al Hassan attempted to report his mistreatment, through his Counsel, at his initial appearance,⁴⁷ and described the circumstances of his torture and abuse

³⁹ [MLI-D28-0003-0315](#) at 0350: 'Interrogation is not an event, it is a process. There is no such thing as a "clean team," once an individual has suffered torture. One interrogator cannot be separated from another once torture has occurred and biopsychological damage has been inflicted- the same biological responses will be triggered by subsequent groups of interrogators, resulting in the same psychological distress and fear.'

⁴⁰ Prolonged incommunicado detention and enforced disappearance satisfy the threshold for psychological torture and have been held to constitute continuous forms of CIDT and torture, see: [El-Megreisi v. Libyan Arab Jamahiriya](#), Communication No. 440/1990, para. 5.4 ('by being subjected to prolonged incommunicado detention in an unknown location, is the victim of torture and cruel and inhuman treatment'); CAT, [Comm. No. 456/2011](#); [El-Masri v. Former Yugoslav Republic of Macedonia](#), paras. 202, 211; [Velasquez Rodriguez v. Honduras](#), paras. 156, 187; [Celis Laureano v. Peru](#), Comm. No. 540/1993; [Katombe L. Tshishimbi c/ Zaïre](#), Comm. No. 542/1993, para. 5; [A/HRC/13/42](#), pp. 2-3. For characterisation as violations of a continuous nature: [Zitha v. Mozambique](#), Comm. No. 361/2008, para. 77; [General comment on enforced disappearance as a continuous crime](#), pp. 10-12.

⁴¹ The Prosecution interviewed and investigated Mr Al Hassan in relation to the same subjects as the DGSE and Barkhane: ICC-01/12-01/18-936-Conf, paras 7-12; ICC-01/12-01/18-991-Conf, para. 16 and fn. 117; ICC01/12-01/18-1008-Conf, para. 11.

⁴² ICC-01/12-01/18-1197-Conf-Anx, para. 302 ('POE Report').

⁴³ POE Report, fn.2.

⁴⁴ POE Report, para. 129.

⁴⁵ [MLI-OTP-0069-1728](#) at 1735, 1740-1742.

⁴⁶ [MLI-OTP-0051-0798](#) at 0806-0807 (psychological torture); [MLI-OTP-0051-0798](#) at 0805 (no contact); [MLI-OTP-0069-1795](#) at 1796 (denied food for several days); [MLI-OTP-0060-1374](#) at 1378 (beaten by guards); [MLI-OTP-0060-1705](#) at 1721-1722 (psychological distress caused by conditions of detention); [MLI-OTP-0060-1662](#) at 1664-1665 (psychological depression, fever and pain); [MLI-OTP-0060-1729](#) at 1732-1733 (deteriorating physical situation); [MLI-OTP-0062-0969](#) at 0970 (physical tremors).

⁴⁷ ICC-01/12-01/18-T-001-CONF-ENG, p. 8, ln. 19 to p. 9, ln. 1.

to detention unit medical personnel, from 2018 onwards.⁴⁸ Expert analysis corroborates Mr Al Hassan's accounts. Full appraisal of Mr Al Hassan's physical and mental states as a result of his ill treatment were conducted by Dr Cohen – a forensic physician with considerable expertise in examining torture victims,⁴⁹ and Dr Porterfield – a clinical psychologist specialising in the analysis of mental disorders arising from war trauma and torture.⁵⁰ Their reports offer highly credible and convincing evidence that Mr Al Hassan endured severe pain and suffering in Barkhane and DGSE custody that has resulted in long-lasting physical and psychological damage.⁵¹ In light of the Trial Chamber's indication that it would consider the experts' reports admissibility,⁵² the Defence requests the Trial Chamber to admit the reports into evidence and to convene a public evidentiary hearing to adduce and authenticate the experts' testimony.⁵³ Their key findings on the fact of torture and CIDT are as follows:

10. According to Dr Cohen's analysis, lesions and other physical injuries to Mr Al Hassan's body are 'highly consistent with the torture described'.⁵⁴ Dr Cohen has further determined that there is no indication of fabrication of the physical findings, based on the fact that Mr Al Hassan 'readily and carefully specified 19 lesions as either due to non-torture causes or he could not recall their cause- there was no exaggeration or embellishment of his account'.⁵⁵ Some of the injuries appear to be of a permanent or long lasting character – including pain in his feet when he walks due to *falaka*, pain in the left side of his jaw, chronic dizziness and exhaustion.⁵⁶ He also appeared to suffer from loss of memory.⁵⁷ Dr Cohen further opined that the information conveyed by Mr Al Hassan during his interviews with the

⁴⁸ [MLI-D28-0003-1375](#) at 1375; [MLI-D28-0003-1391](#) at 1391-1392.

⁴⁹ [MLI-D28-0002-0500](#) at 0526-0529; [MLI-D28-0003-0031](#).

⁵⁰ [MLI-D28-0002-0535](#) at 0536-0537.

⁵¹ The experts were instructed to identify and assess the physical and psychological sequelae of torture/CIDT, related to Article 55(1). The fact that the experts did not review each page related to the application of Article 55(2) does not detract from findings concerning indicia that Mr Al Hassan was experiencing psychological or physiological symptoms of torture/CIDT. Any indicia of torture/CIDT taints the process as a whole.

⁵² ICC-01/12-01/18-1009-Conf, para. 80.

⁵³ *Bati v. Turkey*, [33097/96](#), [57834/00](#), para. 137: when torture allegations are raised, 'there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory'.

⁵⁴ [MLI-D28-0002-0500](#) at 0523, para 99: One lesion highly consistent with the jaw injury; one lesion highly consistent with being beaten with a stick on the head; one lesion highly consistent with being beaten with a cable on the abdomen; two lesions consistent with being beaten; three lesions highly consistent with abuse of handcuffs; one lesion highly consistent with being beaten on the foot; one finding highly consistent with being kicked in the abdomen; one lesion highly consistent with being beaten on the arm; one finding highly consistent with *falaka*.

⁵⁵ [MLI-D28-0002-0500](#) at 0521, para. 96.

⁵⁶ [MLI-D28-0002-0500](#) at 0506-0507, para. 21; 0512, para. 49; 0513, para. 54. [MLI-D28-0003-1410](#); [MLI-D28-0003-2186](#) at 2186, [MLI-D28-0003-1412](#) at 1418; [MLI-D28-0003-1375](#) at 1375, [MLI-D28-0003-2186](#) at 2187.

⁵⁷ [MLI-D28-0002-0500](#) at 0524-0525, para 105; [MLI-D28-0003-1375](#) at 1375; [MLI-D28-0003-1378](#); [MLI-D28-0003-1453](#); [MLI-D28-0003-1409](#).

ICC Prosecution, included allegations of treatment amounting to torture and detention conditions amounting, at a minimum, to CIDT.⁵⁸

11. Dr Cohen's analysis is corroborated by Dr Porterfield, who concluded that his 'symptoms (...) are highly consistent with what one would expect to find in an individual with his history of severe torture and harsh imprisonment conditions'.⁵⁹ Dr Crosby, a specialist in torture and war trauma,⁶⁰ agreed with Dr Porterfield's conclusions that Mr Al Hassan displayed torture *sequelae* during the course of his interviews.⁶¹ Dr Brock Chisholm, the clinical lead of the UK Psychological Trauma Society,⁶² opined that the 'evidence in the POE report, medical records and Dr Porterfield's report are consistent with PTSD in response to torture in Mali'.⁶³

12. Several [REDACTED] corroborate Mr Al Hassan's account. An analysis of [REDACTED] reveal 'multiple elements that can amount to cruel inhuman or degrading treatment or even, depending on intensity and severity, to torture [...] in all cases'.⁶⁴ [REDACTED] report severe overcrowding in cells, poor toilet facilities, deprivation of water as a punishment, inadequate ventilation causing excessive heat, lack of daylight, denial of medical care and inadequate food (leading to dehydration and malnutrition).⁶⁵ Psychological abuse included threats, sleep disturbance, humiliation, being forced to witness abuse of others, deprivation of means to worship, barring contact with family, and indefinite detention.⁶⁶ [REDACTED] confirmed the prolonged use of restraints, [REDACTED] hooding or blindfolding, [REDACTED] prolonged use of solitary confinement, [REDACTED] beatings and one reports use of electric shock:⁶⁷

⁵⁸ [MLI-D28-0003-0031](#) at 0037-0038, paras 28-33. While scarring might preclude the exact dating of the lesions and other injuries documented by Dr Cohen, the indication that many of these are 'highly consistent' with the alleged mistreatment ([MLI-D28-0002-0500](#) at 0513-0516, 0518, 0520-0522; [MLI-D28-0003-2059](#) at 2060-2065), satisfies both the burden and the level of proof of the instant evidentiary application. See *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*, [Comm. No. 334/06](#), paras 166-169, where the ACHPR affirmed that the submission of victim accounts concerning detention abuse and forensic reports concerning bruising satisfied the threshold, notwithstanding claims of Government experts that due to time lapse, the manner, timing and cause of the injuries could not be established: *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*, [Comm. No. 334/06](#), paras 166-169.

⁵⁹ [MLI-D28-0002-0535](#) at 0582.

⁶⁰ [MLI-D28-0003-0315](#) at 0316-0317; [MLI-D28-0003-0546](#).

⁶¹ [MLI-D28-0003-0315](#) at 0349.

⁶² [MLI-D28-0003-2272](#) at 2294.

⁶³ [MLI-D28-0003-2272](#) at 2278.

⁶⁴ [MLI-D28-0003-0031](#) at 0032, para. 2.

⁶⁵ [MLI-D28-0003-0031](#) at 0032-0033, paras 5-6.

⁶⁶ [MLI-D28-0003-0031](#) at 0033, paras 7-8.

⁶⁷ [MLI-D28-0003-0031](#) at 0033, paras 9-10; 0040-0041, paras 46 and 50; 0043, para. 78; 0047, paras 103, 108; 0049, para. 125; 0056-0057, para. 189.

- a. [REDACTED] arrested and transferred to the DGSE [REDACTED] detained at the DGSE without charge, judicial supervision or contact with the outside world.⁶⁸ On the first day of arrest [REDACTED] had water poured on his face during questioning (while handcuffed), and was denied food and water.⁶⁹ On arrival at the DGSE, he was severely beaten, losing consciousness for approximately two hours. [REDACTED] alongside 15 to 23 other inmates, and described the insufficiency of water and food for the inmates, and testified to the coercive environment: he felt powerless in the hands of the Malian authorities.⁷⁰
- b. [REDACTED] confirms that the prisoners' demands were met with 'humiliations, beatings and threats'.⁷¹ [REDACTED] that he could be tortured at any time, and was in 'very very difficult' living conditions.⁷²
- c. [REDACTED] physical violence and humiliation experienced by DGSE detainees,⁷³ and the pervading fear suffered.⁷⁴ [REDACTED] he had been interrogated blindfolded almost every day at the DGSE,⁷⁵ and that all new arrivals were handcuffed 24/7 for the first two to three months.⁷⁶

13. [REDACTED] reveal the prevalence of torture and CIDT in Barkhane and DGSE custody. This includes: waterboarding, electrocution and incessant interrogations by Barkhane,⁷⁷ shackling, hooding, extreme violence and electrocution at the DGSE,⁷⁸ prolonged incommunicado detention, 24/7 handcuffing and psychological abuse,⁷⁹ [REDACTED] and deaths in custody.⁸⁰ As with Mr Al Hassan, detention at the DGSE often results in severe mental and physical degradation.⁸¹

14. The Malian authorities' torture of detainees has been widely reported by international organizations.⁸² Open-source reports refer to Barkhane and FAMA employing excessive force and torture in 2016 and 2017, including during the period of Mr Al Hassan's arrest and

⁶⁸ [REDACTED].

⁶⁹ [MLI-D28-0003-2049](#)-R01 at 2052, para 20.

⁷⁰ [REDACTED].

⁷¹ [REDACTED].

⁷² [REDACTED].

⁷³ [REDACTED].

⁷⁴ [REDACTED].

⁷⁵ [REDACTED].

⁷⁶ [REDACTED].

⁷⁷ [REDACTED]; [MLI-D28-0003-0668](#)-R01 at 0669; [MLI-D28-0003-1203-R01](#) at 1215-1216, 1239-1240.

⁷⁸ [MLI-D28-0003-0417](#)-R01 at 0418.

⁷⁹ [MLI-D28-0003-0668](#)-R01 at 0670.

⁸⁰ [MLI-D28-0003-0017](#) at 0018-0019.

⁸¹ [MLI-D28-0003-0673](#)-R01 at 0674.

⁸² [MLI-D28-0003-0074](#) at 0089-0092; [MLI-D28-0003-0571](#) at 0571-0573, 0575-0580.

detention.⁸³ UN and NGO Reports attest to the illegal detention regime of the DGSE,⁸⁴ describing instances of torture, murder, and severe mistreatment of detainees, particularly those suspected of terrorism offences,⁸⁵ and the lack of external protection and oversight, due to the fact that independent monitors had no access to the DGSE.⁸⁶ A MINUSMA report, obtained by the Prosecution in February 2018 – as Mr Al Hassan’s interviews were ongoing – detailed detainee torture by Malian authorities between January 2016 and June 2017.⁸⁷

C. Mr Al Hassan’s ICC interviews should be excluded due to violations of the Statute and/or internationally recognised human rights law

15. Violations of the Statute or internationally recognised human rights are alternative bases for invoking Article 69(7); both prongs are fulfilled in the current case. Whereas the ICC bears no responsibility for investigative steps that were neither conducted nor requested by the ICC Prosecution, the ICC has a positive duty to ensure that its own investigations do not give effect to or rely on actions and circumstances involving torture or CIDT.⁸⁸ Article 55(1)(b) of the Rome Statute sets out the broad stricture that individuals may not be ‘subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment’, ‘in respect of an investigation under this Statute.’ The objective is to protect the subject of an ICC investigation: the prohibition thus applies irrespective of the identity or affiliation of the person/entity committing the torture/CIDT against the subject.⁸⁹ This obligation is bolstered by Article 4, which imbues

⁸³ [MLI-D28-0003-0571](#) at 0571-0573, 0575-0580; [MLI-D28-0003-0260](#) at 0269 (referring to use of waterboarding in relation to persons suspected of aiding Islamists); [MLI-OTP-0046-8902](#) at 8912, para. 46.

⁸⁴ MLI-OTP-0051-1305 at 1319, para 34: ‘*La Direction générale de la Sécurité d’Etat, selon le droit malien, n’est pas considérée comme une autorité disposant du pouvoir de priver un individu de sa liberté quelles que soient les circonstances. Autrement dit, toute détention par la Sécurité d’Etat est illégale*’. See also 1336-1337, paras. 102-106; [MLI-D28-0003-0190](#) at 0193; [MLI-OTP-0046-8902](#) at 8916, paras. 70-7; [MLI-D28-0003-1203-R01](#) at 1213-1218, 1239-1240.

⁸⁵ [MLI-OTP-0051-1305](#) at 1336, paras. 99-100; [MLI-OTP-0033-4336](#) at 4349-4351, paras. 32, 37; [MLI-D28-0003-0277](#) at 0283; [MLI-D28-0003-0074](#) at 0090; [MLI-D28-0003-0304](#); [MLI-D28-0003-0298](#) at 299-301; [MLI-D28-0003-0650](#) at 0650, 651, [MLI-D28-0003-0185](#); [MLI-D28-0003-0069](#), [MLI-D28-0003-0618](#) at 0618, 0619, 0621-0623; [MLI-D28-0003-0588](#) at 0588, 0591-0592; [MLI-D28-0003-0154](#) at 0157; [MLI-D28-0003-0185](#) at 0188-0189; [MLI-D28-0003-0571](#); [MLI-D28-0003-0195](#); [MLI-D28-0003-0310](#).

⁸⁶ [MLI-OTP-0046-8902](#) at 8916, para 71; [MLI-D28-0003-0190](#) at 0193; [MLI-D28-0003-1203-R01](#) at 1213-1218, 1239-1240.

⁸⁷ [MLI-OTP-0051-1305](#) at 1332.

⁸⁸ *Co-Prosecutors v. Samphan & Chea*, [Decision on Objections to Document Lists Full Reasons](#), para. 34; ECJ, [Case C-239/12 P](#), para. 26, and generally, ICJ, [Reparations for Injuries Suffered in the Service of the United Nations](#), at 179, 182 (discussing ‘rights and duties’ of organisations with international legal personality).

⁸⁹ See [El Haski](#), para. 87: ‘such treatment may be imputed to the authorities of the forum State or to those of a third State and the victim may be the actual defendant or a third party.’ [CAT/C/CR/33/3](#), para. 4; [A/HRC/25/60](#), para. 27: ‘the exclusionary rule applies no matter where in the world the torture was perpetrated and even if the State seeking to rely on the information had no previous involvement in or connection to the acts of torture.’

the ICC with international legal personality, including ‘active and passive international responsibility’ for upholding peremptory legal norms.⁹⁰

16. Article 69(7)’s drafting history reflects the understanding that the exclusion threshold would be met by serious violations of the accused’s rights⁹¹ or violations of UNCAT.⁹² Exclusion can also be triggered by the human-rights violations, occurring outside the framework of the Statute and independently of the Court.⁹³ Trial Chamber II thus found that the exclusion threshold was met in connection with statements taken by domestic authorities from Katanga, while held in arbitrary detention;⁹⁴ the presence of a lawyer was insufficient to cure the coercive effects of the arbitrary detention.⁹⁵ The same position has been adopted by the ICTY, and international and regional human rights systems.⁹⁶ The Special Rapporteur on Human Rights and Counterterrorism has also underscored that:⁹⁷

If there are doubts about the voluntariness of statements by the accused or witnesses, for example when no information about the circumstances is provided or if the person is arbitrarily or secretly detained, a statement should be excluded irrespective of direct evidence or knowledge of physical abuse.

D. There was no attenuation between Mr Al Hassan’s torture and his statements to the Prosecution, which were involuntary

17. Notwithstanding the mandatory terms of exclusion where torture or CIDT are implicated, the Prosecution relies upon an attenuation argument: because Mr Al Hassan was separated by personnel and location from his torture and stated his acquiescence to the interviews, the Prosecution considers his statements to be voluntary. There is no consistent practice accepting attenuation from acts of torture/CIDT;⁹⁸ even if this possibility were to be accepted, the Prosecution’s argument fails the attenuation analysis in every respect.

⁹⁰ Luder, Sascha Rolf, ‘[The Legal Nature of the International Criminal Court and The Emergence of Supranational Elements in International Criminal Justice](#),’ International Review of the Red Cross (March 2002).

⁹¹ [Draft Statute for an International Criminal Court with commentaries \(1994\)](#), pp. 58-59, Draft Proposal Netherlands-Australia (violations of due process as a subcategory of integrity).

⁹² ‘The proposed revision would replace this language with the more explicit phrase “methods which constitute a serious violation of internationally protected human rights or which otherwise cast substantial doubt on its reliability.” This language, which refers to the rights enumerated in widely ratified International Treaties, such as the Torture Convention, provides a uniform standard for determining the admissibility of evidence before the Court’: [Alternative to the ILC-Draft, prepared by a Committee of Experts](#), July 1995, pp. 47-48.

⁹³ [ICC-01/04-01/07-2635](#), para. 59.

⁹⁴ [ICC-01/04-01/07-2635](#), paras 63-65.

⁹⁵ [ICC-01/04-01/07-2635](#), para. 63.

⁹⁶ *Prosecutor v. Halilovic*, ‘[Decision on Interlocutory Appeal Concerning Admission of Record Of Interview of the Accused from the Bar Table](#)’, paras.61-62; *Cabrera Garcia*, para. 155; Part 4(C)(i) of the [Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa](#); Section N(6)(d)(i) of the [Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa](#) (2003); WGAD, [A/HRC/WGAD/2017/21](#), para. 34; [A/HRC/WGAD/2015](#), para. 61.

⁹⁷ [A/61/259](#), para. 47, emphases added.

⁹⁸ The IACtHR takes the position that exclusion applies to ‘all other pieces of evidence subsequently obtained through legal means, but which originated in an act of torture’, [A/HRC/25/60](#) (10 April 2014) at para. 29. Cf. ECtHR *Gäfgen v Germany*, para. 174.

18. The test for whether a statement is voluntary ‘is whether the statement was a ‘product of an essentially free and unconstrained choice by its maker’.⁹⁹ This requires careful evaluation of ‘the totality of the circumstances’ of the interrogation’,¹⁰⁰ including, but ‘not limited to the defendant’s age and education, the length of the detention, whether the defendant was advised of his rights, and the nature of the questioning,’¹⁰¹ as well as ‘use of physical punishment such as the deprivation of food or sleep.’¹⁰² The inquiry focused on whether ‘there has been a “break in the stream of events . . . sufficient to insulate the statement from the effect of all that went before.”’¹⁰³ ‘All that went before’ includes the ‘continuing effect of the prior coercive techniques on the voluntariness of any subsequent confession,’¹⁰⁴ and conditions of confinement such as isolation or inhuman living conditions.¹⁰⁵ The US Supreme Court thus underlined in *United States v. Karake* that:¹⁰⁶

The critical question with respect to attenuation is not the length of time between a previously coerced confession and the present confession, it is the length of time between the removal of the coercive circumstances and the present confession. (...)Where, as here, the coercion was a product of both discrete beatings, as well as the general conditions of confinement, it is impossible for the Court to conclude that there was any meaningful relief from those conditions prior to the interrogations by American investigators.

19. The use of torture and CIDT in interrogations creates a psychological situation - termed ‘learned helplessness’ or ‘Pavlovian classical conditioning’ by a CIA torture programme architect¹⁰⁷ - designed to extract information in a non-voluntary manner. The will of the detainee is permanently replaced by that of the questioners, as the techniques create ‘anxiety or fear in the detainee while removing any form of control from the person to create a state of total helplessness’.¹⁰⁸ In this case, the psychological control established and maintained by the DGSE generated prolonged and extreme stress, impacting Mr Al Hassan’s future responses and cognitive capacities.¹⁰⁹ These effects did not dissipate with Mr Al Hassan’s occasional transfer from his DGSE cell to a room with Prosecution personnel: it

⁹⁹ [United States v. Murdock](#), 667 F. 3d 1302, 1305 (D.C. Cir. 2012) (*Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)).

¹⁰⁰ [Mohammed v. Obama](#), 704 F. Supp. 2d at 25 (D.D.C. 2009).

¹⁰¹ [Murdock](#), 667 F. 3d at 1305-06 (citing [Schneckloth v. Bustamonte](#), 412 U.S. 218, 226 (1973)). Cf Mr Al Hassan had no real prior acquaintance with a legal system, much less an international legal institution purporting to implement international legal standards.

¹⁰² [Mohammed v. Obama](#), 704 F. Supp. 2d at 25 (D.D.C. 2009). This decision cites the UNCAT at 24.

¹⁰³ [Mohammed](#), 704 F. Supp. 2d at 25.

¹⁰⁴ [Karake](#), 443 F. Supp. 2d at 87.

¹⁰⁵ [Brooks v. Florida](#), 389 U.S. 413, 414 (1967).

¹⁰⁶ [Karake](#), 443 F. Supp. 2d 8 (D.D.C. 2006), para. 140.

¹⁰⁷ [Salim v. Mitchell](#), [Deposition of James Elmer Mitchell](#), Jan. 16, 2017, at 272-273.

¹⁰⁸ See generally, [Brown v. Mississippi](#), 297 U.S. 278 (1936); Metin Basuglu, ‘[Torture vs. Other Cruel, Inhuman, and Degrading Treatment: Is the Distinction Real or Apparent?](#)’ 64 Archives of Gen Psychiatry 277, 283 (2007).

¹⁰⁹ [Mohammed](#), 704 F. Supp. 2d 1, 27 (D.D.C. 2009).

persists to this day.¹¹⁰ Mr Al Hassan's conditions of confinement maintained the psychological pressure imposed by incidents of physical torture;¹¹¹ he could not make informed and unconstrained choices. Mr Al Hassan's environmental conditions (being kept in an overcrowded cell with poor ventilation, and deprived of adequate food and water, leading to malnutrition and dehydration (*'jai toujours soif'*)¹¹²) further undermined his cognitive capacity.¹¹³

20. This prima facie case of torture cannot be rebutted through the contrary assertions of [REDACTED]:¹¹⁴ 'In order to show that evidence has not been obtained by torture, a court must rely on evidence other than the testimony of the investigating officer'.¹¹⁵ In addition, the prejudice stemming from the Prosecution's refusal to disclose the full correspondence and records underpinning information in this statement, coupled with its failure to make [REDACTED] prior to the submission of this application,¹¹⁶ outweighs any probative value. The focus of exclusion is also on the subjective apprehension and psychological capacity of the suspect:¹¹⁷ the possibility that [REDACTED] did not appreciate or observe indicia of torture/CIDT does not cure the statements of taint.

21. [REDACTED] statement is also striking in its exclusion of attenuation factors.¹¹⁸ The statement insists that the procedure followed with Mr Al Hassan [REDACTED].¹¹⁹ This assertion is irrelevant, insofar as it simply suggests that the Prosecution consistently applied a flawed legal and procedural approach [REDACTED]. It also ignores the crucial point that the

¹¹⁰ POE Report, paras 133-136, 176-199, 261-268.

¹¹¹ [MLI-D28-0003-0031](#) at 0037-0038, paras 28-33. See also [MLI-OTP-0033-4375](#) at 4384-4386; [MLI-OTP-0033-4336](#) at 4350-4351; [MLI-OTP-0030-0367](#) at 0386.

¹¹² [MLI-OTP-0051-1233](#) at 1246.

¹¹³ *United States v. Khalid Sheikh Mohammad, et al.*, AE42500, [Declaration of Shane O'Mara](#), (Professor of Experimental Brain Research and noted torture expert) (March 24, 2016): 'Prolonged chronic stress impacts negatively across a wide range of brain and bodily organ systems, causing deleterious long-term changes . . . Sources of prolonged chronic stress can include **environmental factors**, such as heat or cold, deprivation such as hunger or thirst, or a wide variety of other stressors' (*'Khalid Sheikh Mohammad'*). [Annex B].

¹¹⁴ [ICC-01/09-01/11-1753-Red](#), para. 30; [ICC-01/05-01/13-2275-Red](#), para. 306: See also *United States v. Karake*, 443 F. Supp. 2d 8 (D.D.C. 2006): 'U.S. investigators . . . claimed not to have observed any visible signs of torture during their interrogations. (...) In the end, however, the government cannot prove a negative.'

¹¹⁵ [A/HRC/25/60](#), para. 25.

¹¹⁶ Annex D.

¹¹⁷ In *Halilovic*, while the Trial Chamber accepted that the Prosecution had offered no inducements, the Appeals Chamber found the Chamber erred by failing to consider that the accused 'was labouring under the misapprehension that his cooperation could lead to the withdrawal of the indictment against him' (para. 45). See also *R v Thomas* [2006] VSCA 165, para. 72, concerning focus of inquiry on subjective perception of the interviewee.

¹¹⁸ [REDACTED].

¹¹⁹ [REDACTED].

Prosecution arranged [REDACTED].¹²⁰ While Mr Al Hassan did reply “no” to questions from the Prosecution about whether he had been mistreated in specific interviews, he also raised concerns about having no contact with the outside world, his psychological state, and his fear that he could be tortured at any moment.¹²¹ The Prosecution’s inability to provide effective redress coupled with its insistence that these factors were irrelevant to the ICC interview process,¹²² undercuts any suggestion that Mr Al Hassan had the effective capacity to assert his legal rights in the face of such an incorrect stance. Mr Al Hassan’s ‘consent’ must also be construed in light of the Prosecution’s assurance that the judges *would* reject his statements if they agreed that he should not have been interviewed under such conditions.¹²³

22. The right to effective legal representation is also not satisfied in circumstances where the suspect has no independent ability to contact and communicate with a lawyer, unless he agrees to participate in interviews;¹²⁴ the suspect does not fully understand his status;¹²⁵ and the lawyer appeared to be unaware of the existence and relevance of critical protections under Article 55(1) and internationally recognised human rights law.¹²⁶ The Prosecution emphasised that Mr Al Hassan’s rights were subject to the whims of the persons responsible for earlier and ongoing forms of torture and CIDT. *Per* [REDACTED] statement, the DGSE’s requirements dictated the parameters of each Prosecution interview, and he was refouled to the DGSE each night.¹²⁷ At the end of each session, Mr Al Hassan did not know if and when he would see anyone outside the DGSE again.¹²⁸ Mr Al Hassan’s learned helplessness was firmly entrenched by the Prosecution’s avowal that ICC judges had approved the interviews *despite knowing his circumstances*.¹²⁹ The totality of circumstances eliminates the possibility of voluntariness in Mr Al Hassan’s case.

¹²⁰ [MLI-D28-0003-0031](#) at 0041, paras 52-60, at 0042 paras 64, 69-72, at 0046 paras 94-100, at 0047 paras 101-105, at 0048 para 118-119, at 0050 paras 138, 139, at 0051 paras 140-145, at 0054 paras 159, 162, 167-170, at 0055 paras 171-177, at 0058 para 200, at 0059 paras 201-207, at 0062 paras 227-235 at 0063 paras 236-237.

¹²¹ [MLI-OTP-0051-0798](#) at 0803-0806.

¹²² [MLI-OTP-0051-0798](#) at 0805-0809; [MLI-OTP-0051-0967](#) at 0991-0992: ‘*certainement c’est pas à la personne en détention de décider ou bien de même souhaiter d’aller quelque part.*’

¹²³ [MLI-OTP-0051-0798](#) at 0808.

¹²⁴ [Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt](#), para. 209; OSCE, [Manual on Human Rights In Counter-Terrorism Investigations](#), 2013, p. 115.

¹²⁵ [MLI-OTP-0069-1728](#) at 1730, Ins. 40-57, where the Prosecution emphasises they are interviewing him as a witness; [MLI-OTP-0051-0798](#) at 0800, where Mr Al Hassan introduces himself as the witness, and the Prosecution does not correct him). Cf [Sesay](#), para. 46

¹²⁶ [MLI-OTP-0051-1099](#) at 1122-1123.

¹²⁷ [REDACTED].

¹²⁸ [MLI-OTP-0051-1257](#) at 1293; [MLI-OTP-0062-1268](#) at 1282.

¹²⁹ [MLI-OTP-0051-0798](#) at 0809; [MLI-D28-0002-0535](#) at 0584-0585, 0592.

23. Given that the Prosecution did not video-record the interviews, it is impermissible and unfair for them to rely on self-serving assertions concerning Mr Al Hassan's visual appearance. In any case, [REDACTED] observations concerning Mr Al Hassan's demeanour¹³⁰ do not rebut the presumption of involuntariness in his statements. When a U.S.-held detainee seemed 'relaxed during the interviews... [enough] to complain about matters regarding his treatment and conditions of confinement,' (just as Mr Al Hassan did) the court nevertheless excluded the statements for two reasons.¹³¹ First, [REDACTED], the investigator met with the detainees for only a few hours at a time, an 'insufficient' period of time in which to gauge the psychological state of a detainee in credible conditions of torture.¹³² Second, the investigator 'had no knowledge of the circumstances of detainee confinement before their arrival at Bagram, and quite limited knowledge of [their] treatment there.'¹³³ Here, the Prosecution had ample information about Mr Al Hassan's confinement and treatment in DGSE custody, placing his statements to the Prosecution well outside of the voluntariness parameters.¹³⁴ The contrast in conditions between the interview setting as compared to general detention also operates as an inducement, which overbears the interviewee's capacity to make free and informed choices concerning participation:¹³⁵ for this reason, attenuation cannot commence until the interviewers extract the interviewee permanently from the abusive or threatening detention environment.¹³⁶

24. [REDACTED] reliance on superficial aspects of Mr Al Hassan's demeanour is also undercut by the POE's observation that in November 2020, Mr Al Hassan 'experience[s] symptoms of anxiety and distress associated with memories and reminders of interrogation and the alleged torture...*this was evident during the interviews.*'¹³⁷ If the POE were able to

¹³⁰ [REDACTED].

¹³¹ *Abdah v. Obama* (Uthman), [708 F. Supp. 2d 9](#) at 18-19 (D.D.C. Apr. 8, 2010).

¹³² *Abdah v. Obama* (Uthman), [708 F. Supp. 2d 9](#) at 20.

¹³³ *Abdah v. Obama* (Uthman), [708 F. Supp. 2d 9](#) at 19-20.

¹³⁴ Cf [MLI-OTP-0051-1305](#) at 1319, 1336, paras 34, 99-100; [MLI-OTP-0033-4336](#) at 4349-4351, paras 32, 37; [MLI-OTP-0033-1110](#) at 1124; [MLI-OTP-0033-4375](#) at 4384-4386; [MLI-OTP-0078-3684](#); [MLI-OTP-0078-4155](#); [MLI-OTP-0071-0041](#); [MLI-OTP-0064-1119](#). See *Karake*, 443 F. Supp. 2d 8 (D.D.C. 2006): 'The government attempts to deflect attention(...)by arguing that Kibingo's testimony was corroborated by U.S. investigators who claimed not to have observed any visible signs of torture during their interrogations(...)In the end, however, the government cannot prove a negative.' The Court found the approach was deficient as 'No U.S. investigator ever examined a defendant's body for signs of abuse other than what may have been visible to them.'

¹³⁵ *R v Thomas*, [2006] VSCA 165, para. 173. See also [MLI-D28-0003-0315](#) at 0320: [REDACTED]; and [MLI-D28-0002-00535](#) at 0605-0606 re Mr Al Hassan's perception of linkages between his willingness to speak to the ICC Prosecution, and positive or negative reactions at the DGSE.

¹³⁶ *Karake*, [443 F. Supp. 2d at 89](#). See also para. 140.

¹³⁷ POE Report, paras. 323, 292.

observe a visceral response to handcuffing¹³⁸ and indicia of learned helplessness¹³⁹ three years after his DGSE detention, the symptoms would have been present during his arbitrary detention in Mali and visible in interviews where he was brought, handcuffed and hooded, by his torturers.¹⁴⁰

25. [REDACTED] assertion that that Mr Al Hassan was aware of his right to silence and had the effective capacity to exercise it, is not born out by the transcripts, and ignores the overarching coercive environment. When Mr Al Hassan attempted to limit his statements to ‘the events of 2012,’ the Prosecution repeatedly asked about subsequent events,¹⁴¹ while reminding him that he had addressed such matters in July 2017 (the interviews closest in time to his DGSE interrogations).¹⁴² By January 2018, Mr Al Hassan was reporting ‘erhak nafsi’ (psychological exhaustion), a severe headache, fever and tooth pain, and asked for medication.¹⁴³ Instead of stopping Mr Al Hassan’s interviews, the Prosecution told him that they would raise his medical issues with Prosecutor [REDACTED] ‘after they finished’ with the interview, at which point Mr Al Hassan continued.¹⁴⁴ On 18 January 2018, while the Prosecution reminded Mr Al Hassan of his privilege against self-incrimination at the beginning of the sessions, they asked him at least six times over several sessions in an increasingly oppositional manner about events on which he had attempted to invoke his right to remain silent.¹⁴⁵ When Mr Al Hassan appeared unable to confirm or elaborate on previous statements regarding [REDACTED], the Prosecution sought to tie him to his 14 July 2017 statements.¹⁴⁶ When Mr Al Hassan said that he preferred not to give further details, the Prosecution said that it was up to them to decide on the details.¹⁴⁷ When Mr Al Hassan said that what he had said was sufficient, the Prosecution said that it was up to them to decide what was sufficient.¹⁴⁸ When Mr Al Hassan repeated that he did not want to discuss anything after 2012, the Prosecution responded that they would decide what they were going to ask him about, that they had initiated an investigation, and that there were precise consequences

¹³⁸ POE Report, para. 125.

¹³⁹ POE Report, para. 40: ‘AH exhibited passivity (learned helplessness) in relation to asserting this right (“I’m a prisoner and I have no choices”; “I will have to take whatever you write”).’

¹⁴⁰ [MLI-D28-0002-0535](#) at 0603-0604.

¹⁴¹ [MLI-OTP-0060-1298](#) at 1300-1302; [MLI-OTP-0060-1791](#) at 1806 [REDACTED]

¹⁴² [MLI-OTP-0060-1752](#) at 1770.

¹⁴³ [MLI-OTP-0060-1662](#) at 1665-1667.

¹⁴⁴ [MLI-OTP-0060-1662](#) at 1665 (Ins. 85-90).

¹⁴⁵ [MLI-OTP-0060-1752](#) at 1770–1778; [MLI-OTP-0060-1791](#) at 1799-1808.

¹⁴⁶ [MLI-OTP-0060-1791](#) at 1797.

¹⁴⁷ [MLI-OTP-0060-1791](#) at 1804 (Ins.441-444).

¹⁴⁸ [MLI-OTP-0060-1791](#) at 1806 (Ins. 490-491).

to everything.¹⁴⁹ The Prosecution’s language clearly implied that they had access to the DGSE interviews,¹⁵⁰ and reinforced Mr Al Hassan’s fear that he was expected to adhere to a specific script.¹⁵¹ Where later interrogators fail to give the suspect with a full opportunity to retract prior admissions, there is no clean break - the detainee is ‘gripped by the same fear that infected his [previous torture] confessions.’¹⁵²

26. The Prosecution’s interview process demonstrates that there was no attenuation between Mr Al Hassan’s torture/CIDT and his interview statements. One of the most compelling examples is the acknowledgment of one Prosecution investigator that Al Hassan’s conditions, at the time of the ICC interview, ‘were the same as Guantanamo Bay’.¹⁵³ Multiple legal declarations affirm that it is impermissible to extract evidence from persons held in such conditions.¹⁵⁴ The duty fell on the Prosecution to stop the interviews - not on Mr Al Hassan, the most vulnerable person in that dynamic, to request them to do so.¹⁵⁵

27. The interpretation of UNCAT obligations by courts handling Guantanamo cases¹⁵⁶ are also instructive. In *Ahmed v. Obama*, the court disallowed a witness’s testimony because ‘it was elicited at Bagram *amidst actual torture or fear of [. . . widespread, credible reports of torture and detainee abuse]*’.¹⁵⁷ The court underscored the futility of ‘[a]ny effort to peer into the mind of a detainee . . . who admitted to fearing torture at a facility *known to engage in such abusive treatment* (...).’¹⁵⁸ Here, the Prosecution knew before Mr Al Hassan’s

¹⁴⁹ [MLI-OTP-0060-1791](#) at 1799-1808.

¹⁵⁰ [REDACTED] [MLI-OTP-0060-1752](#) at 1769. The OTP confirmed that Mr. Al Hassan’s statements are the only evidence that they have on this point: ICC-01/12-01/18-885-Conf-Exp-AnxD.

¹⁵¹ [MLI-D28-0002-0535](#) at 0558; UN Special Rapporteur on Torture, [A/71/298](#), para. 40: ‘Techniques designed to minimize or maximize the suspect’s perceptions of responsibility or blame, including (...) presentation of false evidence, claims or insinuations about the existence of evidence against him (...) increase the likelihood of false confessions.’

¹⁵² See, e.g., *Anam v. Obama* (Al Madhwani), 696 F. Supp 2d 1, 10 (D.D.C. Jan. 6, 2010). : ‘According to the reliable evidence in the record, multiple Guantanamo interrogators on multiple occasions threatened Petitioner when he attempted to retract statements that he now claims were false confessions. Therefore, from Petitioner’s perspective, his interrogators and custodians did not change in any material way during the period in question’.

¹⁵³ [MLI-OTP-0069-1795](#) at 1797, Ins. 48-51 (*c’est pareil*).

¹⁵⁴ [A/HRC/10/3](#), para. 54; [A/71/298](#), para. 45: UK Intelligence and Security Committee, ‘[Detainee Mistreatment and Rendition: 2001–2010](#)’, p. 117; UK Joint Committee on Human Rights, [Allegations of UK Complicity in Torture](#), p. 3; UK Government, [The Principles relating to the Detention and Interviewing of Detainees Overseas and the Passing and Receipt of Intelligence Relating to Detainees](#), July 2019, pp. 4, 15; European Parliament Committee on Legal Affairs and Human Rights, [Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states](#), paras 191, 288.

¹⁵⁵ [MLI-D28-0003-0315](#) at 0321: ‘The potential sequelae of torture, including post-traumatic stress disorder, must be considered when interviewing survivors of torture. Mental health symptoms may cause the survivor to feel coerced or “helpless” to decline participation, or to stop the interview or rescind participation.’

¹⁵⁶ *Mohammed*, 704 F. Supp. 2d at 24 (*citing* UNCAT art. 15).

¹⁵⁷ *Ali Ahmed v. Obama*, 613 F. Supp. 2d 51, 56 (D.D.C. May 11, 2009).

¹⁵⁸ *Id.* at 62.

interviews that the DGSE were known to engage in abusive treatment.¹⁵⁹ In his first interview, Mr Al Hassan told them that he had been abused by the Malian authorities, and had been told that he would be killed unless he said the ‘truth.’¹⁶⁰ The day after he informed them of this coercion, the Prosecution proceeded to elicit a string of allegedly incriminating statements,¹⁶¹ which were repeated back in later interviews. The Prosecution’s knowledge of systemic torture, coupled with Mr Al Hassan’s avowals that he had been subjected to torture, bars use of any statements made concurrently with his DGSE detention.

28. To apply the UNCAT standard in *Mohammed v. Obama*, where the U.S. government claimed that rapport-building by interrogators vitiated prior abuse, the court concluded that ‘even though the identity of the individual interrogators changed . . . [the defendant’s] will was overborne by his lengthy prior torture.’¹⁶² In contrast, Mr Al Hassan did not transition *out* of his torture such that it could be called ‘prior torture.’ Mr Al Hassan was still interrogated by French, American, and Malian authorities under abusive conditions (including blind-folding) concurrent with Prosecution interviews.¹⁶³ As documented by Dr Porterfield and the POE, given this temporal overlap, he could not regulate his responses or assert rights in one forum that were denied in another; he was compelled to adhere to a script, irrespective of the truth.¹⁶⁴ By the clear analysis of *Mohammed*, Mr Al Hassan’s statements to the Prosecution cannot be admissible.

29. The Prosecution interviews were not left unsullied by the DGSE. [REDACTED]¹⁶⁵ but the record of Mr Al Hassan’s 6 September 2017 interview states that when the Prosecution asked questions about [REDACTED], a DGSE guard came into the room to take a chair, then entered to return it.¹⁶⁶ This occurred again during Mr Al Hassan’s interview on 6 December 2017, just days after the beating of multiple detainees by the DGSE.¹⁶⁷ The re-introduction of personnel associated with torture in later interrogations is a tactic used to reinforce learned helplessness. As described by CIA psychologist James Mitchell, ‘We used

¹⁵⁹ See *infra* paras 12-14.

¹⁶⁰ [MLI-OTP-0069-1728](#) at 1739-1747.

¹⁶¹ [MLI-OTP-0051-1067](#) at 1075-1078.

¹⁶² *Mohammed v. Obama*, 689 F. Supp. 2d 38 (D.D.C. Nov. 19, 2009) at 66.

¹⁶³ [MLI-OTP-0069-1728](#) at 1735; [MLI-OTP-0069-1758](#) at 1766-1768 (where, *inter alia*, Mr Al Hassan reported being blindfolded for interviews by other authorities).

¹⁶⁴ POE Report, paras. 43-46; [MLI-D28-0002-0535](#) at 0585, 0603-0606. [REDACTED] affirmed that the Barkhane and DGSE reports regarding his and Mr Al Hassan’s work for jihadists/islamists were false: [MLI-D28-0003-2049-R01](#) at 2055.

¹⁶⁵ [REDACTED].

¹⁶⁶ [MLI-OTP-0051-0376](#) at 0390-0391.

¹⁶⁷ [MLI-OTP-0060-1403](#) at 1414 (when the Prosecution was questioning Mr Al Hassan [REDACTED], a DGSE guard entered the interview room to bring glasses).

classical conditioning [“enhanced interrogation techniques”] to increase the person’s distress, and then operant conditioning to decrease that distress when they began to work with us . . .¹⁶⁸ He recounted how, when individuals from the torture team entered the room, ‘the [detainee’s] stress level increased the moment the team entered the cell, a sign that the [coercive] conditioning strategy was working.’¹⁶⁹ Once Mr Al Hassan was tortured by DGSE personnel, in the absence of attenuation or treatment for that torture, the appearance of DGSE personnel had the same coercive effect on Mr Al Hassan’s ICC statements.

30. The Prosecution presents itself as a ‘clean team,’ to whom Mr Al Hassan provided non-coerced, voluntary statements. The concept of ‘clean teams’ relies on ‘brand new interrogators’ separate from the torturers, an environment separated in time and space from the torture locations and ‘intended to be comfortable and collegial, not threatening and abusive,’ with the decision to talk or not talk as a ‘voluntary choice.’¹⁷⁰ No court that has engaged in serious legal analysis has found attenuation on facts similar to those of Mr Al Hassan: while interrogations attenuated (with a clean break) from the torture beget a complex analysis, interrogations concurrent with torture/CIDT are always tainted. Mr Al Hassan’s statements while in Malian detention were involuntary, a product of learned helplessness,¹⁷¹ and must be excluded.

E. Mr Al Hassan’s statements are inherently unreliable

31. Even if this Chamber were to find that Mr Al Hassan’s statements to the Prosecution were voluntary, his previous coercion rendered his statements unreliable.¹⁷² Because of brain impairment provoked by the chronic extreme stress of learned helplessness, Mr Al Hassan and other torture victims are prone to confabulation, or the production of false memories.¹⁷³ As a result of this process, ‘information presented by [the Prosecution or DGSE] to elicit responses during interrogation might inadvertently [have] become part of [Mr Al Hassan’s]

¹⁶⁸ *Khalid Sheikh Mohammad*, [Transcript 2020-01-22 at 30410](#) (Testimony of James E. Mitchell) [Annex C].

¹⁶⁹ *Id.*

¹⁷⁰ Gregory McNeal, ‘[A Cup of Coffee After the Waterboard: Seemingly Voluntary Post-Abuse Statements](#),’ *DePaul Law Review*, Vol. 59, Issue 3 (Spring 2010) at 953-954.

¹⁷¹ POE Report, para 40; [MLI-D28-0002-0535](#) at 0584-0586.

¹⁷² See, e.g. *Ali Ahmed v. Obama*, [613 F. Supp. 2d 51](#), 57 (D.D.C. May 11, 2009): ‘[T]here is evidence that [redacted] underwent torture, which may well have affected the accuracy of the information he supplied to interrogators. [redacted] spent time at Bagram and the Dark Prison, and alleges that he has been tortured.’

¹⁷³ *Mohammed*, 704 F. Supp. 2d at 27. *Khalid Sheikh Mohammad*, AE42500, [Declaration of Shane O’Mara](#), (March 24, 2016): ‘Especially under stress, people consolidate information to which they are exposed into their memories, even if that information is not accurate ... From the point of view of neuroscience, there is no fundamental difference between physical and psychological abuse.’ [Annex B]

memory.’¹⁷⁴ Forensic psychiatry expert Dr Charles A. Morgan, who specializes in the effects of high stress, agrees that:¹⁷⁵

Traumatic events and highly stressful events may make an individual more susceptible to errors in memory or recalling false memories. Traumatic and stressful events, additionally, create susceptibility to suggestion and compliance; in the context of interrogations, false memories may be created, and over time, these false memories are experienced and recounted as reality.

32. Dr Morgan also attested that ‘Stress-induced elevations of cortisol significantly impair memory performance on a declarative memory task; for instance, asking a detainee to discuss a suspected association or action’.¹⁷⁶ The stress-induced elevation of cortisol is likely why, when the Prosecution repeatedly asked Mr Al Hassan to discuss [REDACTED], Mr Al Hassan could not recall details or expressed confusion.¹⁷⁷ Mr Al Hassan had been tortured and subjected to CIDT during previous interrogations about that association. His fear was elevated, when questioned about [REDACTED], by the entrance of DGSE guards during at least one previous Prosecution interview.¹⁷⁸ Dr Morgan also agrees with Prof. O’Mara, Dr Cohen, Dr Porterfield, and the Panel of Experts¹⁷⁹ that ‘chronic exposure to extreme stress is likely to damage neurons associated with cognitive functioning.’¹⁸⁰ Interrogation techniques such as verbal threats, blind-folding, hooding and continuous handcuffing, qualify as torture/CIDT precisely because they induce a continuing state of extreme stress:¹⁸¹ ‘such practices weaken, disorient and confuse subjects, distort their sense of time and render them prone to fabricate memories, even if they are otherwise willing to answer questions.’¹⁸² Even if the Prosecution did not request the DGSE to use these techniques and they were not employed within the ICC interviews, they generated impermissible consequences during the ICC interviews. It is telling that today, the use of handcuffs still triggers intense despair in Mr Al Hassan.¹⁸³ Internal consistency in statements is also unpersuasive where extreme stress has affected cognitive patterns.¹⁸⁴ In such situations, it is impossible to determine whether the subject himself knows whether his memories are real or false.

F. Admitting the statements undermines the integrity & fairness of the proceedings

¹⁷⁴ See, e.g., [MLI-OTP-0051-1067](#) at 1075-1078; [MLI-OTP-0060-1705](#) at 1722-1725.

¹⁷⁵ *Khalid Sheikh Mohammad*, AE425NN, [Declaration of Charles A. Morgan](#), (April 4, 2016) [Annex A].

¹⁷⁶ *Id.*

¹⁷⁷ [MLI-OTP-0060-1791](#) at 1799-1808.

¹⁷⁸ [MLI-OTP-0060-1403](#) at 1414.

¹⁷⁹ POE Report, para. 292.

¹⁸⁰ *Khalid Sheikh Mohammad*, AE425NN, [Declaration of Charles A. Morgan](#), (April 4, 2016) [Annex A].

¹⁸¹ IACHR, [Djamel Ameziane v United States Of America](#), Case 12,865, para. 169.

¹⁸² [MLI-D28-0003-0031](#) at 0034, citing the UN Special Rapporteur on Torture, [A/71/298](#), para. 18.

¹⁸³ [MLI-D28-0002-0535](#) at 0582; POE Report, paras 125, 132, 141, 183, 271, 288, 299-300, 324, 328.

¹⁸⁴ See, e.g., [Anam](#), 696 F. Supp. 2d 1 at 9 (the court was unpersuaded by the government’s argument that the statements’ internal consistency indicated they were reliable).

33. In considering the global import of investigations undertaken by the ICC, the rejection of such inherently unreliable evidence is critical, both on principle and to safeguard the integrity of the prosecution. Neither the probative value of the evidence¹⁸⁵ nor the nature of the charges against a suspect should have a bearing on whether tainted evidence is admitted.¹⁸⁶ Use of such evidence to establish any facts except the torture or abuse of Mr Al Hassan would undermine the impartiality and fairness of the proceedings as a whole.¹⁸⁷ The POE Report further attests that the use of such evidence would trigger profound psychological consequences incompatible with Mr Al Hassan's fitness to stand trial.¹⁸⁸



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Dated this 08th Day of March 2021
At The Hague, The Netherlands

¹⁸⁵ [Ibrahim & ors v. United Kingdom](#), para. 254.

¹⁸⁶ CAT, [General Comment No. 2: Implementation of Article 2 by States Parties](#), para 6. See also UN HRC, [General Comment No. 32: Article 14, Right to equality before courts and tribunals and to fair trial](#), para 6.

¹⁸⁷ [Ibrahims & ors v. United Kingdom](#) para. 254; [Gäfgen v. Germany](#), para. 166.

¹⁸⁸ POE Report, paras 282, 283, 292, 293, 303. See also [MLI-D28-0003-2272](#) at 2283-2285, paras 37-45 and [MLI-D28-0002-0535](#) at 0607.