

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **30 May 2022**

**TRIAL CHAMBER X**

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

**SITUATION IN THE REPUBLIC OF MALI**

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

**Public**

**With Confidential Annex A and Confidential Annex B**

**Public Redacted Version of Defence application to call Witnesses MLI-D28-P-0020, MLI-D28-P-0025 MLI-D28- P-0500, MLI-D28-P-0501 and MLI-D28-P-0502 as experts and to introduce their reports and associated materials into evidence under rule 68(3), 11 April 2022, ICC-01/12-01/18-2197-Conf**

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

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

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**REGISTRY**

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**Victims Participation and  
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## 1. Introduction

1. The Defence respectfully requests the Trial Chamber to authorise the Defence to introduce expert evidence from Dr Charles Morgan III, Dr Kate Porterfield, Dr Juliet Cohen, Mr Nikolaous Kalantzis, and Dr Brian Sommerlad ('the Defence Experts'), and to receive the associated reports and related materials through Rule 68(3).
2. The Defence Experts possess sufficient qualifications and expertise in relation to the subject matter of their reports and/or proposed testimony. Their reports and/or anticipated testimony fall within the scope of their respective expertise and are relevant and will assist the Chamber in its determination of the issues in this case. The methodology employed in these reports is reliable, and the content is accurate and probative to the outcome of the charges in this case.
3. Defence evidence is not restricted to the truth or falsity of charged facts: it can also relate to the credibility or reliability of Prosecution evidence, positive defences and mitigating circumstances.<sup>1</sup> In line with this broad fact-finding ambit, ICC Chambers have authorized the Defence to adduce expert evidence concerning the legality of processes used by the Prosecution to gather evidence and the reliability of evidence based on the use of specific evidence gathering procedures: the fact that the Chamber had already received such evidence through bar table motions and issued determinations on Article 69(7) challenges during the Prosecution case did not operate as a bar.<sup>2</sup> Although the decision as to whether to receive expert evidence is discretionary, all discretionary powers must be exercised in a manner that is consistent with the Chamber's duty to ensure a fair, impartial and adversarial trial.

## II. Submissions

*Dr Charles Morgan, Dr Kate Porterfield and Dr Juliet Cohen*

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<sup>1</sup> ICC-01/12-01/18-789-AnxA, para. 41.

<sup>2</sup> In *Bemba et al.*, the Trial Chamber issued Article 69(7) determinations concerning the admission of phone intercepts and detention unit recordings in 2015 (before and during the Prosecution case): ICC-01/05-01/13-1257, ICC-01/05-01/13-1284. The Chamber also received Defence expert evidence on legality and reliability issues, during the Defence case: ICC-01/05-01/13-1989-Red, paras. 226, ICC-01/05-01/13-1753.

4. The reports and proposed testimony of these three experts relates directly to the reliability of evidence obtained from individuals, in a high stress environment. In essence, Dr Morgan will give evidence concerning the impact of trauma/high stress environments on the quality and reliability of memory recall and Dr Porterfield and Dr Cohen will give expert evidence that substantiates the conclusion that Mr Al Hassan was experiencing physical and psychological trauma and stress during the periods when he was interviewed by the ICC Prosecution.

*Dr Charles Morgan MLI-D28-P-0502/ D-0502*

5. The Defence seeks authorisation to call D-0502 for the purpose of leading evidence concerning the impact of extrinsic and intrinsic interrogation conditions on cognitive functioning and recall (on a short-term and longer term basis).
6. Dr Morgan possesses substantial academic, clinical, and research expertise in forensic psychiatry and law enforcement fields relating to human memory, credibility assessments and human performance under conditions of high stress.<sup>3</sup> Through clinical trials and academic research conducted over the course of thirty years, Dr Morgan has acquired substantial expertise as concerns the effect of certain interrogation conditions on the content and quality of information during such interrogations.<sup>4</sup> He is recognised as a leader in this field: “no other research group has direct experience or more expertise on what is known about how stress exposure affects human memory”.<sup>5</sup>
7. Dr Morgan’s evidence is relevant to the reliability of P-0398’s evidence and [REDACTED] testimony and has cross-cutting significance as concerns the impact of certain interrogative techniques to prod or retrieve memory recall (such as the use of photographs and videos to identify persons or reconstruct events). Dr Morgan’s research findings demonstrate that stress generates chemical changes in the brain,

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<sup>3</sup> MLI-D28-0006-2741-R01.

<sup>4</sup> MLI-D28-0005-9967-R01, 9968

<sup>5</sup> MLI-D28-0005-9967-R01 at 9969.

which impacts on both cognitive functioning and compliance.<sup>6</sup> This causal relationship exists irrespective as to whether the stress was generated intentionally or unintentionally.<sup>7</sup> It can also be generated by extrinsic environmental factors. This chemical consequence can be amplified through specific interrogation techniques, which replace true recollection with learned memories.<sup>8</sup>

8. Dr Morgan's evidence is of a technical nature and does not usurp the role of the Chamber as the ultimate finder of fact. ICC Trial Chambers have received expert evidence as concerns the impact of trauma on witness memory.<sup>9</sup> It is, moreover, highly significant that this Trial Chamber authorized the Prosecution to introduce *viva voce* and written expert evidence from P-0662 [REDACTED]

[REDACTED]<sup>10</sup> [REDACTED]

[REDACTED]<sup>11</sup>

9. Since the Prosecution [REDACTED] [REDACTED] as concerns the implications of this finding as concerns the reliability of memory recall in the type of interrogation conditions experienced by detained witnesses in this case. The evidence of Dr Morgan will assist the Chamber to address this highly relevant gap in technical expertise as concerns the evidence of individual who were exposed to detention related stress factors, and also

<sup>6</sup> MLI-D28-0005-9967-R01 at 9973.

<sup>7</sup> MLI-D28-0005-9967-R01 at 9973.

<sup>8</sup> MLI-D28-0005-9967-R01 at 9975.

<sup>9</sup> ICC-01/04-02/06-2359, fn. 172, referring to *Lubanga, Katanga, Bemba, and Ngudjolo*.

<sup>10</sup> ICC-01/12-01/18-989-Conf, para. 45. ICC-01/12-01/18-842-Conf, para. 50, [REDACTED]

[REDACTED]. The Trial Chamber subsequently agreed to receive her report and related evidence through Rule 68(3): ICC-01/12-01/18-1119.

<sup>11</sup> [REDACTED].

the testimony of victim-witnesses, whose memory recall was facilitated through photographic and video evidence used by both NGOs and Prosecution investigators.

10. The Defence, through this application, further requests the Trial Chamber to introduce, through Rule 68(3):

- Dr Morgan's report: MLI-D28-0005-9967-R01;
- Dr Morgan's curriculum vitae: MLI-D28-0005-8412.
- Reference materials relied upon by Dr Morgan (as comprising material which is necessary to fully understand the report): MLI-D28-0006-1509, MLI-D28-0006-1773, MLI-D28-0006-2074, MLI-D28-0006-1934, MLI-D28-0006-1943, MLI-D28-0006-2060, MLI-D28-0006-2035, MLI-D28-0006-1973, MLI-D28-0006-2086, MLI-D28-0006-2103, MLI-D28-0006-1569, MLI-D28-0006-1984, MLI-D28-0006-2050, MLI-D28-0006-1892, MLI-D28-0006-1517, MLI-D28-0006-1993, MLI-D28-0006-1824, MLI-D28-0006-2008, MLI-D28-0006-1835, MLI-D28-0006-2001, MLI-D28-0006-1864, MLI-D28-0006-2105, MLI-D28-0006-1817, MLI-D28-0006-2005, MLI-D28-0006-1602, MLI-D28-0006-1591, MLI-D28-0006-1911, MLI-D28-0006-1487, MLI-D28-0006-1971, MLI-D28-0006-1926, MLI-D28-0006-1532.

11. Dr Morgan's report is sufficiently reliable to be introduced through Rule 68(3) and its introduction through this provision occasions no prejudice to the Prosecution or LRV. In his report, Dr Morgan clearly sets out the issues addressed by his report,<sup>12</sup> his expertise in technical fields that are relevant to these issues,<sup>13</sup> and the evidential and academic materials relied upon to conduct his analysis and formulate his opinions (as set out in footnotes throughout the report). The evidential materials were comprised of the materials submitted by the Prosecution in relation to P-0398 and [REDACTED] (either through the P-0398 Article 56 application or through [REDACTED] *viva voce* testimony).<sup>14</sup>

<sup>12</sup> MLI-D28-0005-9967-R01.

<sup>13</sup> MLI-D28-0005-9967-R01 at 9968-9969.

<sup>14</sup> Dr Morgan reviewed the P-0398 transcripts in their entirety, in the language disclosed by the Prosecution (French/Arabic): MLI-D28-0005-9967-R01, fn. 1. See also MLI-D28-0006-3352-R01.

The content therefore allows the Chamber and the parties to ascertain “the established or assumed facts (...) relied upon, and the methods used to form his (...) opinion”.<sup>15</sup>

12. Due to the complexity and breadth of the subject matter, the Defence further seeks to elicit *viva voce* evidence of approximately 4 ½ hours from Dr Morgan in relation to the following topics:

- the concept of uncontrollable stress and its impact on memory;
- research studies conducted by Dr Morgan that bear directly on findings concerning the inter-relationship between stress, suggestibility/compliance, and memory recall and the consequences of using specific interrogation techniques (including videos and photographs);
- specific conditions pertaining to P-0398 and ██████████ that reflect that the individuals experienced uncontrollable stress during the course of ICC Prosecution interrogations; and
- how and why the stress of ██████████ and intrinsic interview conditions affected data and information recall during these interviews by reference to specific examples and topics addressed by P-0398 ██████████ during the interviews.

*Dr Porterfield MLI-D28-P-0020/D-0020*

13. The Defence seeks the authorization of the Chamber to call Dr Porterfield to testify *viva voce* in relation to her findings, based on an in person evaluation, as to:

- Whether Mr Al Hassan exhibited symptoms that are consistent with the psychological *sequelae* of someone who has experienced torture/CIDT in detention and/or uncontrollable stress; and
- The likely extent and severity of the *sequelae* he experienced during his detention in Bamako.

14. Dr Porterfield’s analysis and finding, based on her expert in-person evaluation, are directly relevant to the Chamber’s Article 74 assessment of the reliability P-0398’s

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<sup>15</sup> *Prosecutor v. Stanistic and Simatovic*, Decision on Stanistic, Request for Order of Disclosure of Materials Related to the Admissibility of the Expert Report of Reynaud Theunens, 11 March 2011, para. 19.

statements, and her expertise in the field of trauma will assist the Chamber to make an accurate and informed assessment of this issue. In its Article 69(7) decision, the Chamber clarified that the Chamber’s findings were without prejudice to the weight that will be assigned to the statements in whole or in part in the Article 74 judgment.<sup>16</sup> The Chamber’s Article 69(7) decision also focused on the existence of “a causal link between the violation and the gathering of the evidence”;<sup>17</sup> the Chamber’s decision was thus predicated on the existence of a “violation” and a specific link between the violation and the process of obtaining evidence from Mr Al Hassan. The Chamber framed this as a ‘narrow’ inquiry into the evidence gathering process.<sup>18</sup> As a result, based on an assessment of the “circumstances of the interviews as a whole”,<sup>19</sup> the Chamber focused on whether the steps taken by the Prosecution were sufficient to inure the evidence gathering process from the impact of alleged violations of the Statute or human rights law. The Chamber did not, therefore, consider the broader question as concerns the potential impact of environmental factors on the reliability of specific information provided at specific points in time during the interview processes. Accordingly, even if the evidence gathering process was not directly facilitated by human rights violations, the Chamber’s previous determination left undisturbed the more specific inquiry as concerns whether Mr Al Hassan’s detention conditions impacted on the manner and content of specific responses, and the evidential quality of such responses.

15. The Chamber has also underscored the importance of reaching its final assessment as concerns the reliability and weight of evidence, based on an holistic appreciation of the case-file as a whole.<sup>20</sup> It follows that the Chamber’s assessment of the relevance and reliability of Dr Porterfield’s evidence must necessarily be assessed in light of Defence evidence that had yet to be tendered during the Article 69(7) litigation. As

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<sup>16</sup> ICC-01/12-01/18-1475-Conf, paras. 26 and 29.

<sup>17</sup> ICC-01/12-01/18-1475-Conf, para. 40.

<sup>18</sup> ICC-01/12-01/18-1475-Conf, para. 41. See also para. 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. 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.”

<sup>19</sup> ICC-01/12-01/18-1475-Conf, para. 45.

<sup>20</sup> See ICC-01/12-01/18-2127, para. 24.



will be established by Dr Morgan, the following forms of stress impact on the reliability and quality of memory recall: “restraint stress, isolation stress, heat/cold stress; sleep disruption stress, and interrogation stress”.<sup>21</sup> Dr Morgan will further demonstrate the impact of intrinsic /extrinsic sources of stress on witness compliance and suggestibility.<sup>22</sup> When viewed in this context, Dr Porterfield’s evidence will assist the Chamber to ascertain whether Mr Al Hassan experienced particular forms of psychological stress during the interview process (due to either extrinsic or intrinsic factors), and the likely severity and extent of such stress, with a view to evaluating the impact of stress on his memory recall and suggestibility. The ability to identify the sequelae of psychological stress also requires specialised expertise that falls outside the observational capacity of an investigator or trier of fact.<sup>23</sup> Dr Porterfield’s expert report and evidence will therefore assist the Chamber to identify and evaluate the different types of psychological stress that Mr Al Hassan experienced during the time periods coinciding with the ICC Prosecution interviews. Dr Porterfield’s assessment that in 2019, P-0398 exhibited symptoms consistent with PTSD will further inform the Chamber’s judgment. If the Chamber were to accept the Prosecution’s suggestion that these symptoms could be linked to P-0398’s prior experiences in 2012,<sup>24</sup> then this would also inform the Chamber’s assessment of positive defences of duress, superior orders and mistake of law.

16. In terms of her expertise, [REDACTED] Dr Porterfield has a PhD in clinical psychology, and has conducted substantial post-doctoral and clinical research on the areas of PTSD and trauma.<sup>26</sup> She has been included on the ICC list of experts in the area of clinical psychology,<sup>27</sup> and was invited by the ICC Prosecution to participate

<sup>21</sup> MLI-D28-0005-9967-R01 at 9970.

<sup>22</sup> MLI-D28-0005-9967-R01 at 9976, 9981.

<sup>23</sup> Interim Report of the Special Rapporteur on Torture, [A/69/387](#) para. 51; See also *Prosecutor v. Popovic*, Appeals Judgment, para. 375: “The Appeals Chamber recalls that the purpose of expert testimony is to supply specialised knowledge that might assist the trier of fact in understanding the evidence before it, and that in the ordinary case an expert witness offers a view based on specialised knowledge regarding a technical, scientific or otherwise discrete set of ideas or concepts that is expected to fall outside the lay person’s ken.”

<sup>24</sup> ICC-01/12-01/18-982-Conf-Exp-Corr. para. 160. [REDACTED]

<sup>25</sup> [REDACTED]

<sup>26</sup> MLI-D28-0003-1624

<sup>27</sup> <https://www.icc-cpi.int/get-involved/Documents/2021-06-16-list-of-experts-eng.pdf>

as an expert in an internal advocacy programme focusing on defendants with PTSD.<sup>28</sup> Dr Porterfield also has substantial practical expertise as concerns the evaluation of persons with a similar profile to Mr Al Hassan- that is, Muslim terror suspects detained in high security environments.<sup>29</sup> The Chamber found that P-0662 possessed sufficient academic and professional experience in the area of PTSD and further concluded that testimony and expert report on this issue could assist the Chamber in “its assessment of the evidence in this case.”<sup>30</sup> There is no basis for reaching a contrary conclusion as concerns Dr Porterfield.

17. In order to expedite her testimony, the Defence further seeks to submit the following items into evidence though Rule 68(3):

- Dr Porterfield’s main report - MLI-D28-0002-0535;
- Dr Porterfield’s curriculum vitae – MLI-D28-0002-1624;
- Instruction letter – MLI-D28-0003-1881;
- Diagnostic formulation - MLI-D28-0003-2071;
- Relevant literature relied on upon in the main report: MLI-D28-0003-1725, MLI-D28-0003-1696, MLI-D28-0003-1655, MLI-D28-0003-1667, MLI-D28-0003-1674, MLI-D28-0003-1791.

18. Dr Porterfield’s main report is relevant and reliable. A significant component of Dr Porterfield’s report was based on her in person assessment of Mr Al Hassan, which is the ‘gold standard’ for the evaluation of the psychological sequelae of torture.<sup>31</sup> Dr Porterfield interviewed Mr Al Hassan over the course of 5 days (approximately 30 hours) and conducted discrete follow-up inquiries by telephone. Dr Porterfield sets out Mr Al Hassan’s description of his arrest and detention, and includes her “clinical observations regarding Mr. Al Hassan’s condition as he recounted these events, as

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<sup>28</sup> MLI-D28-0003-1624 at 1633.

<sup>29</sup> MLI-D28-0003-1624

<sup>30</sup> ICC-01/12-01/18-989-Conf, para. 45.

<sup>31</sup> Thomas Wenzel, Andreas Frewer and Siroos Mirzaei, “The DSM 5 and the Istanbul Protocol: Diagnosis of Psychological Sequels of Torture” (2015) 25 *Torture* 51, 53; See also Zapf, Beltrani and Reed (2019) p. 463. See also Marc Nesca and Thomas Dalby, *Forensic Interviewing in Criminal Court Matters: A Guide for Clinicians* (C.C. Thomas, 2013) pp.15-16: “[a]n interview with the subject of the evaluation is both necessary and important when the evaluator is expected to give an opinion regarding the mental health or other functioning of the evaluatee”.

these reactions are relevant to the discussion of his psychological condition.”<sup>32</sup> The purpose of setting out Mr Al Hassan’s account is not to assert that it is true, but to verify the consistency of his account and reactions to the psychological sequelae of someone who experiences treatment of the kind described in his account. The Chamber is not receiving Mr Al Hassan’s account into evidence, but rather Dr Porterfield’s detailed evaluation as concerns the consistency of this account and his reactions with specific psychological sequelae.<sup>33</sup> Dr Porterfield’s approach is fully consistent with recognized methodology for obtaining psychological evidence concerning the existence and impact of torture/CIDT.<sup>34</sup>

19. Dr Porterfield’s observations and evaluation were not dependent on her assessment of transcript extracts. Dr Porterfield’s report contains a clear demarcation between the observations and conclusions which are based on her interactions with Mr Al Hassan, those which relate to her assessment of his medical record, and those which concern the interview transcripts.<sup>35</sup> During *viva voce* testimony, Dr Porterfield can further clarify the extent to which the first set out conclusions (based on clinical observations) were formulated, independently of the transcript analysis.
20. The Defence has disclosed the medical records and literature relied upon by Dr Porterfield and a copy of her clinical notes.<sup>36</sup> The reliability of Dr Porterfield’s expertise and conclusions was also affirmed by the independent Panel of Experts, who

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<sup>32</sup> MLI-D28-0002-0535 at 0539.

<sup>33</sup> The Defence further notes that the Chamber has received, through *viva voce* evidence and Rule 68(3), hearsay observations concerning accounts provided by Prosecution fact witnesses to other Prosecution experts and witnesses: P-0643 - ICC-01/12-01/18-1409-Conf, para. 23; P-0524 –ICC-01/12-01/18-2125-Conf, paras. 8-10; P-0160 – email decision of 16 March 2021 concerning material submitted for P-0160.

<sup>34</sup> Istanbul Protocol para. 260: “The overall goal of a psychological evaluation is to assess the degree of consistency between an individual’s account of torture and the psychological findings observed during the course of the evaluation.”

<sup>35</sup> Clinical observations: MLI-D28-0002-0535 at 0535 to 0580; observations based on medical records: MLI-D28-0002-0535 at 0580 to 0582; observations based on interview transcripts: MLI-D28-0002-0535 at 0582 to 0586 to 0602.

<sup>36</sup> Literature – MLI-D28-0003-1725, MLI-D28-0003-1696, MLI-D28-0003-1655, MLI-D28-0003-1667, MLI-D28-0003-1674, MLI-D28-0003-1791; Clinical notes - MLI-D28-0003-1456; See also Annex A concerning the documents used and disclosed. MLI-D28-0003-0843 was disclosed but is not on the Defence list since the Defence is not seeking to admit any evidence from P-0398’s interviews, and it is comprised of translations of records that are already in evidence.

found “the account [of torture] given in the expert reports to be credible and consistent with observations made during the POE’s assessment of Mr. Al-Hassan”.<sup>37</sup>

21. Dr Porterfield’s evaluation of the DGSE interrogation process also touch on stress factors that have not been disputed by the Prosecution, including that Al Hassan was brought to interviews hooded and handcuffed, and the role of DGSE guards in bringing him to and from the interviews.<sup>38</sup>
22. The Chamber has previously found that any issues concerning sources and methodology can be addressed through cross-examination, and taken into account as part of the Chamber’s holistic assessment of evidence at the end of the case:<sup>39</sup> the fact that a party raises concerns in relation to such matters is not, therefore, grounds to reject a Rule 68(3) application, particularly given the objective of expediting court proceedings.
23. Due to delays in the transmission of information from the detention unit in 2019-2020, Dr Porterfield did not have access to a limited number items at the time she finalized her reports. The information in these items was mostly irrelevant or duplicated in the reports provided to her.<sup>40</sup> Dr Porterfield can in any case, address through her testimony whether these items would have impacted on her evaluation and conclusions.
24. In line with the Chamber’s directive to revise its estimate of hours, the Defence estimates that if the current Rule 68(3) application is granted, the Defence will require 4 hours to examine Dr Porterfield in relation to the following:
  - Dr Porterfield’s expertise in assessing trauma and the causes of trauma, focussing specifically on prior experience concerning persons with a similar profile to P-0398;

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<sup>37</sup> ICC-01/12-01/18-1197-Conf-Anx, fn 2: “The POE of experts was not instructed to independently evaluate the claim of torture. However, the POE found the account given in the expert reports to be credible and consistent with observations made during the POE’s assess- ment of Mr. Al-Hassan.”

<sup>38</sup> MLI-D28-0002-0535 at 0603-0604.

<sup>39</sup> ICC-01/12-01/18-1409-Conf, para. 24.

<sup>40</sup> See MLI-D28-0003-2094-R01, which sets out the information in the medical journal of 3 January 2020, which was duplicated in records that were transmitted to Dr Cohen and Dr Porterfield as compared to the information that was not.

- The particular methodology that Dr Porterfield employed to make a clinical assessment of P-0398 during her interactions with P-0398;
- The steps that Dr Porterfield took to assess alternative causes of trauma;
- The specific implications of trauma as concerns cognitive functioning, by reference to the phenomenon of learned helplessness; and
- Whether access to other information or materials would have impacted on her analysis and conclusions.

*Dr Juliet Cohen - MLI-D28-P-0025/D-0025*

25. Dr Cohen, a forensic physician, has prepared over 1500 expert medical-legal evaluations in relation to reported injuries arising from torture, domestic abuse and trafficking.<sup>41</sup> She is on the ICC list of experts, under the field of forensic medicine.<sup>42</sup>
26. The Defence seeks to introduce MLI-D28-0002-0500, MLI-D28-0003-0031, and related materials (MLI-D28-0003-2059) into evidence through Rule 68(3). The subject matter of these reports fall within Dr Cohen's expertise and the methodology and sources are clearly set out in the reports.
27. The information set out in MLI-D28-0002-0500 is relevant to the Chamber's assessment of the evidential weight of P-0398's evidence. It is based on reliable methodology and the analysis and findings are probative. Dr Cohen conducted an in person physical examination of Mr Al Hassan in January 2020, which assessed the consistency of his description of the causes of lesions and injuries with his account of his treatment in detention at the DGSE. Dr Cohen's opinion, in conjunction with Dr Morgan's expert testimony, will assist the Chamber to determine the impact of environmental stress factors on the quality and reliability of information provided by P-0398, while detained in that environment. As explained by Dr Morgan, physical beatings trigger stress, which corrupts memory and cognition.<sup>43</sup>
28. As set out in her report, Dr Cohen's findings and analysis are based not only on P-0398's self-report, but also her "analysis of the responses, observations and

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<sup>41</sup> MLI-D28-0002-0500 at 0526.

<sup>42</sup> <https://www.icc-cpi.int/get-involved/Documents/2021-06-16-list-of-experts-eng.pdf>

<sup>43</sup> MLI-D28-0005-9967-R0 at 9971, 9973.

examination findings”.<sup>44</sup> Dr Cohen’s report followed the methodology set out in paragraph 187 the Istanbul protocol, which provides that:<sup>45</sup>

2. For each lesion and for the overall pattern of lesions, the physician should indicate the degree of consistency between it and the attribution given by the patient. The following terms are generally used:
  - (a) Not consistent: the lesion could not have been caused by the trauma described;
  - (b) Consistent with: the lesion could have been caused by the trauma described, but it is non-specific and there are many other possible causes;
  - (c) Highly consistent: the lesion could have been caused by the trauma described, and there are few other possible causes;
  - (d) Typical of: this is an appearance that is usually found with this type of trauma, but there are other possible causes;
  - (e) Diagnostic of: this appearance could not have been caused in any way other than that described.

29. This methodology has been widely accepted by regional and domestic courts and jurisdictions as representing an appropriate manner to evaluate the consistency of lesions with reports of alleged torture.<sup>46</sup> The Defence has disclosed the medical records relied upon by Dr Cohen to inform her assessment.<sup>47</sup> After reviewing P-0398’s complete detention unit medical file, the independent Panel of Experts also found “the account [of torture] given in the expert reports to be credible and consistent with observations made during the POE’s assessment of Mr. Al-Hassan”.<sup>48</sup>

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<sup>44</sup> MLI-D28-0002-0500 at 0501.

<sup>45</sup> MLI-D28-0002-0500 at 0530

<sup>46</sup> UK Home Office, [Medical evidence in asylum claims](#), pp. 9-10; ECHR, *Bati and Others v. Turkey*, Judgment of 3 June 2004, applications nos. 33097/96 and 57834/00, para. 100; IACtHR, *Cabrera Garcia and Montiel Flores v. Mexico*, Judgment Of November 26, 2010 (*Preliminary Objection, Merits, Reparations and Legal Costs*), para. 122. See also Interim Report of the Special Rapporteur on Torture, [A/69/387](#) para. 45: “Forensic and medical reports of sufficient quality require standardized medico - legal evaluation report forms in accordance with Istanbul Protocol guidelines. They include standardized screening formats and formats for full Istanbul Protocol evaluations”; para. 52: “the Istanbul Protocol should be used for assessment of allegations of torture and medico-legal reports undertaken in compliance with the standards and principles of the Protocol, including independence and impartiality, present reliable findings on torture. These medico-legal reports therefore should be considered as reliable evidence on the issue of whether torture has or has not been perpetrated.” Dr Cohen also explained that she was unable to take photographs of Mr Al Hassan since the examination took place at the ICC detention unit, and ICC detention unit rules do not allow for cameras to be taken into the unit: MLI-D28-0003-2059 at 2060.

<sup>47</sup> Annex B.

<sup>48</sup> ICC-01/12-01/18-1197-Conf-Anx, fn 2: “The POE of experts was not instructed to independently evaluate the claim of torture. However, the POE found the account given in the expert reports to be credible and consistent with observations made during the POE’s assess- ment of Mr. Al-Hassan.”

30. In MLI-D28-0003-0031, Dr Cohen provided a medical evaluation of the detention conditions described in BSQs and transcript extracts pertaining to P-0398, [REDACTED] [REDACTED].<sup>49</sup> The Chamber received the statements of P-0398 [REDACTED] into evidence and [REDACTED] testified *viva voce*. Dr Cohen's evaluation is relevant to the evidential weight to be afforded to their statements and testimony.

31. The Trial Chamber previously accepted that expert evidence concerning the medical state and conditions of detention of Prosecution witnesses was relevant and an appropriate subject for expert testimony.<sup>50</sup> Dr Cohen's report and prospective testimony falls within the framework of this prior ruling. Dr Cohen evaluated the symptoms and information conveyed by these individuals, with a view to assessing whether they were of a nature that required medical attention. P-0398 [REDACTED] were both interviewed, while detained at the DGSE [REDACTED] [REDACTED]. The Prosecution also conducted substantive interviews with both interviews before they had been examined by an independent physician.<sup>51</sup> This analysis is directly relevant to the issue as to whether the Prosecution investigators or Article 55 counsel were competent to assess the ongoing physical or psychological fitness of P-0398 and [REDACTED] [REDACTED] to be interviewed, in the absence of an independent medical confirmation to that effect. Dr Cohen's report does not intrude into the ultimate issue as to whether P-0398 and [REDACTED] were fit to be interviewed, but rather the forensic question as to whether the type of symptoms and conditions described by them required a prior medical and psychiatric evaluation in order to assess their severity and consequential impact on fitness. This is a technical issue that falls within the remit of an expert forensic physician.

<sup>49</sup> MLI-D28-0003-0031 at 0036-0038.

<sup>50</sup> ICC-01/12-01/18-989-Conf, para. 36: "The Chamber notes that P-0590 has the relevant academic and professional medical and forensic expertise, including in the African context. 50 The Chamber notes that the Defence's challenges in relation to P-0590 are also related to another pending motion, namely its Termination Motion. 51 Without prejudice to the Chamber's determination of the Termination Motion, the Chamber considers that P-0590 may be called to testify as an expert. The expertise of P0590 may assist the Chamber, including in the determination, as suggested by the Defence, of the witnesses' consent to be examined, as well as the conditions of their detention."

<sup>51</sup> [REDACTED]

32. Indeed, in response to Defence questioning concerning [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>52</sup> The Prosecution did not, however, lead evidence from a specialist on this issue.<sup>53</sup> Dr Cohen's specialized knowledge will therefore assist the Chamber to assess the technical aspects of reports related directly to [REDACTED]'s psychological and cognitive capacity during the interview process.<sup>54</sup> As will be explained by Dr Morgan, these issues are not confined to the interview process or cured by [REDACTED]'s subsequent testimony, since psychological stress can trigger false memories and leave an imprint on cognitive recall. The Prosecution also repeatedly used the interview transcripts to refresh [REDACTED]'s memory (both during the two preparation sessions that were conducted prior to his testimony and during his actual testimony).<sup>55</sup> [REDACTED]

[REDACTED],<sup>56</sup> Dr Cohen's expert evaluation will assist the Chamber to evaluate the implications of memory loss and the circumstances of his memory recall.

33. The information in MLI-D28-0003-2059 is probative to the methodological approach employed by Dr Cohen. It therefore constitutes 'material which is necessary to understand the prior recorded testimony'.

34. If this request is granted, Dr Cohen will testify as to the accuracy of her reports, and explain the methodology she used to conduct the physical examination of P-0398 and to reach her conclusions. Dr Cohen will also address the question as to whether any

<sup>52</sup> [REDACTED]

<sup>53</sup> Although P-590 was listed as a viva voce witness, the Prosecution submitted his evidence through Rule 68(2) and declined to introduce his medical reports. The Trial Chamber ruled that the fact that the Prosecution did not introduce this evidence would not preclude the Defence from raising issues based on this evidence during the Defence case :ICC-01/12-01/18-T-144-CONF-ENG, fn. 22.

<sup>54</sup> See for example, MLI-D28-0003-0031 at 0055.

<sup>55</sup> [REDACTED]

<sup>56</sup> [REDACTED].



additional medical records or extracts, which were not included in her report, would have impacted on her analysis or findings.<sup>57</sup> The Defence will also conduct a limited examination on specific findings arising from the two reports. In line with the Chamber's direction to review and reduce its estimate of time, the Defence estimates that it would require 5 hours if the Rule 68(3) requests are not granted, and 1 ¾ to 2 hours if the applications are granted.

*Mr Nikolaos Kalantzis (MLI-D28-P-0501/D-0501)*

35. D-0501, an expert in signature and handwriting examination, has significant expertise as concerns the appropriate methodology that should be employed to prepare an independent and impartial signature examination. The Trial Chamber found, in connection with P-0621 and P-0620, that they possessed “relevant academic and professional expertise in document and handwriting authentication in the context of police investigations and judicial proceedings” and further concluded that “their joint report may be of assistance to the Chamber, particularly in light of the documentary evidence the Prosecution intends to rely on at trial and their alleged link to the accused’s role”.<sup>58</sup> The Chamber subsequently received the report into evidence. D-0501’s evidence will address technical issues that directly concern the reliability and probative value of this report. His expert evidence will therefore assist the Chamber to reach an informed determination as concerns its evidential weight.
36. During P-0620’s testimony, the Defence raised methodological issues concerning cognitive bias, the existence (or not) of a transparent peer review, the extent to which P-0620’s examination had complied with guidelines issued by the European Network of Forensic Science Institutes (ENFSI), and the lack of clarity as concerns if and how P-0620 had incorporated the limitations of her review into her final opinion. P-0620, in turn, sought to minimise the relevance of cognitive bias to her work,<sup>59</sup> averred that certain provisions of the ENFSI guidelines had not yet been adopted,<sup>60</sup> declined to

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<sup>57</sup> See MLI-D28-0003-2094-R01, which sets out the information in the medical journal of 3 January 2020, which was duplicated in records that were transmitted to Dr Cohen and Dr Porterfield as compared to the information that was not.

<sup>58</sup> ICC-01/12-01/18-989-Conf, para. 86.

<sup>59</sup> ICC-01/12-01/18-T-033-CONF-ENG, p. 79, lines 12-18.

<sup>60</sup> ICC-01/12-01/18-T-033-CONF-ENG, p. 58, lines 15-19.

provide [REDACTED],<sup>61</sup> and failed to acknowledge the discrepancies in her report between its acknowledged limitations as compared to the final conclusions.<sup>62</sup>

37. D-0501 possesses specialized technical expertise that will assist the Chamber to assess the reliability of P-0620's evidence, in light of her responses to these issues. He has significant experience as a handwriting and document examiner, has testified on multiple occasions as an expert on such matters, has acted as an expert trainer in this field, has published numerous articles on these subjects and has participated in ENFSI expert working groups.<sup>63</sup> As of January 2022, D-0501 is also included on the ICC list of experts. Since the Registry has not yet updated the list on the website to reflect his inclusion, the Defence seeks authorization, pursuant to Regulation 35(2) of the RoC, to add the letter confirming his inclusion on its list of evidence.<sup>64</sup> It is in the interests of justice to add this letter as it is relevant to the Chamber's assessment of his expertise. Given first, the discrete nature of the letter's content, and second, the fact that his curriculum vitae refers to his inclusion in the Registry list, its late inclusion in the Defence list will also occasion no prejudice to the other parties.

38. D-0501 reads French, and reviewed the P-0620's report in French in addition to the transcripts of her testimony. A draft English translation was provided to him to facilitate Defence examination.<sup>65</sup> His report thus cites the French original and the English translation. D-0501 can confirm, during testimony, that before including English point points, he verified whether the English version corresponded to the French original.

39. The Defence further requests to submit the following items into evidence through Rule 68(3):

- His report - MLI-D28-0005-9928-R01;
- His inclusion on the ICC list of experts - MLI-D28-0006-4140;

<sup>61</sup> [REDACTED].

<sup>62</sup> ICC-01/12-01/18-T-033-CONF-ENG, p. 57.

<sup>63</sup> MLI-D28-0005-9928-R01 at 9950.

<sup>64</sup> MLI-D28-0006-4140, which was disclosed today.

<sup>65</sup> This was disclosed to the Prosecution on 6 April 2022.

- His curriculum vitae - MLI-D28-0005-8399; and
- Literature relied upon as part of his report: MLI-D28-0005-9423, MLI-D28-0005-9451, MLI-D28-0005-9512, MLI-D28-0005-9507, MLI-D28-0005-9496, MLI-D28-0005-9799, MLI-D28-0005-9428, MLI-D28-0005-9476, MLI-D28-0005-9560, MLI-D28-0005-9465, MLI-D28-0005-9824, MLI-D28-0005-9409, MLI-D28-0005-9443, MLI-D28-0005-9808, MLI-D28-0005-9729, MLI-D28-0005-9417.

40. D-0501's report is relevant, reliable and probative to the issues before the Chamber. The report sets out the scope of inquiry, the evidential materials that were considered by D-0501, and the literature and industry standards that support his findings and commentary. The related literature will also assist the Chamber to assess and weigh these conclusions.

41. In line with the Chamber's directives to review its estimates, the Defence estimates that it will require 4 hours to examine D-0501 if the Rule 68(3) application is not granted. If it is granted, the Defence requests to have 1 ¾ hours for the purpose of allowing D-0501 to attest to the accuracy of the contents of his report, provide a brief summary of his expertise in relation to the specific issues addressed in his report, and explain the significance of his observations.

*Dr Sommerlad* - MLI-D28-P-0500/ D-0500

42. The Defence seeks authorization to call D-0500, and admit his reports, for the purpose of discrediting the accounts provided by ██████████ ██████████ concerning the causes of certain lesions.

43. D-0500's evidence is of a specialized technical nature that falls within the scope of his expertise. D-0500 has forty-four years' experience as a plastic surgeon, in countries throughout the world.<sup>66</sup> D-0500 routinely examines skin lesions and has published widely on the area of wound healing.<sup>67</sup> He also routinely provides expert evidence on

<sup>66</sup> MLI-D28-0005-8372-R01. See in particular the various countries in which he has practiced/taught surgery: at 8392 -8398.

<sup>67</sup> MLI-D28-0005-8372-R01 at 8385.

this topic for the purpose of medical asylum cases in the United Kingdom.<sup>68</sup> D-0500 most often appears for claimants (90% of the time).<sup>69</sup> D-0500 therefore possesses significant expertise in the area of lesion analysis, which will assist the Chamber to evaluate the probative value of photographic evidence concerning lesions, and the reliability and weight of testimony concerning the likely causes of these lesions.

44. The Defence requests the Chamber to receive the following reports and documents into evidence, through Rule 68(3):

- Expert report [REDACTED] (MLI-D28-0006-2722-R01);
- Expert report - [REDACTED] (MLI-D28-0006-2725-R01);
- Expert report [REDACTED] (MLI-D28-0006-2730-R01);
- Expert report - [REDACTED] (MLI-D28-0006-2734-R01);
- Expert report – [REDACTED] (MLI-D28-0006-2737-R01);
- Expert report – [REDACTED] (MLI-D28-0006-2778-R01);
- Curriculum Vitae (MLI-D28-0005-8372-R01);
- List of evidence relied upon (MLI-D28-0006-3004);
- Email correspondence with Prosecution (MLI-D28-0006-2788); and
- Istanbul Protocol (MLI-D28-0006-2639).

45. The reports prepared by D-0501 are reliable and probative as concerns these issues. These reports are based on an appropriate and widely accepted methodology and the manner in which D-0501 reached his conclusions can be readily understood from his analysis.

46. The Prosecution submitted into evidence various photographs from the individuals, and further elicited evidence concerning the alleged circumstances under which the lesions were created. Although the Prosecution arranged for [REDACTED] to be examined in person by the Netherlands Forensic Institute, it did not submit these reports into evidence.<sup>70</sup> [REDACTED] declined to be examined by D-0500 and the date provided for [REDACTED] after protracted correspondence, could not be accommodated at short notice.<sup>71</sup> D-0500's reports are therefore based on the photographs disclosed by the Prosecution and the witness

<sup>68</sup> MLI-D28-0006-2722. See also at 2724 (he prepares about 250 expert reports per year).

<sup>69</sup> MLI-D28-0006-2722 at 2724.

<sup>70</sup> MLI-OTP-080-2123, MLI-OTP-0080-2135.

<sup>71</sup> MLI-D28-0006-2788.

accounts provided under oath. D-0500's findings are of a technical nature, addressing first, the limitations inherent in relying on photographic evidence, and second, the consistency of the witnesses' markings with the type of injuries described in their testimony.

47. D-0501 assessed these photographs by reference to the criteria set out in the Istanbul Protocol. As set out above, this is a widely accepted method for evaluating alleged injuries pertaining to torture or cruel and inhumane treatment.
48. The related documents will also assist the Chamber and parties to assess D-0500's expertise and methodology.
49. In line with the Chamber's directives to review its estimates, the Defence estimates that it will require 4 hours to examine D-0500 if the Rule 68(3) application is not granted. If the application is granted, the Defence seeks 1 ¼ hours to allow D-0500 to testify to the accuracy of his reports. The Defence will also conduct a limited examination in relation to his specific expertise in relation to different types of skin lesions, his experience concerning the use of the Istanbul Protocol in similar evaluations, and the distinction between examination of photographs as compared to in person examinations.

### **III. Relief sought**

50. For the reasons set out above, the Defence for Mr Al Hassan respectfully requests the Honourable Trial Chamber to:
  - Authorise the Defence to call the Defence Experts; and
  - Grant the related Rule 68(3) requests.



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Melinda Taylor  
Counsel for Mr Al Hassan

Dated this 30<sup>th</sup> Day of May 2022  
At The Hague, The Netherlands