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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 requests related to the submission into
evidence of Mr Al Hassan’s statements’**

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

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TRIAL CHAMBER X of the International Criminal Court (the ‘Court’ or ‘ICC’), in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, having regard to Articles 21(3), 54, 55, 56, 64, 66, 67, 68, 69(4), 69(7) and 74(2) of the Rome Statute (the ‘Statute’) and Rules 63, 64, 111 and 112 of the Rules of Procedure and Evidence (the ‘Rules’) issues the following decision.

I. Procedural history and submissions

1. The requests which are the subject of the present decision relate to interviews conducted with Mr Al Hassan by the ICC Prosecution over 19 days between July 2017 and March 2018, while Mr Al Hassan was detained in Mali by national authorities prior to the issuance of a warrant of arrest against him and his subsequent surrender to the Court.
2. On 24 August 2020, in relation to the same subject, the Chamber rejected a Defence request to terminate this case on the basis of alleged torture and cruel, inhuman and degrading treatment (‘CIDT’) of Mr Al Hassan [REDACTED] at the hands of national authorities while in Mali prior to Mr Al Hassan’s surrender to the Court (the ‘Termination Motion’)¹ and related requests (the ‘Termination Decision’).²
3. On 18 December 2020, following directions of the Chamber,³ the Prosecution filed a request for the introduction into evidence, pursuant to Article 69 of the Statute, of the totality of the evidence provided by Mr Al Hassan during his

¹ Defence Request to terminate the proceedings, 16 June 2020, ICC-01/12-01/18-885-Conf-Exp (confidential *ex parte*, available only to the Defence and Prosecution; with ten confidential and confidential *ex parte* Annexes; 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; corrigenda of the main filing were later notified on 25 June 2020, ICC-01/12-01/18-885-Conf-Exp-Corr and 24 August 2020, ICC-01/12-01/18-885-Conf-Red-Corr; public redacted versions of the main filing were also later notified and subsequently reclassified as confidential; a final public redacted version was later notified on 29 July 2020, ICC-01/12-01/18-885-Corr-Red3; a corrected version of Annex B was also filed, in accordance with the decision of the Chamber).

² Decision on the Defence request to terminate the proceedings and related requests, ICC-01/12-01/18-1009-Conf (a public redacted version was issued on 29 October 2020, ICC-01/12-01/18-1009-Red). *See also* Decision on Defence request for leave to appeal the ‘Decision on the Defence request to terminate the proceedings and related requests’, 12 October 2020, ICC-01/12-01/18-1099-Conf (a public redacted version was issued on 29 October 2020, ICC-01/12-01/18-1099-Red).

³ Decision on matters related to Defence challenges under Article 69(7) of the Statute, 6 November 2020, ICC-01/12-01/18-1150; Decision on Prosecution request for variation of Decision on matters related to Defence challenges under Article 69(7) of the Statute, 24 November 2020, ICC-01/12-01/18-1160.

interviews with the Prosecution (the ‘Request for Introduction’).⁴ The evidence, preserved under Article 56 of the Statute, consists of: (i) the audio recordings and transcripts of Mr Al Hassan’s security assessments and interviews (altogether, the ‘Statements’);⁵ (ii) materials signed or produced by Mr Al Hassan during the interviews (the ‘Related Material’); and (iii) material commented on by Mr Al Hassan during his interviews that are not yet submitted into evidence (the ‘Other Material’) (together, the ‘Article 56 Evidence’).

4. On 2 and 24 December 2020, the Chamber rejected two requests for leave to submit *amicus curiae* observations related to the exclusion of evidence under Article 69(7) of the Statute on the basis of allegations of torture and CIDT.⁶
5. On 18 and 23 December 2020, the Prosecution filed three requests related to the Request for Introduction: (i) a request to add medical forms to its List of Evidence pursuant to Regulation 35 of the Regulations of the Court (the ‘Regulations’), and to submit them into evidence via the bar table;⁷ (ii) a request pursuant to Regulation 35 of the Regulations to call psychiatrist and forensic doctor, Dr [REDACTED] (P-0661) as an expert witness and to add forensic doctor, Dr [REDACTED] (P-0598) and Dr [REDACTED] prior recorded testimony and associated material to its List of Evidence, and to introduce this material into evidence pursuant to either Rule 68(2)(b) or Rule 68(3) of the Rules;⁸ and (iii) a request pursuant to Regulation 35 of the Regulations to add P-0165 – the Prosecution’s [REDACTED] who conducted the interviews with Mr Al Hassan

⁴ Prosecution request to introduce evidence preserved under article 56 of the Statute, ICC-01/12-01/18-1218-Conf-Exp (confidential *ex parte*, available only to Prosecution and Defence; with confidential *ex parte* Annexes A to C, available only to Prosecution and Defence; a public redacted version was notified on 29 March 2021, ICC-01/12-01/18-1218-Red).

⁵ The Chamber’s reference to ‘interviews’ in this decision also encompasses the sessions devoted to the biographical and security questionnaires.

⁶ Decision on request for leave to submit *amicus curiae* observations, ICC-01/12-01/18-1177; Second decision on request for leave to submit *amicus curiae* observations, ICC-01/12-01/18-1228.

⁷ Prosecution’s first request for the admission of documentary evidence from the bar table, and regulation 35 request, 18 December 2020, ICC-01/12-01/18-1213-Conf (with confidential Annex A; a public redacted version was notified on 26 April 2021, ICC-01/12-01/18-1213-Red).

⁸ Prosecution requests to add five items to its List of Evidence pursuant to regulation 35 of the Regulations of the Court and for the introduction of P-0598’s and P-0661’s prior recorded testimony and associated material into evidence pursuant to rule 68 of the Rules of Procedure and Evidence, 18 December 2020, ICC-01/12-01/18-1215-Conf (with confidential *ex parte* Annexes A and B, available only to the Prosecution and the Defence; a public redacted version was notified on 30 April 2021, ICC-01/12-01/18-1215-Red).

– to its List of Witnesses, to add P-0165’s prior recorded testimony and associated material to its List of Evidence, and to introduce that material into evidence pursuant to either Rule 68(2)(b) or Rule 68(3) of the Rules⁹ (together the ‘Related Evidentiary Requests’). These requests were all opposed by the Defence.¹⁰ Relatedly, on 22 January 2021, the Defence filed a request seeking various relief in relation to this litigation, including for the Chamber to convene a ‘*voir dire*’ preliminary evidentiary hearing related to the Article 69(7) application (the ‘Consolidated Defence Request’).¹¹

6. On 17 February 2021, the Chamber issued a decision, *inter alia*, deferring its determination of the Prosecution’s Related Evidentiary Requests and the Defence’s request for a ‘*voir dire*’ evidentiary hearing.¹²
7. On 8 March 2021, following an extension of time granted by the Chamber,¹³ the Defence filed a request to exclude ‘Mr Al Hassan’s ICC Interviews’ under Article 69(7) of the Statute (the ‘Exclusion Request’).¹⁴ The Defence firstly submits that

⁹ Prosecution request to add P-0165 to its List of Witnesses and to add P-0165’s prior recorded testimony to its List of Evidence pursuant to regulation 35 of the Regulations, and request for the introduction of P-0165’s prior recorded testimony and associated material into evidence pursuant to rule 68 of the Rules of Procedure and Evidence, 23 December 2020, ICC-01/12-01/18-1226-Conf (with confidential Annex A; a public redacted version was notified on 28 April 2021, ICC-01/12-01/18-1226-Conf).

¹⁰ Defence Response to ‘Prosecution’s first request for the admission of documentary evidence from the bar table, and regulation 35 request’, 22 January 2021, ICC-01/12-01/18-1264-Conf (a public redacted version was notified on 30 April 2021, ICC-01/12-01/18-1264-Red); Defence response to ‘Prosecution requests to add five items to its List of Evidence pursuant to regulation 35 of the Regulations of the Court and for the introduction of P-0598’s and P-0661’s prior recorded testimony and associated material into evidence pursuant to rule 68’, 21 January 2021, ICC-01/12-01/18-1254-Conf (a public redacted version was notified on 30 April 2021, ICC-01/12-01/18-1254-Red); Defence response to ‘Prosecution request to add P-0165 to its List of Witnesses and to add P-0165’s prior recorded testimony to its List of Evidence pursuant to Regulation 35 of the Regulations, and request for the introduction of P-0165’s prior recorded testimony and associated material into evidence pursuant to rule 68 of the Rules of Procedure and Evidence’, 21 January 2021, ICC-01/12-01/18-1255-Conf (with confidential *ex parte* Annexes A and B available only to the Defence, Prosecution and Registry; a public redacted version was notified on 30 April 2021, ICC-01/12-01/18-1255-Red) (the ‘Response to the P-0165 Request’).

¹¹ Defence consolidated application regarding Article 69(7) procedural matters, ICC-01/12-01/18-1256-Conf (a public redacted version was notified on 30 March 2021, ICC-01/12-01/18-1256-Red2).

¹² Decision on Prosecution and Defence procedural requests related to Article 69(7) of the Statute, ICC-01/12-01/18-1304-Conf.

¹³ ICC-01/12-01/18-1304-Conf, para. 32; email from the Chamber, 1 March 2021, at 11:06, granting a Defence request pursuant to Regulation 35 of the Regulations for an extension of five days to submit its Article 69(7) request, and rejecting a Defence request for an extension of 10 pages pursuant to Regulation 37(2) of the Regulations.

¹⁴ Article 69(7) Application, ICC-01/12-01/18-1346-Conf (with confidential Annexes A to C and confidential *ex parte* Annex D initially only available to the Prosecution and Defence and reclassified

Mr Al Hassan's statements were obtained while he was subjected to continuous torture and CIDT, constituting violations of both the Statute and internationally recognised human rights law.¹⁵ Relatedly, it submits that there was no attenuation between Mr Al Hassan's torture and his statements to the Prosecution, which were involuntary.¹⁶ Further, the Defence submits that even if the Chamber were to find that Mr Al Hassan's statements to the Prosecution were voluntary, his previous coercion rendered his statements unreliable,¹⁷ and that admitting the statements undermines the integrity and fairness of these proceedings.¹⁸

8. On 17 March 2021, the Single Judge issued a decision partially granting a request from the Legal Representatives of Victims (the 'LRVs') to access certain *ex parte* material referred to in the Exclusion Request.¹⁹
9. On 26 March 2021, in accordance with the extended deadline authorised by the Chamber,²⁰ the Prosecution filed a response to the Exclusion Request, submitting that it should be rejected (the 'Prosecution Response').²¹ The Prosecution submits that the Defence has failed to establish a real risk that the evidence provided by Mr Al Hassan during his interview with the Prosecution²² was obtained by means of torture or CIDT, submitting that many of the Defence's allegations, especially the most serious ones, are based on unreliable evidence and/or misrepresent the facts and/or the evidence.²³ It further submits that the Defence has failed to show that there is a causal link between the Statements and any torture/CIDT to which Mr Al Hassan was allegedly subjected to and that the record is clear that the

confidential on 18 March 2021 pursuant to ICC-01/12-01/18-1386-Conf; a public redacted version was notified on 30 March 2021, ICC-01/12-01/18-1346-Red2).

¹⁵ Exclusion Request, ICC-01/12-01/18-1346-Conf, paras 5-16. *See also* 2-4.

¹⁶ Exclusion Request, ICC-01/12-01/18-1346-Conf, paras 17-30.

¹⁷ Exclusion Request, ICC-01/12-01/18-1346-Conf, paras 31-32.

¹⁸ Exclusion Request, ICC-01/12-01/18-1346-Conf, para. 33.

¹⁹ Decision on the LRVs' request on access to material submitted in support of Defence Article 69(7) Application, ICC-01/12-01/18-1386-Conf.

²⁰ Email from the Chamber, 10 March 2021, at 20:02.

²¹ Prosecution response to Defence Article 69(7) Application, ICC-01/12-01/18-1401-Conf (with one confidential annex; a public redacted version was notified on 1 April 2021, ICC-01/12-01/18-1401-Red).

²² The Chamber notes that the Prosecution Response refers to the evidence provided by Mr Al Hassan during his interview with the Prosecution, ('Evidence') rather than the 'Statements'. For ease of reference, the term 'Statements' is used in referring to the Prosecution submissions.

²³ Prosecution Response, ICC-01/12-01/18-1401-Conf, paras 2, 11-29.

Statements were obtained in a voluntary interview process.²⁴ It further submits that the Statements are reliable²⁵ and that their admission would not be antithetical to or seriously damage the integrity of the proceedings.²⁶

10. On 26 March 2021, in accordance with the same extended deadline,²⁷ the LRVs also filed a response to the Exclusion Request, submitting that it should be rejected (the ‘LRVs Response’).²⁸ The LRVs submit that the alleged acts of torture have no link with the circumstances in which Mr Al Hassan provided the Statements.²⁹ They further submit that the Defence has failed to establish that any such act of torture may have vitiated the evidence collection process or excluded the accused’s free will.³⁰ The LRVs also submit that the acts of torture have not been established to the requisite standard, as they rest exclusively on allegations Mr Al Hassan made before Defence experts.³¹
11. On 13 April 2021, pursuant to leave granted by the Chamber,³² the Defence submitted a reply to the Prosecution Response (the ‘Defence Reply’).³³
12. On 16 April 2021, the Prosecution filed a response in relation to the Defence Reply, making three further requests including for leave to file a ‘sur-reply’ to certain issues identified in the Defence Reply (the ‘Prosecution Further Response’).³⁴

²⁴ Prosecution Response, ICC-01/12-01/18-1401-Conf, paras 2, 30-59.

²⁵ Prosecution Response, ICC-01/12-01/18-1401-Conf, paras 2, 60-61.

²⁶ Prosecution Response, ICC-01/12-01/18-1401-Conf, paras 2, 62-63.

²⁷ Email from the Chamber, 10 March 2021, at 20:02.

²⁸ Réponse à la Requête de la Défense fondée sur l’article 69(7) du Statut, ICC-01/12-01/18-1400-Conf (a public redacted version was notified on 6 April 2021, ICC-01/12-01/18-1400-Red).

²⁹ LRVs Response, ICC-01/12-01/18-1400-Conf, paras 15-19.

³⁰ LRVs Response, ICC-01/12-01/18-1400-Conf, paras 20-24.

³¹ LRVs Response, ICC-01/12-01/18-1400-Conf, para. 25.

³² Email from the Chamber, 31 March 2021, at 12:01. *See also* email from the Chamber, 12 April 2021 at 12:56, granting an extension of pages and time.

³³ Defence Article 69(7) Reply, ICC-01/12-01/18-1411-Conf-Exp (confidential *ex parte* available only to the Prosecution and Defence; with four confidential *ex parte* annexes and one confidential annex; a confidential redacted version was filed simultaneously, ICC-01/12-01/18-1411-Conf-Red; a public redacted version was notified on 20 April 2021, ICC-01/12-01/18-1411-Red2).

³⁴ Prosecution response to Defence request for *in limine* dismissal and request to strike confidential Annex B and for leave to sur-reply to Defence article 69(7) reply, ICC-01/12-01/18-1416-Conf.

13. On 19 April 2021, the Chamber dismissed the Prosecution request to file a ‘sur-reply’, noting that it would not be assisted by further submissions on any of the issues identified.³⁵
14. On 30 April 2021, the Defence filed a response to the remaining requests in the Prosecution Further Response (the ‘Defence Further Response’).³⁶

II. Related preliminary requests

A. Preliminary evidentiary hearing

15. The Chamber recalls that the Defence previously requested a ‘*voir dire*’ for the purpose of hearing evidence related to the Exclusion Request, including from its consultants, Prosecution witnesses Dr [REDACTED] and Dr [REDACTED], and the Prosecution [REDACTED] P-0165, and that the Chamber’s decision on this matter was deferred.³⁷
16. The Chamber notes that in the Exclusion Request, the Defence partially restates its request for a ‘*voir dire*’: requesting the Chamber to admit the reports of its consultants into evidence, and to convene a public evidentiary hearing to adduce and authenticate their testimony.³⁸ The Prosecution submits that the ‘*voir dire*’ request should be dismissed because the Chamber has already found the reports of Defence consultants Dr Porterfield (clinical psychologist) and Dr Cohen (forensic physician) to be unreliable,³⁹ and that the Chamber can decide the matter without a separate evidentiary hearing.⁴⁰
17. Before turning to the specifics of this case, the Chamber notes that ‘*voir dire*’ is a concept originating from the common law, not expressly provided for in the framework of the Statute. It has been described as a procedure which ‘allows for

³⁵ Email from the Chamber, 19 April 2021, at 13:30.

³⁶ Defence Response to ‘Prosecution response to Defence request for *in limine* dismissal and request to strike confidential Annex B and for leave to sur-reply to Defence article 69(7) reply’, ICC-01/12-01/18-1450-Conf (with confidential annex; reclassified public on 7 May 2021, ICC-01/12-01/18-1450).

³⁷ ICC-01/12-01/18-1304-Conf, para. 33. *See also* paras 6, 16, 22, 24. The Chamber considered it premature to determine the necessity of such a hearing before the Defence’s motion was filed and the issues before the Chamber were properly framed.

³⁸ Exclusion Request, ICC-01/12-01/18-1346-Red2, para. 9.

³⁹ Prosecution Response, ICC-01/12-01/18-1401-Red, para. 65.

⁴⁰ Prosecution Response, ICC-01/12-01/18-1401-Red, para. 65.

arguments and evidence to be brought before the court solely on a defined issue'.⁴¹ The Chamber notes that similar such hearings have been proposed and/or used on occasion at the ICC and other international and hybrid courts and tribunals for various purposes,⁴² and notably at the ICTY, ICTR and the SCSL regarding the voluntariness of a statement taken from an accused and sought to be admitted into evidence.⁴³

18. The Chamber considers that it would be open to it to hold such a hearing as requested by the Defence in the present case, and that whether to hold such a hearing is a discretionary decision of the Chamber. In this instance, the Chamber notes that there is a significant amount of written material before it regarding the issues at stake. In light of the issues for central determination as identified by the Chamber below, the Chamber considers the material and the information before it sufficient to make its determinations without hearing live evidence. The Defence request for a preliminary evidentiary hearing is accordingly rejected.

⁴¹ ICTY, Appeals Chamber, *Prosecutor v. Delalic et al.*, Judgment, 20 February 2001, IT-96-21-A, para. 541; *see also* ICTR, Trial Chamber, *The Prosecutor v. Nchamihigo*, Decision on the Prosecutor's Application to Admit into Evidence the Transcript of the Accused's Interview as a Suspect and the Defence's Request to Hold a Voir Dire, 5 February 2007, ICTR-2001-63-T, para. 7.

⁴² Trial Chamber V, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Public redacted version of Decision on the Ruto Defence's Request for Admission of Documentary Evidence, 11 December 2017, ICC-01/09-01/11-1943-Red, paras 1, 10; Trial Chamber 1, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, transcript of hearing on 30 May 2017, ICC-02/11-01/15-T-163-ENG, pp 1-2; Trial Chamber VII, *The Prosecutor v. Bemba et al.*, transcript of hearing on 8 October 2015, ICC-01/05-01/13-T-16-Red2-ENG, pp 51-52; ICTR, Trial Chamber, *Prosecutor v. Muvunyi*, Decision on the Prosecutor's Motion for Admission of Testimony of Expert Witness - Rule 92bis of the Rules, 24 March 2005, ICTR-2000-55A-T, para. 27; ICTR, Trial Chamber, *Prosecutor v. Karemera*, Decision on Voir Dire of Kim Hughes, 7 January 2010, ICTR-98-44-T, pp 3-4; STL, Trial Chamber, *Prosecutor v. Ayyash et al* Decision allowing Mr Gary Platt (Witness Prh147) to give Expert Opinion Evidence, 13 April 2016, STL-11-01/T/TC, para. 3.

⁴³ *See e.g.* ICTY, Appeals Chamber, *Prosecutor v. Halilovic*, Decision on Interlocutory Appeal Concerning Admission of Record of Interview from the Accused from the Bar Table, 19 August 2005, IT-01-48-AR73.2, paras 30, 45-46; ICTY, Appeals Chamber, *Prosecutor v. Delalic et al.*, Judgment, 20 February 2001, IT-96-21-A, paras 541-544; ICTR, Appeals Chamber, *Prosecutor v. Ntahobali*, Decision on 'Appeal Of Accused Arsene Shalom Ntahobali Against The Decision On Kanyabashi's Oral Motion To Cross-Examine Ntahobali Using Ntahobali's Statements To Prosecution Investigators In July 1997', 27 October 2006, ICTR-97-21-AR73, paras 3, 12-13; ICTR, Trial Chamber, *Prosecutor v. Zigiranyirazo*, Decision on the Voir Dire Hearing of the Accused's Curriculum Vitae, 29 November 2006, ICTR-2001-73-T, para. 1; ICTR, Trial Chamber, *Prosecutor v. Nchamihigo*, Decision on the Prosecutor's Application to Admit into Evidence the Transcript of the Accused's Interview as a Suspect and the Defence's Request to Hold a Voir Dire, 5 February 2007, ICTR-2001-63-T, paras 1, 8-9; SCSL, Trial Chamber, *Prosecutor v. Sesay*, Written reasons - decision on the admissibility of certain prior statements of the accused given to the Prosecution, 30 June 2008, SCSL-04-15-T, para. 10.

B. Defence request for *in limine* dismissal of parts of the Prosecution Response

19. In the Defence Reply, the Defence requests the Chamber to dismiss *in limine* certain Prosecution arguments based on ‘improper cross-referencing’, namely incorporation of prior Prosecution arguments based on reliance on findings in the Termination Decision.⁴⁴ It submits this is an impermissible attempt to circumvent the page limit and the Chamber’s instruction that the Article 69(7) motion should be self-contained and should not incorporate by reference extensive aspects of earlier submissions,⁴⁵ and the Chamber’s statement that its findings in the Termination Decision were without prejudice to any challenges to the admissibility of evidence the Defence may decide to bring pursuant to Article 69(7) of the Statute.⁴⁶ The Prosecution refutes this request.⁴⁷ The Defence requests the Chamber to disregard the latter Prosecution submissions.⁴⁸
20. The Chamber considers that nothing in its earlier rulings precluded the parties from referring to the Chamber’s findings in the Termination Decision in their submissions. The Defence request is therefore rejected.

C. Prosecution request to strike Annex B of the Defence Reply

21. In the Prosecution Further Response, the Prosecution requests the Chamber to strike Annex B of the Defence Reply on the basis that it contains submissions, in violation of Regulation 36(2)(b) of the Regulations.⁴⁹ The Defence requests the Chamber to disregard the latter Prosecution submissions.⁵⁰
22. The Chamber notes that Annex B of the Reply contains a 29 page-long table with certain assertions in the Prosecution Response on one side, compared on the other side to extracts of evidence which, in the Defence’s submission, purportedly

⁴⁴ Defence Reply, ICC-01/12-01/18-1411-Red2, para. 1, referring to Prosecution Response, ICC-01/12-01/18-1401-Conf, n. 97, 98, 106, 111, 114, 120, 121, 127, 144, 145, 146, 151, 152, 183.

⁴⁵ Defence Reply, ICC-01/12-01/18-1411-Red2, para. 1. *See* ICC-01/12-01/18-1160, para. 10.

⁴⁶ Defence Reply, ICC-01/12-01/18-1411-Red2, para. 1. *See* Termination Decision, ICC-01/12-01/18-1009-Red, para. 122.

⁴⁷ Prosecution Further Response, ICC-01/12-01/18-1416-Conf, paras 1, 5-6.

⁴⁸ Defence Further Response, ICC-01/12-01/18-1450, paras 8-11.

⁴⁹ Prosecution Further Response, ICC-01/12-01/18-1416-Conf, paras 2, 7.

⁵⁰ Defence Further Response, ICC-01/12-01/18-1450, paras 6-7, 11.

refute those assertions. The Chamber notes that the extracts of the evidence have obviously been selected by the Defence and considers that the purpose of this annex is for the Defence to put forward its interpretation of the facts and circumstances in order to demonstrate alleged factual inaccuracies.⁵¹ The Chamber considers that Annex B is not in compliance with Regulation 36 of the Regulations and accordingly will not consider Annex B.

III. Analysis

A. Scope of this decision

23. There are two interrelated applications before the Chamber for determination: (i) the Prosecution's Request for Introduction, seeking admission of the Article 56 Evidence pursuant to Article 69; and (ii) the Defence's request to exclude the Statements under Article 69(7) of the Statute.
24. While generally deferring its assessment of evidence to the Article 74 judgment pursuant to the 'submission' system of evidence adopted in this case, the Chamber recalls that it may exceptionally rule upfront on the admissibility of evidence if deemed appropriate for a fair and expeditious trial,⁵² including but not limited to instances when it is a procedural requirement under the statutory framework.⁵³
25. In relation to the Request for Introduction, insofar as it concerns the Statements, the Chamber considers that it is appropriate to exceptionally consider the admissibility of this material upfront at this stage and not to defer the decision for consideration at the judgment stage. This would have been the case even absent the Defence application for exclusion under Article 69(7) of the Statute, in light of the nature of the evidence, which concerns detailed statements of the accused person taken by the ICC Prosecution. The Chamber considers that deciding on the status of this submitted material at this stage will provide clarity for the parties

⁵¹ See *similarly*, Decision on Mr Al Hassan's ongoing fitness to stand trial, 10 May 2021, ICC-01/12-01/18-1467 (the 'Fitness Decision'), paras 37-38.

⁵² Directions on the conduct of proceedings, 6 May 2020, ICC-01/12-01/18-789-AnxA (the 'Directions on the conduct of proceedings '), para. 34 (viii).

⁵³ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 34 (vii).

and participants going forward and is relevant to both the fairness and efficiency of the proceedings.

26. In relation to the Exclusion Request, the Chamber recalls that decisions on the potential application of exclusionary rules – including Article 69(7) of the Statute – must be rendered separately from, and preliminarily to, the assessment of evidence for the Article 74 judgment.⁵⁴
27. The present decision accordingly contains the Chamber’s determination on both the Prosecution’s Request for Introduction in relation to the Statements and the Defence’s request to exclude the Statements.⁵⁵

B. Applicable law

1. Article 69(4) of the Statute

28. Article 64(9)(a) and 69(4) of the Statute give the Chamber the power to rule on the ‘relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the [Rules]’.⁵⁶ Rule 63(2) of the Rules provides that the Chamber shall have the authority to ‘assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69.’
29. The Chamber’s assessment of material for the purposes of admissibility is a distinct question from the evidentiary weight which the Chamber may ultimately attach to admitted evidence in its final assessment once the entire case record is before it.⁵⁷

⁵⁴ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 32.

⁵⁵ The Chamber will issue a subsequent decision on the Prosecution’s Request for Introduction of the Related Material and the Other Material in due course. Further, the Chamber also recalls that the Defence made separate requests under Article 69(7) in relation to the expert reports of witnesses P-0620, P-0653 and P-0655 (*see* ICC-01/12-01/18-1150, para. 5 and references therein). Those requests will be dealt with in the Chamber’s subsequent decision.

⁵⁶ Article 69(4).

⁵⁷ Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011, 9 February 2012, ICC-01/05-01/08-2012-Red (the ‘*Bemba* Admissibility Decision’), para. 14; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on Prosecution’s first request for the

2. Article 69(7) of the Statute

30. Article 69(7) of the Statute is *lex specialis* when compared with the general admissibility provisions set out elsewhere in the Statute.⁵⁸
31. As noted by the Appeals Chamber, Article 69(7) envisages two consecutive inquiries.⁵⁹ First, in accordance with the *chapeau* of this provision, the Chamber must determine whether the evidence at issue was ‘obtained by means of a violation of [the] Statute or internationally recognized human rights’. If the conditions of the *chapeau* of Article 69(7) are met, the second step is to consider whether: (i) the ‘violation casts substantial doubt on the reliability of the evidence’ under Article 69(7)(a); or (ii) the ‘admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings’ under Article 69(7)(b). In this second inquiry, if the answer to either of these two questions is affirmative, the evidence concerned is inadmissible.
32. In its assessment, the Chamber may be guided by the text of Article 69(7) which provides an indication of some of the rationales for this exclusionary rule: to avoid reliance on unreliable evidence; and to preserve the integrity of the Court’s proceedings.⁶⁰ Trial Chamber I in the *Lubanga* case also noted another possible purpose of exclusionary rules of evidence which is that, ‘they have the effect, *inter alia*, of disciplining or deterring irregular or unlawful conduct by law enforcement officials.’⁶¹ In this respect, that chamber observed that ‘[d]eterrence

admission of documentary evidence, 19 February 2016, ICC-01/04-02/06-1181 (the ‘*Ntaganda* Admissibility Decision’), para. 7.

⁵⁸ Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the admission of material from the “bar table”, 24 June 2009, ICC-01/04-01/06-1981 (the ‘*Lubanga* Bar Table Decision’), para. 34.

⁵⁹ Appeals Chamber, *The Prosecutor v. Bemba et al.*, Public redacted version of Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Red (the ‘*Bemba et al* Appeals Judgment’), para. 280. See also Trial Chamber VII, *The Prosecutor v. Bemba et al.*, Decision on Kilolo Defence Motion for Inadmissibility of Material, 16 September 2015, ICC-01/05-01/13-1257 (the ‘*Bemba et al.* Inadmissibility Decision’), para. 9; *Lubanga* Bar Table Decision, ICC-01/04-01/06-1981, paras 39, 41.

⁶⁰ See e.g. Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor’s Bar Table Motions, 17 December 2010, ICC-01/04-01/07-2635 (the ‘*Katanga* Bar Table Decision’), para. 39.

⁶¹ *Lubanga* Bar Table Decision, ICC-01/04-01/06-1981, para. 45.

and discipline, if they are to be given any sustainable meaning and purpose within the framework of exclusionary rules, should be directed at those in authority - the individuals who control the process or who have the power, at least, to prevent improper or illegal activity'.⁶²

33. The *chapeau* of Article 69(7) of the Statute provides that the provision applies where evidence was 'obtained *by means of* a violation' (emphasis added). The Chamber observes that this, by its plain wording, requires not only a breach of the Statute or internationally recognised human rights but also, and importantly, a causal link between the violation and the gathering of the evidence.⁶³ More on this aspect is discussed at paragraphs 39 to 45 below.
34. In terms of factors that may guide the Chamber in assessing the seriousness of the damage to the integrity of the proceedings under Article 69(7)(b), previous chambers of this Court have considered the following elements: (i) the nature and gravity of the violation;⁶⁴ (ii) whether the rights violated related to the accused;⁶⁵ and (iii) the Prosecution's degree of control over the evidence gathering process or power to prevent the improper or illegal activity.⁶⁶

C. Burden and standard of proof

35. The criteria and burden for the consideration under Article 69(4) must be kept distinct from that which apply with reference to the Defence application for exclusion under Article 69(7).

⁶² *Lubanga* Bar Table Decision, ICC-01/04-01/06-1981, para. 46, footnotes omitted. *See also* Appeals Chamber, *The Prosecutor v. Bemba et al.*, Separate Opinion of Judge Geoffrey Henderson, 8 March 2018, ICC-01/05-01/13-2275-Anx (the '*Bemba et al.* Separate Opinion'), para. 33.

⁶³ *See also* Donald Piragoff and Paula Clarke, 'Article 69, Evidence' in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: a commentary* (2016), para. 60.

⁶⁴ *See Lubanga* Bar Table Decision, ICC-01/04-01/06-1981, paras 35, 47. *See also* Trial Chamber VII, *The Prosecutor v. Bemba et al.*, Decision on Request in Response to Two Austrian Decisions, 14 July 2016, ICC-01/05-01/13-1948 (the '*Bemba et al.* Second Western Union Decision'), para. 33.

⁶⁵ *Lubanga* Bar Table Decision, ICC-01/04-01/06-1981, para. 47.

⁶⁶ *See Lubanga* Bar Table Decision, ICC-01/04-01/06-1981, paras 45-47. *See also* Trial Chamber VII, *The Prosecutor v. Bemba et al.*, Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7), 29 April 2016, ICC-01/05-01/13-1854 (the '*Bemba et al.* First Western Union Decision'), paras 65, 68-69; *Bemba et al.* Second Western Union Decision, ICC-01/05-01/13-1948, paras 33, 36-37, 39. *See also Bemba et al.* Separate Opinion, ICC-01/05-01/13-2275-Anx, para. 34.

36. The Chamber recalls that in the context of a determination on the admissibility under Article 69(4) of the Statute, if a challenge is made to the admissibility of evidence, the burden rests with the party seeking to introduce the evidence.⁶⁷ In the present case, noting that the Defence has raised issues as to the admissibility of the Statements, the burden rests with the Prosecution.
37. In relation to challenges under Article 69(7) of the Statute, the Chamber observes consistent jurisprudence of this Court that the party bringing the motion under Article 69(7) of the Statute bears the burden to show that the criteria for the exclusion of evidence has been met.⁶⁸ The Chamber is of the view that this approach reflects the plain wording and intent of Article 69(7) and accordingly in the present case it is for the Defence to substantiate its arguments that the Statements should be excluded. As to the substantiation required with respect to such an Article 69(7) challenge, this will depend on the nature of the violation or breach alleged in each particular instance.
38. Noting that in the present case the alleged violations relate to torture and CIDT, the Chamber has considered the approach of other courts and tribunals on this issue to discern an appropriate standard. In particular, the Chamber notes the jurisprudence of the ECtHR under which the applicant must establish that there is a ‘real risk’ that the evidence in question had been obtained by torture.⁶⁹ The

⁶⁷ Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Public Redacted Version of Corrigendum to Decision on the admissibility of four documents, 20 January 2011, ICC-01/04-01/06-1399-Corr (the ‘Lubanga Admissibility Decision’), para. 25; *Bemba Admissibility Decision*, ICC-01/05-01/08-2012-Red, para. 17.

⁶⁸ See e.g. Pre-Trial Chamber I, *The Prosecutor v. Callixte Mbarushimana*, Public Redacted Version of Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red, paras 59-60; see also paras 62-65, 71; *Bemba et al. Inadmissibility Decision*, ICC-01/05-01/13-1257, para. 22; Trial Chamber VII, *The Prosecutor v. Bemba et al.*, Decision on Request to declare telephone intercepts inadmissible, 24 September 2015, ICC-01/05-01/13-1284, para. 32; Trial Chamber VII, *The Prosecutor v. Bemba et al.*, Decision on Bemba and Arido Defence Requests to Declare Certain Materials Inadmissible, 30 October 2015, ICC-01/05-01/13-1432, para. 26; Trial Chamber VII, *The Prosecutor v. Bemba et al.*, Decision on Request for Leave to Appeal ‘Decision on Bemba and Arido Defence Requests to Declare Certain Materials Inadmissible’, 20 November 2015, ICC-01/05-01/13-1489, para. 7. See also; *Bemba et al. First Western Union Decision*, ICC-01/05-01/13-1854, para. 62; Pre-Trial Chamber I, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges, 1 October 2008, ICC-01/04-01/07-717, para. 98.

⁶⁹ ECtHR, *El Haski v. Belgium*, 25 September 2012, 649/08, paras 86-88, 96; ECtHR, *Othman (Abu Qatada) v. The United Kingdom*, 17 January 2012, 8139/99, paras 273-276, 280. See also Exclusion Request, ICC-01/12-01/18-1346-Red2, para. 3, n. 14; Prosecution Response, ICC-01/12-01/18-1401-Red, para. 4, n. 9.

Chamber notes that the ECtHR's 'real risk' standard has been adopted at other criminal courts and tribunals in determining whether evidence was obtained through torture.⁷⁰ The Chamber considers this approach instructive and considers that in this particular case, noting the allegations at hand, the Defence must show a real risk that the evidence in question was obtained by means of torture or CIDT.

D. Exclusion of the Statements under Article 69(7) of the Statute

1. Overall remarks

39. The Defence submissions are premised on the allegation that Mr Al Hassan's statements were obtained while he was subjected to continuous torture and CIDT, constituting violations of both the Statute and internationally recognised human rights law.⁷¹ It is argued that Mr Al Hassan was subjected to torture and cruel, inhuman or degrading treatment by national authorities before and throughout the nine-month period (July 2017 to March 2018) when his 19 days of interviews by the ICC Prosecution took place, and that the evidence taken during those interviews is consequently tainted.⁷²
40. The Chamber notes that exclusion of evidence under Article 69(7) of the Statute can be triggered by human rights violations occurring outside the framework of the Statute and independently of the Court.⁷³ Notably Article 69(7) is not exclusive in application to breaches or violations perpetrated by the ICC Prosecution but can apply to the actions of other actors.⁷⁴ However, as noted above, by its plain wording, the *chapeau* of Article 69(7) requires not only a breach of the Statute or internationally recognised human rights, but importantly also a causal link between the violation and the gathering of the evidence. This link is a necessary element whether the breach is alleged to have been committed

⁷⁰ See ECCC, Trial Chamber, *Prosecutor v. Chea and Samphan*, Decision on evidence obtained through torture, 5 February 2016, 002/19-09-2007/ECCC/TC, paras 33-35; STL, Trial Chamber, *Prosecutor v. Ayyash et al.*, Decision Admitting Statements of Witness PRH103 under Rule 158, 12 December 2016, STL-11-01/T/TC, n. 20.

⁷¹ Exclusion Request, ICC-01/12-01/18-1346-Conf, paras 5-16. *See also* 2-4.

⁷² *See* Exclusion Request, ICC-01/12-01/18-1346-Conf, paras 5-33.

⁷³ *See e.g.* *Katanga* Bar Table Decision, ICC-01/04-01/07-2635, paras 52, 63, 65.

⁷⁴ *See e.g.* *Katanga* Bar Table Decision, ICC-01/04-01/07-2635, paras 52, 55- 65, where Trial Chamber II excluded statements made by Mr Katanga before domestic judicial authorities on the basis that the Chamber had 'serious concerns that those statements were obtained from [Mr Katanga] in violation of his right to remain silent and of the privilege against self-incrimination'.

by the ICC Prosecution or, as alleged here by the Defence, by domestic and other authorities. The Defence does not submit in this case that the Prosecution was the perpetrator of the alleged acts of torture or CIDT.⁷⁵

41. In this regard, the Chamber observes that the *chapeau* requirement of Article 69(7) is narrowly framed and does not call for findings as to whether there has been a breach of the Statute or internationally recognised human rights *writ large*, but rather in the specific context of evidence gathering. Therefore the first determination for the Chamber is whether it has been shown that the evidence in question was gathered, or its gathering was facilitated by, such a breach or violation. The Chamber considers that this approach is consistent with the Appeals Chamber findings regarding the two consecutive inquiries for an Article 69(7) analysis, the first being for the Chamber to determine whether ‘the evidence was obtained *by means of* a violation’ (emphasis added).⁷⁶
42. It is not disputed that the Statements sought to be admitted were gathered in this case directly by the ICC Prosecution, and not by those authorities who are alleged to have breached the Statute or the international human rights standards. In such a case, the exclusionary rule under the Statute warrants an assessment focused on the investigative activities of the ICC Prosecution which generated this particular evidence. Such an analysis may include consideration of the general context in which the evidence was gathered and interaction with, or influence of other authorities, but only insofar as those factors are relevant to the gathering of the specific evidence in this case by the ICC Prosecution. This construction of Article 69(7) is consistent with its plain language and with the practical realities which surround evidence gathering with respect to alleged atrocity crime in the different situations within the jurisdiction of the Court. ICC investigators are dependent on the cooperation of States to conduct investigative activities and their control with respect to the overall conditions and circumstances in which those activities are carried out will be limited. Article 69(7) in its plain wording recognises that distinction by focusing not on the general conditions applicable in the situation

⁷⁵ See also Prosecution Response, ICC-01/12-01/18-1401-Red, para. 6.

⁷⁶ See paragraph 31 above.

where the investigations and evidence gathering are occurring but rather those specific to the way in which evidence is actually obtained.

43. This approach is also in line with the general interpretation of Article 69(7) by other chambers of this Court, which have noted that a factor in the separate assessment under Article 69(7)(b) of the Statute is the Prosecution's degree of control over the evidence gathering process or power to prevent any improper or illegal activity.⁷⁷ While that is not necessarily a consideration in assessing whether a breach or violation has occurred, it supports that the exclusionary rule, especially to the extent that it is intended to discipline or deter irregular or unlawful conduct by authorities, must be construed narrowly with focus on the circumstances pertaining to gathering of the specific evidence.
44. The Chamber has reviewed the submissions of the Defence and related material presented in depth. However, without diminishing in any way the gravity and seriousness of allegations of torture and inhuman treatment, the Chamber emphasises it does not have a remit to pronounce on such allegations more generally. That is a matter reserved for other courts and tribunals, including those with specific mandates with respect to alleged torture or other human rights violations. The analysis of this Chamber in the context of a criminal trial before the ICC must be confined to the specific evidentiary issue before it.
45. Against this background, the Chamber considers that the relevant question in the present case for the assessment under Article 69(7) is whether the ICC Prosecution obtained the Statements by means of a violation of the Statute or internationally recognised human rights. The central issues in this analysis are what measures, if any, the ICC Prosecution put in place to ensure that any possible violations arising from the surrounding context and circumstances did not impact on, or facilitate, their evidence gathering process. This includes examining what steps, if any, were taken to ensure that the evidence gathering process afforded the necessary rights and protections to the person interviewed and safeguarded

⁷⁷ See *Lubanga* Bar Table Decision, ICC-01/04-01/06-1981, paras 45-47. See also *Bemba et al.* First Western Union Decision, ICC-01/05-01/13-1854, paras 65, 68-69; *Bemba et al.* Second Western Union Decision, ICC-01/05-01/13-1948, paras 33, 36-37, 39. See also, *Bemba et al.* Separate Opinion, ICC-01/05-01/13-2275-Anx, para. 34.

the product of the interview, pursuant to the applicable law under the Statute. The Chamber must examine the conditions under which the Statements were taken and considers this to be a fact specific determination, considering the circumstances of the interviews as a whole.

2. Supporting materials

46. In relation to the sources of material before the Chamber in relation to its enquiry, the Chamber makes the following brief remarks at the outset.
47. First, the Chamber notes that the Prosecution relies on the statement of P-0165, Prosecution [REDACTED] who conducted the interview with Mr Al Hassan. The Chamber has noted the Defence submissions in relation to this statement,⁷⁸ and material disclosed by the Prosecution in relation to it in April 2021.⁷⁹ In particular, the Chamber observes that on the basis of the material recently disclosed, P-0165's statement appears to have been prepared pursuant to instructions issued by the *Al Hassan* Prosecution team and it also appears that some, but not all, guidance given to P-0165 to prepare his statement has been disclosed to the Defence.⁸⁰ Moreover, the Chamber notes that P-0165's statement is largely a summary of the interview transcripts themselves and that P-0165 expressed a number of concerns before preparing his statement. Notably, P-0165 stressed that, in his view, and on certain points, including on the question of Mr Al Hassan's free participation, no additional observations could be provided outside of what was reflected in the interview record.⁸¹ In addition, the Chamber notes the concerns expressed by P-0165 before preparing his statement on the inappropriateness of being asked *a posteriori* to evaluate and express his opinion on Mr Al Hassan's behaviour during the interviews,⁸² notwithstanding that

⁷⁸ Response to the P-0165 Request, ICC-01/12-01/18-1255-Conf; Defence Reply, ICC-01/12-01/18-1411-Conf-Red, para. 7.

⁷⁹ Notably, MLI-OTP-0081-0279; MLI-OTP-0080-2115; MLI-OTP-0081-0286.

⁸⁰ In particular, no response to MLI-OTP-0081-0286 appears to have been disclosed, nor the related correspondence referred to in MLI-OTP-0081-0286 see ICC-01/12-01/18-1411-Conf-Exp-AnxE.

⁸¹ MLI-OTP-0081-0286 at 0289, under the heading 'la question de sa libre participation aux auditions menées par vous' P-0165 states 'Dans tous les cas, tout ce que nous disons aux personnes entendues comme Mr. Al Hassan en vertu de l'article 55.2 du Statut de Rome, sur les conditions de leur audition, y compris le caractère volontaire et leurs droits, est dûment enregistré sur support audio. Aucune explication ne peut être donnée en dehors de l'enregistrement.' See also 0287, 0288.

⁸² MLI-OTP-0081-0286 at 0290.

comments in this regard then appear in his statement. As a result, and particularly noting that the Defence has repeatedly and unsuccessfully sought to obtain evidence directly from P-0165, the Chamber has relied only in a very limited manner on P-0165's statement, where indicated in the analysis below, and in particular does not afford any weight to P-0165's observations on Mr Al Hassan's demeanour or behaviour during the interviews.

48. Second, the Chamber recalls that in the Termination Decision, it afforded little weight to reports from three Defence consultants⁸³ in assessing certain Defence allegations, on the basis that the consultants had only analysed a portion of Mr Al Hassan's interview record selected by the Defence, rather than the entire record as disclosed to the Defence.⁸⁴ The Chamber observed that there were significant gaps in the extracts provided, that missing extracts were critical to assessing the dynamic that existed between Mr Al Hassan and the Prosecution during the interview process, and that the issue impacted on the reliability of the reports.⁸⁵ The Chamber considers that the aforementioned conclusions remain applicable in the present litigation.⁸⁶ The Chamber also notes that what is at issue is a factual determination as to the circumstances surrounding the gathering of the evidence and in this respect the consultant opinions do not assist the Chamber. Rather, a holistic consideration of Mr Al Hassan's interview record is necessary for the assessment required by the present decision. The Chamber has accordingly afforded no weight in this decision to the consultants' analysis and conclusions

⁸³ Report of Dr Porterfield, MLI-D28-0002-0535 (the 'Porterfield Report'); report of Dr Cohen, MLI-D28-0003-0031; report of licensed physician Dr Crosby, MLI-D28-0003-0315.

⁸⁴ Termination Decision, ICC-01/12-01/18-1009-Conf, paras 106, 109.

⁸⁵ Termination Decision, ICC-01/12-01/18-1009-Conf, paras 106, 109. The Chamber noted that missing key sections included, 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; (ii) went through, consistently throughout the interview process, Mr Al Hassan's rights under Article 55(2) of the Statute; (iii) confirmed that Mr Al Hassan had had the opportunity to confer with his counsel; and (iv) asked him about the conditions of his detention (Termination Decision, ICC-01/12-01/18-1009-Conf, para. 106).

⁸⁶ Contrary to the Defence's submission in the present litigation that '[t]he fact that [these consultants] 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', Exclusion Request, ICC-01/12-01/18-1346-Red2, n. 51.

in relation to Mr Al Hassan's interviews and has relied on its own holistic assessment of the material at hand.

3. Analysis

(a) Separation with national procedures

49. First, the Chamber observes that a consistent theme evident in the interview record is the steps taken by the ICC Prosecution to distinguish for Mr Al Hassan between the ICC's process and national procedures. In this regard, the Chamber notes that the Prosecution consistently emphasised to Mr Al Hassan the separation between the ICC procedure and the Malian national procedures, including to emphasise that it had no control over his conditions of detention.⁸⁷ To further highlight the distinct nature of the ICC interviews, the principle of confidentiality was consistently emphasised with Mr Al Hassan being informed that information from the ICC Prosecution interviews would not be shared with third parties.⁸⁸
50. Contrary to the Defence's suggestion that the Prosecution's efforts to emphasise the separate nature of the ICC process negatively impacted Mr Al Hassan's ability to provide an informed waiver of his rights during the ICC interviews,⁸⁹ the Chamber considers that the Prosecution made it very clear to Mr Al Hassan that it had no control over his treatment and conditions of detention, and this was an important factor to be aware of when deciding whether or not to proceed with the Prosecution interviews. The Chamber considers the consistent steps by the Prosecution to emphasise the distinctive and confidential nature of the ICC procedure also important in light of the information the Prosecution had received

⁸⁷ See e.g. 13 July 2017 MLI-OTP-0051-1233 at 1235, 1243; MLI-OTP-0069-1728 at 1752; 17 July 2017 MLI-OTP-0051-1213 at 1224; 13 September 2017 MLI-OTP-0069-1758 at 1766; 2 October 2017 MLI-OTP-0051-0798 at 0803, 0805, 0807; 6 October 2017 MLI-OTP-0051-0967 from 0991 to 0992; 6 December 2017 MLI-OTP-0060-1374 at 1379; 18 January 2018 MLI-OTP-0060-1729 at 1733; 6 March 2018 MLI-OTP-0062-1095 from 1117 to 1118; 7 March 2018 MLI-OTP-0062-1143 from 1144 to 1145.

⁸⁸ See e.g. 13 July 2017 MLI-OTP-0051-1233 from 1250 to 1252; 17 July 2017 MLI-OTP-0051-1213 at 1224; 6 September 2017, MLI-OTP-0051-0376 at 0380; 2 October 2017 MLI-OTP-0051-0798 at 0802; 4 December 2017 MLI-OTP-0060-1289 from 1294 to 1295; 6 December 2017 MLI-OTP-0060-1374 at 1376; 8 December 2017 MLI-OTP-0060-1484 at 1486; 15 January 2018 MLI-OTP-0060-1580 at 1583; 5 March 2018 MLI-OTP-0062-0940 at 0944.

⁸⁹ Defence Reply, ICC-01/12-01/18-1411-Red2, para. 8.

that multiple authorities were dealing with and interrogating Mr Al Hassan during the period that it met with him.⁹⁰

51. In terms of the subject matter of the ICC interviews and interviews by national authorities, the Chamber observes that the ICC Prosecution interviews were for the large part focussed on events which occurred in Timbuktu in 2012-2013 and there appears to be only a limited degree of overlap to the extent that, in both, Mr Al Hassan was questioned about his activities post Timbuktu 2012-2013.⁹¹ Relatedly, the Chamber notes that there was an ongoing spatial separation between the DGSE and the location of Mr Al Hassan's interviews with the Prosecution. All interview sessions were conducted at [REDACTED], and not at the DGSE where Mr Al Hassan was detained.⁹² Mr Al Hassan had Article 55(2) counsel and Article 56 counsel present for the substance of his interviews with the Prosecution.⁹³ In addition to these counsel, the two Prosecution investigators (including P-0165) and the Arabic/French interpreter were also present.⁹⁴ The Chamber notes that it is captured in the interview record that on two occasions there was an intrusion of outside persons into the Prosecution interviews: once, entry of a staff of the premises to take chairs in and out of the room,⁹⁵ and once, the entry of a guard during one interview to bring glasses.⁹⁶ The Chamber notes the Defence submission on this point that the appearance of DGSE personnel (who had allegedly tortured Mr Al Hassan) had the same coercive effect on Mr Al Hassan's ICC statements.⁹⁷ The Chamber finds these submissions highly speculative,⁹⁸ noting that these interruptions were limited and exceptional and

⁹⁰ See e.g. 13 July 2017 MLI-OTP-0069-1728 from 1734 to 1742, 1749 to 1750; 13 September 2017 MLI-OTP-0069-1758 from 1766 to 1767; 2 October 2017 MLI-OTP-0051-0798 at 0804.

⁹¹ On the overlap, see e.g. 14 July 2017 MLI-OTP-0051-1032 from 1048 to 1065; MLI-OTP-0051-1067 from 1068 to 1088; 8 September 2017 MLI-OTP-0051-0513 from 0525 to 0526; 2 October 2017 MLI-OTP-0051-0847 from 0850 to 8051, and 0860; 18 January 2018 MLI-OTP-0060-1752 from 1768 to 1778; MLI-OTP-0060-1780 from 1781 to 1790; MLI-OTP-0060-1791 from 1792 to 1807; 5 March 2018 MLI-OTP-0062-0951 from 0952 to 0960; 8 March 2018 MLI-OTP-0062-1268 from 1269 to 1271; and MLI-OTP-0066-0452, MLI-OTP-0066-0455 and MLI-OTP-0061-1622.

⁹² P-0165 statement, MLI-OTP-0080-1522 at 1524. See also Prosecution Response, ICC-01/12-01/18-1401-Conf, para. 33; Request for Introduction, ICC-01/12-01/18-1218-Conf-Exp, para. 7.

⁹³ P-0165 statement, MLI-OTP-0080-1522 at 1522.

⁹⁴ P-0165 statement, MLI-OTP-0080-1522 at 1522.

⁹⁵ 6 September 2017: MLI-OTP-0051-0376, from 0390 to 0392.

⁹⁶ 6 December 2017: MLI-OTP-0060-1403 at 1414.

⁹⁷ Exclusion Request, ICC-01/12-01/18-1346-Red2, para. 29.

⁹⁸ See also Prosecution Response, ICC-01/12-01/18-1401-Conf, para. 33.

that following these interruptions the interview continued as before on the same topic.

52. The Chamber notes that the Prosecution also repeatedly and consistently emphasised the voluntary nature of Mr Al Hassan's interviews. This includes at the beginning of the first day of interviews, where the Prosecution informed Mr Al Hassan that their procedure was completely separate from the Malian procedure, and that in relation to them, his statement was voluntary and that if he decided to continue, he must answer their questions of his own free will.⁹⁹ The importance of this was emphasised.¹⁰⁰ The voluntariness of the process was consistently underlined by the Prosecution investigators throughout the 19 days of interviews.¹⁰¹ Mr Al Hassan was asked to confirm multiple times that he had voluntarily answered the Prosecution's questions, and he so confirmed.¹⁰² Mr Al Hassan stated on day 7 of his interviews (13 September 2017) that he volunteered to give testimony so that the truth would be clear about what happened because he was among the witnesses.¹⁰³ This statement was recalled to Mr Al Hassan during later interviews,¹⁰⁴ and Mr Al Hassan was given the opportunity to add or clarify anything in relation to this statement.¹⁰⁵
53. The Chamber notes the Defence's submissions that Mr Al Hassan's continuing expressions of consent and voluntariness should be considered in light the Prosecution's statements on his eighth day of interviews (2 October 2017) where Mr Al Hassan reported that his psychological or mental condition did not allow

⁹⁹ 13 July 2017 MLI-OTP-0051-1233 from 1243 to 1244.

¹⁰⁰ 13 July 2017 MLI-OTP-0051-1233 at 1244.

¹⁰¹ See e.g. 13 July 2017 MLI-OTP-0051-1233 at 1235, 1243 to 1244, 1247; 14 July 2017 MLI-OTP-0051-1032 at 1034; 6 September 2017 MLI-OTP-0051-0376 at 0378; 13 September 2017 MLI-OTP-0051-0692 from 0697 to 0698; 4 December 2017 MLI-OTP-0060-1289 at 1291; 6 December 2017 MLI-OTP-0060-1374 at 1375; 8 December 2017 MLI-OTP-0060-1484 at 1485; 15 January 2018 MLI-OTP-0060-1580 at 1582; 16 January 2018 MLI-OTP-0060-1662 at 1663; 18 January 2018 MLI-OTP-0060-1729 at 1731; 5 March 2018 MLI-OTP-0062-0940 from 0942 to 0943; 6 March 2018 MLI-OTP-0062-1014 at 1016; 7 March 2018 MLI-OTP-0062-1122 at 1123; 8 March 2018 MLI-OTP-0062-1194 at 1195.

¹⁰² See e.g. 13 July 2017 MLI-OTP-0051-1257 at 1294; 13 September 2017 MLI-OTP-0051-0692 from 0697 to 0698; 8 December 2017 MLI-OTP-0060-1565 at 1577; 18 January 2018 MLI-OTP-0060-1791 at 1810; 5 March 2018 MLI-OTP-0062-0988 from 1011 to 1012; 6 March 2018 MLI-OTP-0062-1095 at 1117; 8 March 2018 MLI-OTP-0062-1268 at 1276.

¹⁰³ 13 September 2017 MLI-OTP-0051-0790 at 0796.

¹⁰⁴ 2 October 2017 MLI-OTP-0051-0798 at 0809 to 0810; 4 December 2017 MLI-OTP-0060-1289 at 1292; MLI-OTP-0060-1298 at 1300.

¹⁰⁵ 2 October 2017 MLI-OTP-0051-0798 at 0809 to 0810.

him to do a lot of things and that he could be tortured at any time and asked whether it was allowed for the Prosecution to interview him before he had been transferred to the Malian justice system.¹⁰⁶ In response, as noted by the Defence, the Prosecution told Mr Al Hassan that if they had no right to meet with him while he was in his current situation, then they would not be meeting him because such interviews would be rejected by the Court,¹⁰⁷ and told him that interviews had been authorised by the ICC judges knowing his conditions.¹⁰⁸ Notwithstanding, the Chamber also notes that during this exchange, the Prosecution highlighted their lack of any influence over the Malian procedures, and that what was important to them was Mr Al Hassan's physical wellbeing, which is why they ask him how he has been treated and if everything is fine.¹⁰⁹ They further 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.¹¹⁰ In light of the above, and having considered the Chamber's assessment of the circumstances of the ICC interviews with Mr Al Hassan as a whole, the Chamber is of the view that, contrary to the Defence submission,¹¹¹ this exchange has no bearing on its finding under Article 69(7) of the Statute.

(b) Assistance by counsel

54. The Chamber notes that counsel was present to assist Mr Al Hassan during the interviews. After the Prosecution investigators explained that Mr Al Hassan had the right to legal assistance and to be questioned in counsel's presence, Mr Al Hassan indicated his decision to be assisted by counsel.¹¹² Mr Al Hassan was also informed that he had the right to change his decision about counsel at any point during the interview.¹¹³ The Prosecution consistently reminded Mr Al Hassan of

¹⁰⁶ 2 October 2017 MLI-OTP-0051-0798 from 0805 to 0806.

¹⁰⁷ 2 October 2017 MLI-OTP-0051-0798 at 0808.

¹⁰⁸ 2 October 2017 MLI-OTP-0051-0798 at 0809. *See also* 13 July 2017 MLI-OTP-0051-1233 at 1238.

¹⁰⁹ 2 October 2017 MLI-OTP-0051-0798 from 0805 to 0808.

¹¹⁰ 2 October 2017 MLI-OTP-0051-0798 at 0807.

¹¹¹ Defence Reply, ICC-01/12-01/18-1411-Conf-Red, para. 8.

¹¹² 13 July 2017 MLI-OTP-0051-1233 from 1247 to 1250.

¹¹³ 13 July 2017 MLI-OTP-0051-1233 at 1249.

his right to consult with counsel at any time¹¹⁴ including in particular if he was afraid of saying something that might incriminate him,¹¹⁵ and Mr Al Hassan confirmed regularly throughout the 19 days of interview that he had the opportunity to consult with counsel before the sessions started and during the breaks.¹¹⁶

55. In relation to the Defence submissions disputing effective legal representation on the basis that Mr Al Hassan did ‘not fully understand his status’,¹¹⁷ the Chamber recalls its previous finding¹¹⁸ 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.¹¹⁹ This was raised by the Prosecution investigators consistently throughout subsequent sessions.¹²⁰ The Chamber also considers speculative the related Defence submission that the lawyer appeared to be unaware of the existence and relevance of critical protections under Article 55(1) of the Statute and internationally recognised

¹¹⁴ See e.g. 13 July 2017 MLI-OTP-0051-1257 at 1261; 17 July 2017 MLI-OTP-0051-1124 at 1128; 8 September 2017 MLI-OTP-0051-0537 at 0538; 11 September 2017 MLI-OTP-0051-0598 at 0599; 13 September 2017 MLI-OTP-0051-0692 at 0698; MLI-OTP-0051-0767 at 0768; 2 October 2017 MLI-OTP-0051-0798 from 0801 to 0802; 6 October 2017 MLI-OTP-0051-0912 at 0913; 4 December 2017 MLI-OTP-0060-1289 at 1294, 1296; MLI-OTP-0060-1352 at 1353; 6 December 2017 MLI-OTP-0060-1374 at 1376; 15 January 2018 MLI-OTP-0060-1580 at 1582, 1590; 16 January 2018 MLI-OTP-0060-1662 at 1663; 18 January 2018 MLI-OTP-0060-1791 at 1792; 5 March 2018 MLI-OTP-0062-0940 at 0944; MLI-OTP-0062-0951 at 0951; MLI-OTP-0062-0988 at 0990; 6 March 2018 MLI-OTP-0062-1014 at 1016; MLI-OTP-0062-1037 at 1038, 1057; MLI-OTP-0062-1095 at 1096; 7 March 2018 MLI-OTP-0062-1143 at 1145; 8 March 2018 MLI-OTP-0062-1218 at 1219.

¹¹⁵ 13 July 2017 MLI-OTP-0051-1257 at 1261.

¹¹⁶ See e.g. 13 July 2017 MLI-OTP-0051-1257 at 1258; 14 July 2017 MLI-OTP-0051-1099 at 1100; 17 July 2017 MLI-OTP-0051-1124 at 1128; 8 September 2017 MLI-OTP-0051-0457 at 0459; 13 September 2017 MLI-OTP-0051-0790 at 0791; 6 October 2017 MLI-OTP-0051-0967 at 0968; 6 December 2017 MLI-OTP-0060-1446 at 1447; 18 January 2018 MLI-OTP-0060-1729 at 1732; MLI-OTP-0060-1791 at 1792; 5 March 2018 MLI-OTP-0062-0940 at 0944; 6 March 2018 MLI-OTP-0062-1058 at 1059; 8 March 2018 MLI-OTP-0062-1239 at 1240.

¹¹⁷ Exclusion Request, ICC-01/12-01/18-1346-Red2, para. 22. See also Defence Reply, ICC-01/12-01/18-1411-Conf-Red, para. 11.

¹¹⁸ Termination Decision, ICC-01/12-01/18-1009-Red, para. 110.

¹¹⁹ 13 July 2017 MLI-OTP-0051-1233 from 1244 to 1246.

¹²⁰ See e.g. 6 September 2017 MLI-OTP-0051-0376 at 0379; 2 October 2017 MLI-OTP-0051-0798 from 0800 to 0802; 4 December 2017 MLI-OTP-0060-1289 at 1293; 15 January 2018 MLI-OTP-0060-1580 from 1581 to 1582; 18 January 2018 MLI-OTP-0060-1752 at 1769; 5 March 2018 MLI-OTP-0062-0940 from 0942 to 0944.

human rights law.¹²¹ The Chamber also find that the fact that legal assistance was only provided for in the context of ICC interviews, and not beyond, has no bearing on its assessment under Article 69(7) of the Statute.¹²²

56. Accordingly, the Chamber finds that Mr Al Hassan was assisted by counsel in accordance with Article 55(2) of the Statute throughout the ICC interview process.

(c) Explanation and exercise of rights

57. The Chamber further notes that questions of procedure and rights in the context of the ICC interviews were clearly and thoroughly explained by the Prosecution, and Mr Al Hassan confirmed that he understood these and decided to proceed with the interview.¹²³ This was after a break and a consultation between Mr Al Hassan and his counsel.¹²⁴ The Chamber notes that Mr Al Hassan was consistently asked during later interviews whether he had any questions in relation to this procedure.¹²⁵ Mr Al Hassan was assisted throughout the interviews by an Arabic interpreter, in accordance with the preference he expressed to speak Arabic during his interview.¹²⁶ The Chamber further notes that the Prosecution systematically informed Mr Al Hassan of his right to silence and his right against self-incrimination,¹²⁷ giving not only general but also specific warnings.¹²⁸

¹²¹ Exclusion Request, ICC-01/12-01/18-1346-Red2, para. 22.

¹²² *Contra* Exclusion Request, ICC-01/12-01/18-1346-Conf, para. 22.

¹²³ 13 July 2017 MLI-OTP-0051-1233 from 1234 to 1256; MLI-OTP-0051-1257 from 1258 to 1259, 1264.

¹²⁴ 13 July 2017 MLI-OTP-0051-1257 at 1258.

¹²⁵ *See e.g.* 2 October 2017 MLI-OTP-0051-0798 at 0803; 8 December 2017 MLI-OTP-0060-1484 from 1486 to 1487; 5 March 2018 MLI-OTP-0062-0940 at 0945; 6 March 2018 MLI-OTP-0062-1014 at 1016; 7 March 2018 MLI-OTP-0062-1122 at 1124.

¹²⁶ 13 July 2017 MLI-OTP-0051-1233 from 1239 to 1240.

¹²⁷ *See e.g.* 13 July 2017 MLI-OTP-0051-1233 from 1246 to 1247; 14 July 2017 MLI-OTP-0051-1067 at 1078; 6 September 2017 MLI-OTP-0051-0376 at 0379; 2 October 2017 MLI-OTP-0051-0798 at 0801; 6 October 2017 MLI-OTP-0051-0891 at 0893; MLI-OTP-0051-0967 from 0986 to 0987; 4 December 2017 MLI-OTP-0060-1289 from 1293 to 1294, 1302; 8 December 2017 MLI-OTP-0060-1484 at 1486; 18 January 2018 MLI-OTP-0060-1729 at 1731; MLI-OTP-0060-1752 from 1768 to 1769; MLI-OTP-0060-1791 from 1805 to 1809; 5 March 2018 MLI-OTP-0062-0940 from 0942 to 0943; 6 March 2018 MLI-OTP-0062-1014 at 1016, from 1032 to 1033; 7 March 2018 MLI-OTP-0062-1122 at 1124.

¹²⁸ *See e.g.* 14 July 2017 MLI-OTP-0051-1067 at 1078; 6 October 2017 MLI-OTP-0051-0967 from 0986 to 0987.

58. The Chamber observes that the interviews by the Prosecution as a whole were conducted in an open, constructive and respectful manner, with Mr Al Hassan consistently being given the opportunity to make statements or clarifications, to ask questions, and to raise issues. In this regard, the Chamber notes, for example, that the Prosecution consistently reminded Mr Al Hassan to say so if he did not remember or did not know something, and reassured him that it was fine if he did not remember something.¹²⁹ The investigators also systematically asked Mr Al Hassan whether he had unsolicited statements to make, or wanted to clarify or add to his statements.¹³⁰ The Chamber also observes that during the ICC Prosecution interviews Mr Al Hassan was given water and tea, as well as regular breaks for meals and prayer.¹³¹ Contrary to the Defence's submissions that Mr Al Hassan's cognitive capacities were undermined by torture/CIDT,¹³² the Chamber considers that nothing from the Statements suggests that Mr Al Hassan was unable to actively assert himself during the interviews, particularly bearing in mind his responses and the information he chose not to disclose. In this regard, the Chamber in particular observes that the Statements are lengthy and comprehensive, and Mr Al Hassan answered questions clearly and in detail, and actively made many clarifications and corrections throughout his interviews.¹³³

¹²⁹ See e.g. 13 July 2017 MLI-OTP-0051-1257 at 1260; 14 July 2017 MLI-OTP-0051-1032 at 1034; MLI-OTP-0051-1099 at 1105, 1108; 17 July 2017 MLI-OTP-0051-1124 at 1132, 1154; 8 September 2017 MLI-OTP-0051-0457 at 0480; MLI-OTP-0051-0483 0486, 0487; 11 September 2017 MLI-OTP-0051-0571 at 0579; MLI-OTP-0051-0598 at 0600, 0601; 13 September 2017 MLI-OTP-0051-0767 at 0776; 6 October 2017 MLI-OTP-0051-0912 at 0925; 4 December 2017 MLI-OTP-0060-1298 at 1301, 1303; 8 December 2017 MLI-OTP-0060-1484 from 1500 to 1501; 15 January 2018 MLI-OTP-0060-1580 at 1589; 7 March 2018 MLI-OTP-0062-1122 at 1128; 8 March 2018 MLI-OTP-0062-1194 at 1196.

¹³⁰ See e.g. 13 July 2017 MLI-OTP-0051-1257 at 1261, 1293; 14 July 2017 MLI-OTP-0051-1099 from 1121 to 1122; 17 July 2017 MLI-OTP-0051-1124 from 1127 to 1128; MLI-OTP-0051-1213 at 1214, at 1223; 6 September 2017 MLI-OTP-0051-0376 at 0385; MLI-OTP-0051-0422 at 0452; 8 September 2017 MLI-OTP-0051-0457 at 0459; MLI-OTP-0051-0557 at 0565; 11 September 2017 MLI-OTP-0051-0658 from 0689 to 0690; 8 December 2017 MLI-OTP-0060-1484 at 1490, 1492; 8 December 2017 MLI-OTP-0060-1565 at 1577; 15 January 2018 MLI-OTP-0060-1580 at 1590; 18 January 2018 MLI-OTP-0060-1791 at 1807; 5 March 2018 MLI-OTP-0062-0988 at 1011; 7 March 2018 MLI-OTP-0062-1187 at 1188.

¹³¹ See e.g. 13 July 2017 MLI-OTP-0051-1257 at 1258; 14 July 2017 MLI-OTP-0051-1099 at 1100; 17 July 2017 MLI-OTP-0051-1155 at 1180; 6 September 2017 MLI-OTP-0051-0422 at 0423; 2 October 2017 MLI-OTP-0051-0847 at 0861; 6 October 2017 MLI-OTP-0051-0936 at 0966; 4 December 2017 MLI-OTP-0060-1352 at 1353; 18 January 2018 MLI-OTP-0060-1791 at 1792; 5 March 2018 MLI-OTP-0062-0988 at 0989.

¹³² Exclusion Request, ICC-01/12-01/18-1346-Red2, para. 19.

¹³³ See e.g. 17 July 2017 MLI-OTP-0051-1213 at 1214; 6 September 2017 MLI-OTP-0051-0422 from 0452 to 0453; 11 September 2017 MLI-OTP-0051-0658 from 0689 to 0691; 6 October 2017 MLI-OTP-0051-0912 at 0934; 8 December 2017 MLI-OTP-0060-1484 from 1490 to 1492; 5 March 2018 MLI-

59. An important indication, in the Chamber's view, that Mr Al Hassan understood his rights and was able to effectively exercise them during the interviews is the fact that he actively asserted his right to silence and privilege against self-incrimination on several occasions. On 4 December 2017, Mr Al Hassan chose not to answer questions regarding [REDACTED].¹³⁴ Although Mr Al Hassan came back to the first point in a later interview on 5 March 2018 to give more details, the Chamber notes that the Prosecution investigator specifically reminded him that he had asserted his right to silence on this point.¹³⁵ On 5 March 2018, Mr Al Hassan also chose not to give [REDACTED].¹³⁶
60. The Chamber notes that the main issue raised by the parties in this regard is the right to silence and privilege against self-incrimination in relation to Mr Al Hassan's activities post-dating the events of Timbuktu 2012-2013. This is important, in light of the Defence submission that '[w]hen later interrogators fail to give the suspect with a full opportunity to retract prior admissions, there is no clean break',¹³⁷ since it is in relation to this subject matter in particular that the Defence suggests that Mr Al Hassan felt forced to adhere to 'script' as a result of torture and CIDT.¹³⁸ Critical to this subject is the Prosecution interview of 18 January 2018, during which Mr Al Hassan sought to assert his right to silence and privilege against self-incrimination in relation to questions on [REDACTED], related to information he had disclosed during earlier interviews.¹³⁹
61. The Chamber notes that in this session, following Mr Al Hassan's statement that he preferred not to give details on this subject, the Prosecution investigator stated that there was a need to understand what was considered details and not considered details, and reminded Mr Al Hassan of his right not to answer and the right not to incriminate himself, to consult his lawyer at any time on all points,

OTP-0062-0969 from 0971 to 0973; 6 March 2018 MLI-OTP-0062-1095 from 1113 to 1114; 8 March 2018 MLI-OTP-0062-1239 from 1240 to 1242.

¹³⁴ 4 December 2017 MLI-OTP-0060-1352 from 1356 to 1359, 1368 to 1369.

¹³⁵ 5 March 2018 MLI-OTP-0062-0969 from 0971 to 0973.

¹³⁶ 5 March 2018 MLI-OTP-0062-0951 from 0954 to 0955.

¹³⁷ Exclusion Request, ICC-01/12-01/18-1346-Red2, para. 25.

¹³⁸ Exclusion Request, ICC-01/12-01/18-1346-Red2, paras 25, 28.

¹³⁹ 18 January 2018 MLI-OTP-0060-1791 from 1804 to 1809 and *also generally* 1791 to 1803.

and that responding was voluntary.¹⁴⁰ While it is true, as noted by the Defence,¹⁴¹ that the investigator stated next that it was not up to Mr Al Hassan to decide when it is enough, that the Prosecution would let him think because all of this has specific consequences, and that if they decided to see him again, they would ask other questions and clarifications,¹⁴² the investigator also asked Mr Al Hassan to think of the fact that he was necessarily going to ask Mr Al Hassan questions about the investigation, and that as always, Mr Al Hassan had the right to reply or not.¹⁴³ When Mr Al Hassan then explained that he preferred not to answer in order to not incriminate himself, the investigator unequivocally reiterated that it was Mr Al Hassan's absolute right to answer or not, and that the rights of the defence were precisely why precautions like recording of the interview were taken.¹⁴⁴ The Chamber accordingly disagrees with the Defence's interpretation of the exchange between Mr Al Hassan and the Prosecution on this point, including that the Prosecution 'sought to tie' Mr Al Hassan to earlier statements from 14 July 2017.¹⁴⁵

62. This conclusion is reinforced when considering the exchange of 18 January 2018 together with other relevant parts of the interview record. In particular, in light of the fact that on the second day of interviews, before [REDACTED], Mr Al Hassan was asked to describe a little about this topic in an open and neutral manner, without being pressured to provide details.¹⁴⁶ In addition, at the point of this interview where [REDACTED], the Prosecution investigator specifically intervened to remind Mr Al Hassan of his privilege against self-incrimination.¹⁴⁷ Furthermore, on 4 December 2017, where Mr Al Hassan stated that he would like to limit the discussion to the events of Timbuktu and not talk about what happened afterwards,¹⁴⁸ the Prosecution investigator noted that in relation to what Mr Al Hassan had earlier said, the investigator would ask a few questions, and reminded

¹⁴⁰ 18 January 2018 MLI-OTP-0060-1791 from 1804 to 1806.

¹⁴¹ Exclusion Request, ICC-01/12-01/18-1346-Red2, para. 25.

¹⁴² 18 January 2018 MLI-OTP-0060-1791 at 1806.

¹⁴³ 18 January 2018 MLI-OTP-0060-1791 at 1807.

¹⁴⁴ 18 January 2018 MLI-OTP-0060-1791 from 1808 to 1809.

¹⁴⁵ Exclusion Request, ICC-01/12-01/18-1346-Red2, para. 25.

¹⁴⁶ 14 July 2017 MLI-OTP-0051-1032 at 1055 '[REDACTED]'.

¹⁴⁷ 14 July 2017 MLI-OTP-0051-1067 at 1078.

¹⁴⁸ 4 December 2017 MLI-OTP-0060-1298 from 1300 to 1301.

Mr Al Hassan that he had every right to answer or not to answer, and that the investigator had no problem with that.¹⁴⁹ Finally, after the 18 January 2018 exchange, on 6 March 2018, when Mr Al Hassan mentioned [REDACTED], the Prosecution investigator noted that he would not ask about this since Mr Al Hassan explained he did not want to talk about [REDACTED], and emphasised the importance of respecting the right to silence and the privilege against self-incrimination.¹⁵⁰

63. Considering the matters set out above as a whole, the Chamber is not convinced of the Defence's submission that Mr Al Hassan was compelled by the ICC Prosecution to adhere to a 'script' as a result of torture and CIDT, and its related suggestion that Mr Al Hassan was only advised about his privilege against self-incrimination in relation to events after 2012 and outside of Timbuktu in a vague and equivocal manner.¹⁵¹ In addition, in relation to the Defence's submissions that the Prosecution's language in the 18 January 2018 exchange 'clearly implied that they had access to the DGSE interviews',¹⁵² the Chamber observes that according to the Prosecution's records, it did not receive any copies of statements taken from Mr Al Hassan by Malian or French authorities until after his transfer to the ICC.¹⁵³
64. In light of all of the abovementioned factors, in particular the safeguards taken by the Prosecution in explaining and consistently reinforcing Mr Al Hassan's rights during the interviews, and Mr Al Hassan's exercise of his rights to silence and privilege against self-incrimination, the Chamber does not agree with the Defence submission that Mr Al Hassan could not regulate his responses or assert his rights during the ICC interviews given the temporal overlap between allegedly abusive conditions and the ICC interviews,¹⁵⁴ and could not make informed and

¹⁴⁹ 4 December 2017 MLI-OTP-0060-1298 at 1302.

¹⁵⁰ 6 March 2018 MLI-OTP-0062-1014 from 1032 to 1033. *See similarly* 8 March 2018 MLI-OTP-0062-1268 at 1270.

¹⁵¹ Defence Reply, ICC-01/12-01/18-1411-Red2, para. 12.

¹⁵² Exclusion Request, ICC-01/12-01/18-1346-Red2, para. 25.

¹⁵³ *See* MLI-OTP-0078-0919 from 1920 to 1921 and metadata of the documents mentioned therein which indicates that the documents were all received by the Prosecution after Mr Al Hassan's transfer to the ICC. *See also* Prosecution Response, ICC-01/12-01/18-1401-Conf, n. 134.

¹⁵⁴ Exclusion Request, ICC-01/12-01/18-1346-Red2, para. 28.

unconstrained choices.¹⁵⁵ Contrary to the Defence's submissions, the Chamber does not consider the factors addressed in paragraphs 49 to 63 above to be merely 'formal consent or procedural formalities that do not remedy the effects of the torture/CIDT in question'¹⁵⁶ but considers that these are all critical factors in assessing the circumstances of the interview process as a whole.

(d) Steps taken in relation to reports regarding treatment and detention conditions

65. The Chamber notes that Mr Al Hassan made a series of reports about conditions of detention and treatment to the Prosecution during the period of his ICC interviews.¹⁵⁷
66. In this regard, the Chamber observes that, for the preparation of Mr Al Hassan's first Biographical and Security Questionnaire, Prosecution investigators asked Mr Al Hassan detailed questions about his health and security (including [REDACTED]), and conditions of detention,¹⁵⁸ and asked follow up questions about Mr Al Hassan's reports that he had been beaten¹⁵⁹ and whether there was anyone else who had threatened him.¹⁶⁰ During subsequent interviews, the Prosecution also systematically asked Mr Al Hassan whether he had anything to

¹⁵⁵ Exclusion Request, ICC-01/12-01/18-1346-Red2, para. 19.

¹⁵⁶ Defence Reply, ICC-01/12-01/18-1411-Red2, para. 13.

¹⁵⁷ See e.g. 13 July 2017 MLI-OTP-0069-1728 from 1734 to 1751; 17 July 2017 MLI-OTP-0051-1213 from 1224 to 1225; 6 September 2017 MLI-OTP-0051-0376 from 0381 to 0382; 13 September 2017 MLI-OTP-0051-0692 at 0694, 0697; 13 September 2017 MLI-OTP-0069-1758 from 1759 to 1762, 1766 to 1769; 2 October 2017 MLI-OTP-0051-0798 from 0804 to 0806; 6 October 2017 MLI-OTP-0967 from 0991 to 0992; 4 December 2017 MLI-OTP-0069-1772 at 1791; MLI-OTP-0060-1298 from 1299 to 1300; 6 December 2017 MLI-OTP-0060-1374 from 1378 to 1380; 18 January 2018 MLI-OTP-0060-1729 from 1732 to 1733; 16 January 2018 MLI-OTP-0060-1662 from 1664 to 1667; MLI-OTP-0060-1705 from 1721 to 1722; 18 January 2018 MLI-OTP-0060-1729 from 1732 to 1733; 5 March 2018 MLI-OTP-0062-0940 from 0945 to 0948; MLI-OTP-0062-0951 at 0953, from 0963 to 0966; MLI-OTP-0062-0969 at 0970; 6 March 2018 MLI-OTP-0062-1095 from 1117 to 1118; 7 March 2018 MLI-OTP-0062-1122 from 1124 to 1126.

¹⁵⁸ 13 July 2017 MLI-OTP-0069-1728; MLI-OTP-0069-1754.

¹⁵⁹ 13 July 2017 MLI-OTP-0069-1728 from 1740 to 1742.

¹⁶⁰ 13 July 2017 MLI-OTP-0069-1728 from 1741 to 1742.

raise regarding his detention,¹⁶¹ including asking follow up questions and encouraging him to raise issues.¹⁶²

67. Further, the Chamber notes that the Prosecution took certain steps when Mr Al Hassan complained in later interviews about conditions of detention and alleged violations of rights by the Malian authorities. The Prosecution indicated to Mr Al Hassan that it would inform the relevant Malian authorities, in particular [REDACTED], so that the latter could take any appropriate measures.¹⁶³ The Prosecution also encouraged Mr Al Hassan to raise his concerns, for example [REDACTED], directly with [REDACTED].¹⁶⁴ The record also reflects that the Prosecution informed the Malian authorities of some of Mr Al Hassan's complaints and concerns,¹⁶⁵ and that Mr Al Hassan had the occasion to raise his concerns in person with [REDACTED].¹⁶⁶ The record further indicates that similar steps were undertaken in relation to [REDACTED],¹⁶⁷ and that, albeit after Mr Al Hassan's transfer to the ICC, issues regarding detainee treatment and

¹⁶¹ See e.g. 14 July 2017 MLI-OTP-0051-1032 at 1035; 17 July 2017 MLI-OTP-0051-1124 at 1125; 6 September 2017 MLI-OTP-0051-0376 from 0381 to 0382; 11 September 2017 MLI-OTP-0051-0571 at 0573; 13 September 2017 MLI-OTP-0051-0692 at 0694, 0697; MLI-OTP-0069-1758 from 1759 to 1760, 1762; 2 October 2017 MLI-OTP-0051-0798 from 0803 to 0805; 6 October 2017 MLI-OTP-0051-0891 at 0893; 4 December 2017 MLI-OTP-0069-1772 at 1774, 1791; MLI-OTP-0060-1298 from 1299 to 1300; 6 December 2017 MLI-OTP-0060-1374 from 1376 to 1379; 8 December 2017 MLI-OTP-0060-1484 at 1487; 15 January 2018 MLI-OTP-0060-1580 from 1585 to 1586, 1589; 16 January 2018 MLI-OTP-0060-1662 from 1664 to 1667; 18 January 2018 MLI-OTP-0060-1729 at 1732; 5 March 2018 MLI-OTP-0062-0940 from 0945 to 0948; MLI-OTP-0062-0951 from 0963 to 0966; 6 March 2018 MLI-OTP-0062-1014 from 1016 to 1017; 7 March 2018 MLI-OTP-0062-1122 from 1224 to 1125; 8 March 2018 MLI-OTP-0062-1194 at 1196.

¹⁶² See e.g. 13 September 2017 MLI-OTP-0051-0692 at 0697; 6 December 2017 MLI-OTP-0060-1374 from 1378 to 1379; 5 March 2018 MLI-OTP-0062-0951 from 0965 to 0966 'D'accord. C'est important qu'on vous demande à chaque fois de nous dire parce que c'est un détail que vous soulevez maintenant, mais c'est important à chaque fois qu'on vous demande de nous dire s'il y a des choses comme ça qui ... qui se passent dans vos conditions de détention'; 6 March 2018 MLI-OTP-0062-1014 from 1016 to 1017; MLI-OTP-0062-1095 at 1118.

¹⁶³ See 6 December 2017 MLI-OTP-0060-1374 from 1378 to 1380; 16 January 2018 MLI-OTP-0060-1662 from 1664 to 1665; 18 January 2018 MLI-OTP-0060-1729 from 1732 to 1733; 5 March 2018 MLI-OTP-0062-0940 from 0945 to 0947; MLI-OTP-0062-0969 from 0970 to 0971; 6 March 2018 MLI-OTP-0062-1014 from 1016 to 1017; MLI-OTP-0062-1095 from 1117 to 1118; 7 March 2018 MLI-OTP-0062-1122 from 1124 to 1125; MLI-OTP-0062-1143 from 1144 to 1145.

¹⁶⁴ 6 October 2017 MLI-OTP-0051-0967 from 0991 to 0992.

¹⁶⁵ See 18 January 2018 MLI-OTP-0060-1729 from 1732 to 1733; 5 March 2018 MLI-OTP-0062-0940 from 0945 to 0947; 6 March 2018 MLI-OTP-0062-1014 from 1016 to 1017; 7 March 2018 MLI-OTP-0062-1122 from 1124 to 1125; MLI-OTP-0062-1143 from 1144 to 1145. See also P-0165 statement, MLI-OTP-0080-1522 from 1526 final paragraph to 1527 first paragraph. See also MI-OTP-0071-0286.

¹⁶⁶ 7 March 2018 MLI-OTP-0062-1143 at 1144. See also MI-OTP-0071-0286 at 0287.

¹⁶⁷ [REDACTED].

conditions were raised to a high level in the context of cooperation between the ICC Prosecution and the Malian authorities.¹⁶⁸

68. In relation to other measures taken by the Prosecution, the Chamber notes that in general throughout the 19 days of interviews, the Prosecution systematically enquired with Mr Al Hassan about how he was feeling and whether he was ready to continue with the interviews, which he confirmed.¹⁶⁹ Other measures were also taken in relation to specific issues raised by Mr Al Hassan during his interviews, for example, making interviews shorter when requested,¹⁷⁰ noting that measures would be followed up with [REDACTED],¹⁷¹ noting that issues would be reported to [REDACTED],¹⁷² and enquiring whether Mr Al Hassan could continue with the interview.
69. The Chamber considers that, in light of the other elements of the interviews as a whole, the abovementioned steps were reasonable in the circumstances, also bearing in mind the limited powers of the ICC Prosecution in its cooperation with public authorities at the national level.¹⁷³ The Chamber accordingly rejects the Defence submission that the Prosecution's interventions with the Malian

¹⁶⁸ MLI-OTP-0069-9929.

¹⁶⁹ See e.g. 14 July 2017 MLI-OTP-0051-1032 at 1033; MLI-OTP-0051-1067 at 1068; MLI-OTP-0051-1099 at 1100; 6 September 2017 MLI-OTP-0051-0407 at 0408; 8 September 2017 MLI-OTP-0051-0457 at 0459; MLI-OTP-0051-0483 at 0484; MLI-OTP-0051-0513 at 0514; MLI-OTP-0051-0537 at 0538; MLI-OTP-0051-0557 at 0558; 11 September 2017 MLI-OTP-0051-0598 at 0599, 0624; MLI-OTP-0051-0658 at 0659; 13 September 2017 MLI-OTP-0051-0717 at 0718; 6 October 2017 MLI-OTP-0051-0912 at 0913; MLI-OTP-0051-0936 at 0937; MLI-OTP-0051-0967 at 0968; 4 December 2017 MLI-OTP-0060-1298 at 1299; MLI-OTP-0060-1352 at 1353; 6 December 2017 MLI-OTP-0060-1403 at 1404; MLI-OTP-0060-1423 at 1424; 8 December 2017 MLI-OTP-0060-1511 at 1512; MLI-OTP-0060-1539 at 1540; 15 January 2018 MLI-OTP-0060-1631 at 1632; 16 January 2018 MLI-OTP-0060-1705 at 1706; 18 January 2018 MLI-OTP-0060-1729 from 1730 to 1731, 1733; MLI-OTP-0060-1752 at 1753; MLI-OTP-0060-1780 at 1781; MLI-OTP-0060-1791 at 1792; 5 March 2018 MLI-OTP-0062-0951 at 0952; MLI-OTP-0062-0969 at 0971; 6 March 2018 MLI-OTP-0062-1037 at 1038; MLI-OTP-0062-1058 at 1059; MLI-OTP-0062-1084 at 1085; MLI-OTP-0062-1095 at 1096; 7 March 2018 MLI-OTP-0062-1168 at 1169; 8 March 2018 MLI-OTP-0062-1218 at 1219; MLI-OTP-0062-1239 at 1240; MLI-OTP-0062-1257 at 1258; MLI-OTP-0062-1268 at 1269.

¹⁷⁰ [REDACTED] (16 January 2018 MLI-OTP-0060-1662 from 1664 to 1666). [REDACTED] (16 January 2018 MLI-OTP-0060-1705 from 1721 to 1722)

¹⁷¹ [REDACTED] (18 January 2018 MLI-OTP-0060-1729 from 1732 to 1733).

¹⁷² [REDACTED] (5 March 2018 MLI-OTP-0062-0969 from 0970 to 0971).

¹⁷³ See also Termination Decision, ICC-01/12-01/18-1009-Red, para. 97.

authorities were too late and that the Prosecution could and should have done more to discharge its duty towards Mr Al Hassan.¹⁷⁴

(e) Mr Al Hassan's account of his subjective experiences of the ICC interviews

70. Finally, the Chamber notes the Defence's submission that, *inter alia*, the ongoing physical and psychological effects of torture and CIDT irrevocably tainted Mr Al Hassan's statements to the Prosecution.¹⁷⁵ The Chamber notes that Mr Al Hassan gave accounts about his state of mind during his ICC interviews to Defence consultants¹⁷⁶ and to the Chamber's appointed Panel of Experts,¹⁷⁷ which are recounted in their respective reports. The Defence has notably referred to this material in support of contentions regarding Mr Al Hassan's subjective state of mind during his interviews.¹⁷⁸ The Chamber does not consider that an evidentiary basis for Mr Al Hassan's subjective state of mind during his ICC interviews can be properly established through consultants and experts in this manner. The Chamber notes that it was open to Mr Al Hassan to provide more information about conditions at the time and the impact on him in terms of the statement taking process. Such testimony by Mr Al Hassan in a preliminary evidentiary hearing was not proposed by the Defence. Accordingly, the Chamber cannot rely on Mr Al Hassan's account in this respect as reported by the Defence consultants and the Chamber's Panel of Experts to make any findings with respect to his subjective state of mind at the relevant time or the impact of that on his ability to give a statement.

¹⁷⁴ Defence Reply, ICC-01/12-01/18-1411-Conf-Red, para. 8. *See also* paras 7, 9-11.

¹⁷⁵ Exclusion Request, ICC-01/12-01/18-1346-Conf, paras 5, 7, 19, 20.

¹⁷⁶ Porterfield Report, MLI-D28-0002-0535; *see also* report of Dr Cohen, MLI-D28-0002-0500.

¹⁷⁷ *See e.g.* Report on the medical examination pursuant to Rule 135 of the Rules of Procedure and Evidence in the case of Mr. AL Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 9 December 2020, ICC-01/12-01/18-1197-Conf-Anx (reclassified confidential on 26 January 2021) (the 'Panel Report'), paras 43-46. The Panel of Experts was appointed by the Chamber in the context of the assessment of Mr Al Hassan's ongoing fitness to stand trial, *see* Fitness Decision, ICC-01/12-01/18-1467.

¹⁷⁸ *See e.g.* Exclusion Request, ICC-01/12-01/18-1346-Conf, para. 25, n. 151, citing to Porterfield Report, MLI-D28-0002-0535 at 0558 and para. 28, n. 164, citing to Panel Report, ICC-01/12-01/18-1197-Conf-Anx, paras 43-46 and Porterfield Report, MLI-D28-0002-0535 at 0585, 0603-0606. *See also e.g.* Exclusion Request, ICC-01/12-01/18-1346-Conf, para. 23, n. 135, citing to Porterfield Report, MLI-D28-0002-0535 at 0605-0606.

4. Conclusion on the Exclusion Request

71. Based on all of the above, the Chamber considers that the Defence has not shown a real risk that the Statements were obtained by means of torture or CIDT and therefore it has failed to substantiate its arguments that the Statements were obtained by means of a violation of the Statute or internationally recognised human rights.
72. The answer to the first step of the inquiry under Article 69(7) – whether the evidence in question was obtained by means of a violation of the Statute or internationally recognised human rights - is therefore negative. As a result, it is unnecessary for the Chamber to consider the second step of Article 69(7), namely whether the violations cast substantial doubt on the reliability of the Statements (Article 69(7)(a)), or whether admission of the Statements would be antithetical to and seriously damage the integrity of the proceedings (Article 69(7)(b)). The Exclusion Request is accordingly rejected.

E. Admissibility of the Statements under Article 69(4) of the Statute

73. In order to be admitted into evidence, and in line with the burden of proof outlined in paragraph 36 above, the Prosecution must demonstrate on a preliminary or *prima facie* basis that the Statements (i) are relevant to the trial; (ii) have probative value; and (iii) are sufficiently relevant and probative to outweigh any prejudicial effect that could be caused from their admission.¹⁷⁹
74. In relation to relevance of the Statements, the Chamber notes that the Statements include an account *inter alia* of [REDACTED].¹⁸⁰
75. In relation to probative value of the Statements, the Chamber notes that many considerations which are relevant have already been addressed above, including in relation to the presence of a qualified interpreter and most notably the voluntariness of the Statements. On the latter point, and noting that voluntariness

¹⁷⁹ See *Lubanga* Admissibility Decision, ICC-01/04-01/06-1399-Corr, paras 26-32; *Bemba* Admissibility Decision, ICC-01/05-01/08-2012-Red, paras 13-16. See also *Ntaganda* Admissibility Decision, ICC-01/04-02/06-1181, para. 7.

¹⁸⁰ Request for Introduction, ICC-01/12-01/18-1218-Conf-Exp, para. 22.

is a factor relevant to the evaluation of the probative value of the Statements,¹⁸¹ the Chamber is satisfied on the basis of the analysis above that the Prosecution has demonstrated on a preliminary or *prima facie* basis that the Statements were voluntary. The Chamber further notes that the audio recordings and transcripts bear sufficient indicia of reliability of a formal nature and are not so manifestly unbelievable or incoherent so as to make them unsuitable for introduction. Accordingly, the Chamber finds without basis the Defence's submission that the Statements are so unreliable that they should be excluded or else a prejudice would arise.¹⁸² It is noted, however, that these submissions will be considered further by the Chamber in its ultimate assessment of the probative value and weight, if any, to be attributed to Mr Al Hassan's evidence.

76. Finally, the Chamber notes that the Defence has raised objections related to some of the audio recordings in the context of its Article 69(7) objections to the expert report of witness P-0655.¹⁸³ The Chamber considers these objections relate to the fact that these items were used by the expert in his report for the purpose of the subject voice analysis, as opposed to the admissibility into evidence of these items themselves *per se*. Accordingly the Chamber will rule on those Article 69(7) objections in its subsequent decision on the expert reports.
77. On the basis of all the information before it, the Chamber is satisfied that the Prosecution has demonstrated to the necessary standard that the Statements can be admitted into evidence in full. The Prosecution's Request for Introduction of the Statements is accordingly granted.

¹⁸¹ See *Lubanga* Admissibility Decision, ICC-01/04-01/06-1399-Corr, para. 28.

¹⁸² Exclusion Request, ICC-01/12-01/18-1346-Red2, paras 31-32.

¹⁸³ See emails from the Defence, 21 October 2020 at 15:03 and 13 October 2020 at 15:35. The objected items are items 1-6 listed in ICC-01/12-01/18-Conf-Exp-AnxA.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY:

REJECTS the Defence's Exclusion Request;

GRANTS the Prosecution's Request for Introduction in relation to the Statements;

ADMITS the Statements into evidence; and

INSTRUCTS the Registry to reflect the admission of the Statements in the Court metadata.¹⁸⁴

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 17 May 2021

At The Hague, The Netherlands

¹⁸⁴ See ERNs listed in ICC-01/12-01/18-1218-Conf-Exp-AnxA.