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TRIAL CHAMBER X

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

SITUATION IN THE REPUBLIC OF MALI

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

Public

Defence request for leave to appeal the "Decision on Defence request for reconsideration of Decision on requests related to the submission into evidence of Mr Al Hassan's statements"

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

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I. Introduction

1. The Defence for Mr Al Hassan respectfully seeks leave to appeal the "Decision on Defence request for reconsideration of Decision on requests related to the submission into evidence of Mr Al Hassan's statements" ('the Decision'),[1] pursuant to Article 82(1)(d) of the Rome Statute ('Statute'). This is an application for leave to appeal, and not to reconsider the admissibility of statements made by Mr Al Hassan during interviews with ICC Prosecution investigators ('ICC-OTP') after he had been tortured along with the admissibility of related materials.

2. The Decision was made on 23 November 2022, following a Defence request dated 2 November 2022 ('the Request').[2] The statements by Mr Al Hassan and the related materials had previously been admitted in evidence in the trial by an earlier decision dated 17 May 2021 ('First Decision').[3]

3. The Defence Request was supported by new and additional fact and expert evidence, information and arguments, concerning Mr Al Hassan's exposure to physical and psychological torture prior to and during the ICC-OTP interviews, and the nexus between that experience of torture and the ongoing effects of that torture including severe cognitive impairment.

4. That evidence included inter alia the following:

- The written and *viva voce* testimony of witnesses concerning the fact that Mr Al Hassan had been physically and psychologically tortured before and during his interviews with the ICC-OTP;
- The written and *viva voce* testimony of witnesses concerning the tortuous and coercive conditions of detention at the DGSE, and the nexus between these dire conditions and their participation in ICC-OTP interviews – due to their desperate desire for assistance;
- The *viva voce* expert testimony of Professor Charles Morgan III that there was a reasonable degree of medical certainty that the conditions of detention and treatment experienced by Mr Al Hassan at the General State Security Directorate (DGSE) in Bamako would have produced uncontrollable/unpredictable stress. These forms of stress, in turn, negatively impact on memory and volition. Based on the transcripts of Mr Al Hassan's interviews, it was Professor Morgan's expert opinion that Mr Al Hassan had experienced unpredictable/uncontrollable

[1] ICC-01/12-01/18-2414.
[2] ICC-01/12-01/18-2403-Red.
[3] ICC-01/12-01/18-1475-Conf.

stress during the interviews and that his responses and volition had been negatively impaired.

5. The Trial Chamber rejected the Defence Request, finding that the new evidence was not relevant/capable of affecting its assessment.

6. The Issues which arise from the Decision are as follows:

> **a) First issue:** Whether the Chamber erred in its assessment of evidence due to an improper application of the test for reconsideration and the real risk test;
> **b) Second Issue:** Whether Trial Chamber erred by failing to take into consideration evidence and argumentation concerning the impact of torture/CIDT on the reliability of Mr Al Hassan's statements and/or the integrity of the proceedings.
> **c) Third Issue:** Whether the Trial Chamber erred in law and abused its discretion by ignoring expert opinion concerning the psychological sequelae of torture;
> **d) Fourth Issue:** Whether the Trial Chamber failed to comply with the obligation to provide a reasoned opinion as concerns its findings;
> **e) Fifth Issue:** Whether the Trial Chamber erred in failing to make an assessment as to whether the detention conditions at the General Directorate for State Security (DGSE) amounted to violations of the Statute/internationally recognized human rights and/or continuous forms of torture/CIDT

II. Submissions

The Issues Arise from the Decision

a) ***First issue:*** *Whether the Chamber erred in its assessment of evidence due to an improper application of the test for reconsideration and the real risk test*

7. The relevant law and facts were before the Trial Chamber as they were set out in detail in the Request.

8. There are two related aspects to this Issue: first, the Chamber misapplied the test for reconsideration and second, the Chamber failed to properly apply the 'real risk' test. As a result, the Decision was materially affected by an improperly high threshold and evidential onus placed exclusively on the Defence.

9. In the Reconsideration Decision, the Trial Chamber found that the remedy of reconsideration was only applicable if "a clear error in reasoning has been demonstrated or if it is necessary to do so to prevent an injustice".[4] The first element concerns the

[4] ICC-01/12-01/18-2414, para. 7.

process by which the Chamber reached its decision and the second, the consequences of an incorrect decision on the fairness of the proceedings.

10. The Chamber's assessment of the first prong of reconsideration was materially affected by the Chamber's failure to apply the "real risk" test, in the manner that the test is framed by human rights and international courts.

11. In the First Decision, the Trial Chamber confirmed that it would apply the 'real risk' test, as formulated under human rights law (in the *El Haski* and *Othman* cases) and international judicial entities, such as the ECCC and STL.[5] These legal precedents uniformly support *inter alia*:

- The existence of a positive duty on the part of the Chamber to proactively ensure that the judicial record is not tainted by torture; and
- The importance of interpreting and applying the real risk threshold in a manner that is consistent with the defendant's right to a fair trial and the right to an effective remedy.

12. In *El Haski* and *Othman*, the ECtHR emphasized that in the context of adjudicating exclusion requests, "it was necessary to have due regard for the special difficulties in proving allegations of torture. It emphasised that torture was uniquely evil, both for its barbarity and its corrupting effect on the criminal process".[6] In line with this concern, the Court explained the real risk test in the following terms:[7]

> […] necessary and sufficient for the complainant, if the exclusionary rule is to be invoked on the basis of Article 6 § 1 of the Convention, to show that there is a "real risk" that the impugned statement was thus obtained. It would be unfair to impose any higher burden of proof on him.
>
> 89. The domestic court may not then admit the impugned evidence without having first examined the defendant's arguments concerning it and without being satisfied that, notwithstanding those arguments, no such risk obtains. This is inherent in a court's responsibility to ensure that those appearing before it are guaranteed a fair hearing, and in particular to verify that the fairness of the proceedings is not undermined by the conditions in which the evidence on which it relies has been obtained (see, mutatis mutandis, Stojkovic v. France and Belgium, no. 25303/08, 7 April 2011, § 55).

[5] ICC-01/12-01/18-1475-Conf, para. 38, fn 70.
[6] ECtHR, *El Haski v. Belgium*, 25 September 2012, 649/08, para. 86 ('*El Haski*'), citing *Othman:* ECtHR, *Othman (Abu Qatada) v. The United Kingdom*, 17 January 2012, 8139/99 ('*Othman*').
[7] *El Haski*, paras. 88-89.

13. In terms of the evidential threshold required to satisfy the real risk test, in *El Haski*, the ECtHR found that it was satisfied through evidence of a pattern of abuses inflicted on persons with a similar profile, as substantiated by human rights reports;[8] in *Othman*, statements from the torture victims describing the beatings and injuries, which were corroborated by reports of systemic abuse, were sufficient to satisfy the threshold of concluding that there was a real risk that their confessions had been obtained through torture.[9] In the ECCC and STL cases cited by the Chamber, the real risk test was formulated in the following terms. In *Nuoun Chea*, the Chamber noted that while there was evidence that tortured had been practiced at the detention facility, it would be "difficult to establish whether any particular piece of evidence was obtained through torture".[10] Requiring the objecting party to "establish" that a specific piece had been obtained through torture was also not consistent with the Chamber's duty to protect the integrity of the proceedings.[11] For this reason, the Chamber found that it had a positive obligation to assess whether there was a real risk that evidence had been obtained by torture, after which it fell to the party seeking to use the evidence to rebut the existence of such a risk.[12] The real risk threshold was satisfied through proof that statements were obtained at security centres, where torture was practiced.[13] In circumstances where it was not clear as to whether the confession had been obtained through torture, the Chamber applied a presumption of taint.[14] In reaching these conclusions, the Court referenced the ECtHR *El Haski* findings concerning the Court's positive duty to ensure that "the fairness of the proceedings is not undermined by the conditions in which the evidence on which it relies has been obtained".[15] In the *Ayyash* case, the STL Trial Chamber found, in a related decision, that the Chamber has a positive duty to proactively assess whether statements were made in circumstances that warranted exclusion, even if the parties had made no submissions to this effect.[16]

[8] *El Haski*, paras. 94-98.
[9] *Othman*, paras. 103, 272.
[10] ECCC Decision, para 34.
[11] ECCC Decision, para. 34.
[12] ECCC Decision, para. 36.
[13] ECCC Decision, para. 88.
[14] ECCC Decision, para. 86.
[15] ECCC Decision, fn. 87.
[16] *Ayyash et al.*, STL-11-01/T/TC, Decision denying Prosecution Application for Certification to Appeal 'Decision Admitting Statements of Witness PRH103 under Rule 158 into Evidence', 20 October 2017, paras. 2, 5.

14. In contradistinction to these precedents, the Chamber required the Defence to 'convince' the Chamber that its ultimate findings should be reversed. This goes above and beyond the requirement of merely demonstrating a 'risk' that the evidence was collected in circumstances involving torture/CIDT. The fact that the Chamber was seized of a request to 'reconsider' an earlier decision also should not have altered the application of the real risk test. This is because the test for reconsideration concerns the threshold question as to whether there are grounds to reopen a prior finding and make a new determination. If such grounds exist, then the Chamber must then evaluate the evidence or arguments in accordance with the real risk standard. This is consistent with the approach concerning the submission of new evidence on appeal: if the Defence satisfies the burden of establishing that new or fresh evidence should be admitted, it then falls to the Appeals Chamber to assess the impact of new evidence in accordance with the standard burden of proof (that is, that it falls to the Prosecution to establish the defendant's guilt beyond reasonable doubt). The Chamber is also obliged to assess the new evidence in light of the record as a whole, and not in isolation.[17] The same evidential approach also applies as concerns re-trials and circumstances where the Appeals Chamber makes new factual findings on appeal, due to procedural or legal errors. It follows that if the threshold for reconsideration is met in connection with an application concerning torture-tainted evidence, the Chamber is then required to apply the 'real risk test' to the totality of evidence before it.

15. Rather than following the sequence of assessment mandated by the "real risk" test, the Chamber appears to have assessed whether specific items of Defence evidence demonstrated that the Prosecution had not taken sufficient measures to insulate the interview process from the effects of torture.[18] This placed the entirety of the burden of proof on the Defence, and did so in accordance with an "exceptional" threshold related to the ultimate issues.[19]

16. As concerns the second and alternative prong for reconsideration, whilst it is accepted that generally the test for reconsideration will be high, the *jus cogens* prohibition concerning the use of torture tainted evidence fulfils this threshold. This is because the

[17] *Blaškić,* IT-95-14-A, Decision on Evidence, 31 October 2003.
[18] *See* ICC-01/12-01/18-2414, para. 9, framing the issue as to whether the measures put in place by the Prosecution were not sufficient, rather than an enquiry into whether such measures were sufficient.
[19] ICC-01/12-01/18-2414, para. 10.

Chamber has an independent duty to protect the integrity of the judicial record from such taint: its responsibility to do so is not contingent on the existence and timing of Defence submissions.[20] Nonetheless, when the Chamber sought to apply the reconsideration test, it focused exclusively on whether the application and materials were capable of 'convincing' the Chamber to change its analysis or conclusions,[21] or undermining past conclusions.[22]

17. The Chamber did not, therefore, assess whether the second alternative basis for consideration was met due to the specific nature of requests to exclude torture tainted evidence and the related and independent duty of the Chamber to ensure Mr Al Hassan's right to a fair trial and related right to an effective remedy.[23]

18. The Trial Chamber therefore erred by failing to make a preliminary assessment as to whether the particular nature of the application justified reconsideration in order to "prevent an injustice".

b) ***Second Issue****: Whether Trial Chamber erred by failing to take into consideration evidence and argumentation concerning the impact of torture/CIDT on the reliability of Mr Al Hassan's statements and/or the integrity of the proceedings.*

19. At paragraph 9, the Chamber explained that its enquiry was concerned with whether "any possible violations arising from the surrounding context and circumstances did not impact on, or facilitate, the evidence gathering process".[24] The Chamber then concluded that the measures put in place by the ICC-OTP were sufficient to conclude that the gathering of evidence was not facilitated by any violations.[25] The Chamber did not, however, make any findings as to whether the evidence was *impacted* by such violations. Given the substantial volume of evidence from D-0502 concerning the existence and *impact* of uncontrollable stress on the content of Mr Al Hassan's statements, the Chamber was required by law to make a ruling on this point. It is also

[20] ICC-01/04-01/06-1981, para. 8.
[21] *See* for example, ICC-01/12-01/18-2414, para. 12.
[22] ICC-01/12-01/18-2414, para. 10.
[23] *Othman*, para 264: "No legal system based upon the rule of law can countenance the admission of evidence – however reliable – which has been obtained by such a barbaric practice as torture. The trial process is a cornerstone of the rule of law. 'Torture evidence' damages irreparably that process; it substitutes force for the rule of law and taints the reputation of any court that admits it. 'Torture evidence' is excluded to protect the integrity of the trial process and, ultimately, the rule of law itself'."
[24] ICC-01/12-01/18-2414, para. 9.
[25] ICC-01/12-01/18-2414, para. 9.

not possible to simply assume that the Chamber considered the existence of such an impact and determined that the degree was insufficient. Under human rights law, *any* impact is sufficient to trigger exclusion due to the overarching obligation to protect the integrity of the proceedings.[26]

c) *Third Issue:* *Whether the Trial Chamber erred by disregarding expert opinions concerning the psychological sequelae of torture*

20. The Chamber was in possession of evidence from D-0502, along with D-0020 and D-0025, who provided expert evidence that it is not possible for laypersons (such as ICC-OTP investigators or the Chamber) to identify the psychological effects of uncontrollable stress and the extent of these effects by either interacting with Mr Al Hassan or reviewing the contents of transcripts.[27] D-0502, along with D-0020 and D-0025, testified that the only (and minimum) remedy/safeguard sufficient to counteract the psychological and physical effects of torture in a detention environment where the conditions amount to torture or cruel, inhumane or degrading treatment (CIDT) is to remove the person from that environment.[28] The Trial Chamber rejected this evidence on the grounds that this evidence was not relevant to its "factual determination as to the circumstances surrounding the gathering of the evidence".[29]

21. The Trial Chamber's decision to accept or reject expert evidence cannot be arbitrary or based on unidentified standards: this is especially true as concerns issues of a technical nature.[30] In the particular field of torture law, the UN Special Rapporteur on Torture has advised that the ability to identify the sequelae of psychological stress requires specialised expertise that falls outside the observational capacity of an investigator or trier of fact.[31] The Inter-American Court has found that domestic courts cannot

[26] ECtHR, *Cwik v Poland*, 31454/10, 5 November 2020, para. 68 ('*Cwik v Poland*') : "The Court reiterates that Article 3 of the Convention enshrines an absolute right. Being absolute, there can be no weighing of other interests against it, such as the seriousness of the offence under investigation or the public interest in effective criminal prosecution, for to do so would undermine its absolute nature. Neither the protection of human life nor the securing of a criminal conviction may be obtained at the cost of compromising the protection of the absolute right not to be subjected to ill-treatment proscribed by Article 3, as this would sacrifice those values and discredit the administration of justice".
[27] ICC-01/12-01/18-2403-Red, paras. 13, 15, 26.
[28] ICC-01/12-01/18-2403-Red, paras 9, 13, 15, 25, 26, 27.
[29] ICC-01/12-01/18-2414, para. 11.
[30] *Gotovina et al.*, IT-06-90-A, Judgment, 16 November 2012, para. 61.
[31] Interim Report of the Special Rapporteur on Torture, A/69/387, para. 51.

disregard expert reports that comply with the Istanbul Protocol, nor can they cite issues of impartiality concerning the relationship between the expert and the torture victim.[32] The Revised Istanbul Protocol also stresses the importance of considering clinical evidence and further explains that "decision makers must not adopt opinion on clinical matters for which they are not qualified and must not dismiss clinical evidence on the basis of having made a prior negative credibility finding".[33]

22. D-0502's expert opinion concerning the continuing and coercive effect of certain forms of detention conditions (such as incommunicado detention) is also consistent with the approach endorsed by UN Special Rapporteurs,[34] the Working Group on Arbitrary Detention, and the African Commission on Human and Peoples Rights.[35]

23. Given first, the highly technical nature of the nature (the psychological sequelae of torture) and second, that D-0502's expert opinions were reflective of internationally recognized human rights law and standards, it was arbitrary and an abuse of discretion for the Chamber to discard these opinions, without any explanation or justification for doing so.

d) *Fourth Issue:* *Whether the Trial Chamber failed to comply with the obligation to provide a reasoned opinion as concerns its findings*

24. The duty to provide a reasoned opinion is a critical aspect of fair, adversarial proceedings, and is also directly related to the ability of the Defence to exercise an effective right to appeal.[36] While this duty does not require the Chamber to provide reasons as concerns each and every argument raised by the Defence, it does require the Chamber to "explain with sufficient clarity the basis for its determination",[37] and to

[32] Int.Am.CtHR, *Cabrera García and Montiel Flores v. Mexico*, Case 12,449, 26 November 2010, para. 122 ('*Cabrera*').
[33] Revised Istanbul Protocol, para 265.
[34] A/61/259 para. 56 (deprecating the use of evidence collected from someone held in prolonged incommunicado detention). See also A/HRC/43/49, para. 59: "The severe psychological and physical effects of incommunicado detention, solitary confinement and social exclusion, including mobbing, are well documented and, depending on the circumstances, can range from progressively severe forms of anxiety, stress and depression to cognitive impairment and suicidal tendencies. Particularly if prolonged or indefinite, or combined with the death row syndrome, isolation and social exclusion can also cause serious and irreparable mental and physical harm".
[35] Part 4(C)(i) of the Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa; Section N(6)(d)(i) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003); WGAD, A/HRC/WGAD/2017/21, para. 34: A/HRC/WGAD/2015, para. 61.
[36] ICC-01/04-01/06-773, para. 20.
[37] ICC-01/05-01/13-2275-Red, para. 596.

address any "specific, pertinent and important point made by the accused".[38] The ICC Appeals Chamber has also endorsed ICTY precedent that ""as a minimum, the Trial Chamber must provide reasoning to support its findings regarding the substantive considerations relevant to its decision".[39]

25. The Chamber's findings concerning D-0502 are confined to the following sparse statement:

> "the Chamber recalls its findings in the Impugned Decision 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".[40]

26. From this single sentence, it is not possible to ascertain whether the Chamber was of the opinion that expert psychiatric evidence was irrelevant to its assessment of the facts or whether D-0502's testimony did not change its assessment of the facts.

27. Similarly, as concerns fact evidence, the Chamber dismissed an extensive array of evidence that Mr Al Hassan was physically and psychologically tortured before and during the periods he was interviewed by the OTP.

28. Again the decision was cursory, stating that it was "unconvinced" that this evidence concerning the "alleged detention conditions at the DGSE have any bearing on the Chamber's analysis in the Impugned Decision or conclusions reached therein". [41] It is unclear whether this finding rested on relevance, reliability or evidential weight.

29. At a bare minimum, given that the Chamber had received expert and fact evidence that made a direct linkage between these detention conditions, the effects of torture, the voluntariness of interviews and the cognitive capacity of the interviewee, the Chamber should have provided clear reasons as to why these conditions had no bearing on its assessment.

e) ***Fifth Issue:*** *Whether the Chamber erred by failing to make an assessment as to whether the conditions of Mr Al Hassan's detention and treatment in detention*

[38] ECtHR, *Zhang v Ukraine*, 6970/15, 13 November 2018, para. 61.
[39] ICC-01/04-01/06-773, para. 20.
[40] ICC-01/12-01/18-2414, para. 11.
[41] ICC-01/12-01/18-2414, para. 12.

amounted to violations of the Statute/internationally recognized human rights and/or continuous forms of torture/CIDT

30. In the Decision, the Chamber also found that the central issue in this particular Article 69(7) application concerned the question as whether the measures put in place by the Prosecution were sufficient to safeguard the interviews from the effects of any violations of Mr Al Hassan's rights.

31. Conversely in the Decision, the Trial Chamber found that "the substantiation required with respect to such an Article 67(7) challenge (…) will depend on the nature of the violation or breach alleged in each particular instance".[42]

32. It follows from these findings that the Chamber should have made a preliminary characterization of the legal character of the alleged violations in order to determine which degree of substantiation was required to support the application.

33. Similarly, it would not have been possible for the Chamber to have assessed whether the measures adopted by the Prosecution were 'sufficient' to protect the reliability and integrity of the interview process, without first determining what these measures were sufficient to address. It is well-recognised that detention conditions in and of themselves can amount to torture/produce coercive effects.[43] The Chamber had also received substantial evidence on this point concerning the specific conditions at the DGSE.[44] The Chamber's own legal framework therefore required the Chamber to assess the existence and extent of coercive effects, in order to determine whether the Prosecution's actions were sufficient to address such effects.

34. The Decision is, however, wholly silent on this point: the Chamber refers to Mr Al Hassan's 'general conditions of detention' without making any assessment as to whether these conditions violated his rights under human rights law or the Rome Statute, or whether the conditions could be characterized as continuous forms of

[42] ICC-01/12-01/18-1475-Conf, para. 37.
[43] Revised Istanbul Protocol, p. 67 – listing detention conditions as a 'torture method'. See also Human Rights Committee, El-Megreisi v. Libya, communication No. 440/1990, para. 5.4; 8 Inter-American Court of Human Rights, Godínez-Cruz v. Honduras, Judgment, 20 January 1989, para. 164. See also Inter-American Commission on Human Rights, Luis Lizardo Cabrera v. Dominican Republic, Case 10.832, Report No. 35/96, 19 February 1998, paras. 86–87; Inter-American Court of Human Rights, Maritza Urrutia v. Guatemala, Judgment, 27 November 2003, para. 90.
[44] ICC-01/12-01/18-2403-Red, paras. 16, 18, 20.

physical and/or psychological torture. The Chamber's silence on this point could be construed as a procedural error since the real risk test, as framed under human rights law, requires the Chamber to ensure that an effective investigation of the torture allegations has been conducted.[45] The Panel of Experts appointed by the Chamber to assess Mr Al Hassan's ongoing fitness to stand trial also prefaced their findings on the expectation that the Chamber would ensure that an active investigation was conducted into Mr Al Hassan's account that he had been subjected to various forms of torture.[46]

35. The Chamber also disregarded a significant volume of evidence concerning the conditions of detention at the DGSE (including in Mr Al Hassan's cell) and the psychological and physical effects produced by these conditions, due to the following considerations:[47]

> In the absence of allegations that the Prosecution itself breached the Statute or internationally recognised human rights, the inquiry in the Impugned Decision focused on the measures taken by the Prosecution, rather than on the general conditions which detainees, including Mr Al Hassan, were allegedly subject to.

36. It is not possible to reconcile this finding with the legal framework established by the Chamber for adjudicating the application. First, the Chamber itself recognized that the exclusionary rule could still apply even if the ICC-OTP was not responsible for violating Mr Al Hassan's rights:[48] the Chamber was therefore required to assess the physical or psychological effects produced by Mr Al Hassan's conditions of detention

[45] *Cabrera*, para. 136; ECtHR: *Almasi v Serbia*, 21388/15, 8 October 2019, para. 64: "The Court furthermore notes that the applicant complained of having been abused by the police. He did so before the investigating judge and in the presence of a public prosecutor, as well as the trial and appellate chambers. Yet, despite the Convention and the domestic law requiring that an allegation of this sort be examined *ex officio* (see paragraphs 61 and 39 above, in that order), no separate abuse-related investigation aimed at the identification and punishment of those responsible was ever instituted by the relevant authorities. The criminal case against the applicant, wherein he raised his abuse complaints in order to have some of the impugned evidence excluded, was certainly not capable of the latter (*see*, regarding precisely this point, *Hajnal v. Serbia*, 36937/06, 19 June 2012, para. 99, and *Lakatoš and Others v. Serbia*, 3363/08, 7 January 2014, para. 82)."

[46] ICC-01/12-01/18-1197-Anx-Red, para. 302: ". The POE assumes that the Chamber and the ICC will wish to investigate Mr Al Hassan's claims of torture and of CIDT during his interrogation in Mali. We have no reason not to believe Mr Al Hassan's account of this, which has been fairly consistent over time, however we do not consider that it falls within our expertise, as medical experts to comment further on the allegations, or steps to deal with this".

[47] ICC-01/12-01/18-2414, para. 12.

[48] ICC-01/12-01/18-1475-Conf, para. 40. *See also* Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law para. 3 (c): "The obligation to provide an effective remedy applies "irrespective of who may ultimately be the bearer of responsibility for the violation".

even if the ICC-OTP were not responsible for them. Second, an assessment as to whether the Prosecution breached the Statute/human rights depends on the existence and nature of the alleged violations:[49] given the *jus cogens* obligation not to condone/acquiesce/benefit from violations of peremptory norms of international law, the ICC-OTP could breach Statutory or human rights obligations even if the ICC-OTP did not perpetrate the torture itself.[50] Thus, if Mr Al Hassan was arbitrarily detained or subjected to continuous forms of torture or continuous crimes such as enforced disappearance, then the *jus cogens* nature of these violations would have triggered additional obligations on the part of the Prosecution.[51] It was therefore necessary to assess the nature of the violations and related obligations in order to determine whether the Prosecution had breached these obligations. Second, according to the test adopted by the Chamber, the Chamber was required to assess whether "any possible violations arising from the surrounding context and circumstances" had an impact on the evidence gathering process.[52] Detention conditions fall within the direct definition of the "surrounding context and circumstances" of the interviews. Third, the Chamber's assessment of the measures taken by the Prosecution cannot take place in a hermetically sealed vacuum: this assessment required the Chamber to assess the sufficiency of these measures by reference the psychological and physical state of Mr Al Hassan at the time of the interviews. His state was in turn, directly influenced by his detention conditions.

37. This aspect of the Decision therefore raises the appealable issue as to whether the Chamber fell into error by failing to make findings concerning the existence and nature of the alleged violations and dismissing evidence on these aspects as 'irrelevant', when:

- These findings were necessary components of the legal test it had established for adjudicating the request; and/or
- The absence of positive findings deprived Mr Al Hassan of the procedural right to an effective investigation as to the claims that he was tortured.

[49] ICC-01/12-01/18-1346-Red2, para. 15.
[50] In the First Article 69(7) Decision, ICC-01/12-01/18-1475-Conf, the Chamber observed that the Defence had not alleged that the "Prosecution was the perpetrator of the alleged acts of torture of CIDT" (para. 40); the Defence had, however, alleged that the Prosecution's actions violated both internationally recognized human rights law and Article 55(1) of the Statute as concerns the duty to ensure that a person, investigated under the Statute, was not subjected to any form of coercion/duress/torture/CIDT/arbitrary arrest or detention.
[51] ICC-01/12-01/18-1346-Red2, para. 15.
[52] ICC-01/12-01/18-2414, para. 9.

The Issues affect the fair and expeditious conduct of the proceedings

38. In *Othman*, the ECtHR underlined that:"[f]ew international norms relating to the right to a trial are more fundamental than the exclusion of evidence obtained by torture".[53] The direct tie between the exclusionary rule and the fairness of the proceedings extends beyond the outcome of such decisions, encompassing the procedure used to adjudicate such claims, the Court's appreciation of evidence, and the legal test and burden of proof employed by the Court in question – in sum, the very Issues that are the subject of this leave to appeal applications.

39. The burden and evidential standard is also tied directly to the time and resources available to the Defence to investigate and substantiate such applications, and the volume of time required to litigate them. An overly onerous approach will retard the ability of the parties to raise such issues in an expeditious and efficacious manner

The Issues affect the outcome of the trial

40. Article 82(1)(d) requires the Chamber to forecast the consequences of an erroneous decision,[54] including the possible consequences that would result from the improper admission of evidence.[55] Each Issue, if resolved differently, would have resulted in the exclusion of Mr Al Hassan's statements and related materials and thereby impacted on the outcome of the proceedings. For the **First Issue,** if the Chamber had applied the real risk test in the manner understood by the legal precedents cited by the Chamber, then the type of evidence adduced by the Defence would have satisfied this low threshold. Indeed, whereas other Courts have accepted evidence of a general pattern of abuses or torture at the detention facility in question,[56] the Defence adduced specific evidence that demonstrated that Mr Al Hassan was himself subjected to continuous forms of physical and psychological torture, during the time periods coinciding with the ICC-OTP interviews. With the **Second Issue**, if the Chamber's determination had extended to an assessment of the *impact* of torture on either the reliability of the interviews or the integrity of the proceedings, it would have excluded the statements.

[53] *Othman*, para 95.
[54] ICC-01/04-168, para.13.
[55] ICC-01/09-01/11-1953-Red-Corr, paras 15, 23, 24.
[56] *El Haski*, paras. 94-98; *Othman*, paras. 103, 272; ECCC Decision, para 34.

This is because given the gravity of the legal prohibition of torture, any impact would have undermined the integrity of the proceedings and justified exclusion.[57] A proper resolution of the **Third Issue** would have mandated the same outcome: D-502 provided clear and unequivocal evidence that the existence of uncontrollable stress before and during the ICC-OTP interviews had adversely impacted Mr Al Hassan's cognitive capacities and volition- there was a taint produced by torture. The provision of clear and coherent reasons, as required by the **Fourth Issue**, would have directed the Chamber towards an outcome that was more consistent with the legal test it had adopted and the content of the evidence before it. This, in turn, would have led to the exclusion of Mr Al Hassan's statements. A different resolution of the **Fifth Issue** would have resulted in findings that the ability of the ICC-OTP to interview and obtain evidence from Mr Al Hassan was directly facilitated by a system of illegal and arbitrary detention involving torture and Mr Al Hassan's enforced disappearance: the test adumbrated by the Chamber would have been satisfied.

41. The admission of Mr Al Hassan's statements, due to erroneous adjudication of any or all the Issues, would result in a mistrial. This is because any use of statements, obtained as a result of a violation of the prohibition on torture or CIDT, "renders the proceedings as a whole automatically unfair".[58] In light of the paramount importance of protecting the integrity of the proceedings, this is also not an issue that can be regulated by the Chamber's assessment of weight.[59] In *Ruto & Sang*, Trial Chamber Va also dismissed the Prosecution's argument on the basis that the question of the potential assessment of weight is wholly divorced from the question as to whether, 'noting the scope and content of the prior recorded testimonies,' these 'may objectively be expected to have a significant impact on the outcome of the trial.'[60] The Issues therefore significantly affect the outcome of the trial.

[57] *Cwik v Poland*, para. 68.
[58] ECtHR, *Zličić v. Serbia*, 73313/17 and 20143/19, 26 January 2021, para 119.
[59] As argued by the STL Prosecution: "This is not an issue that can be rectified by the weight (even if none) that the Trial Chamber may ultimately decide to give the impugned evidence. The Tribunal, in enacting Rule 162, established a prohibition against the admission of such evidence because of the detrimental effects upon the integrity of both the ongoing proceedings and the trial outcome if such evidence were even admitted":*Ayyash et al.* STL-11-01/T/TC, Prosecution Request for Certification to Appeal the "Decision Admitting Statements of Witness PRH103 under Rule 158", 20 December 2016, para. 10.
[60] ICC-01/09-01/11-1953-Red-Corr, para. 24.

A decision of the Appeals Chamber would materially advance the proceedings

42. A determination as to whether 'an immediate resolution by the Appeals Chamber *may* materially advance the proceedings' requires only the possibility that it will: as explained by the Appeals Chamber:[61]

> [T]he issue must be such that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.

43. The Prosecution has continuously cited to Mr Al Hassan's statements in evidential filings and the Chamber has 'used' information from these statements for various purposes, including a Regulation 55 requalification decision.[62] Immediate appellate intervention would ensure that the judicial record in this case is either disinfected of the actual or potential taint of improper evidence, before final submissions are tendered and the judgment is drafted. If the appropriate remedy is to terminate the proceedings due to a mistrial, it would be in the interests of expeditious and effective justice to render such a resolution now, rather than on final appeal.

III. Relief sought

44. For the foregoing reasons, the Defence respectfully requests Trial Chamber X to:

GRANT Leave to Appeal the Decision on the issues mentioned above.

Melinda Taylor
Counsel for Mr. Al Hassan

Dated this 29th Day of November 2022
At The Hague, The Netherlands

[61] ICC-01/04-168, para. 14.
[62] ICC-01/12-01/18-1739 paras. 34-36.