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**International
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Court**

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Date: **14 November 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

Public redacted version of Defence request for reconsideration of ‘Decision on requests related to the submission into evidence of Mr Al Hassan’s statements’, ICC-01/12-01/18-1475-Conf, ICC-01/12-01/18-2403-Conf, 2 November 2022

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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I. Introduction

1. Sixth on the list of enumerated crimes against humanity that can be prosecuted before the International Criminal Court is torture.¹ As stated by former Special Rapporteur on Torture Juan Mendez, “[a]ny use of torture-tainted information, even if the torture has been committed by agents of another State, is an act of acquiescence in torture.”² The Chamber has a critical duty, therefore, to safeguard its decisions by excluding any evidence tainted by torture and Cruel, Inhuman or Degrading Treatment (‘CIDT’).
2. It is submitted that the Trial Chamber should reconsider its decision to admit evidence which is derived from the torture of Mr Al Hassan. There is fresh evidence to enable such a reconsideration and, when considering this evidence and the principles of torture-tainted evidence, the proper conclusion is that such evidence should not form part of the material upon which Mr Al Hassan is tried.
3. The Chamber’s previous decision, rejecting the Defence’s Article 69(7) application (‘the Article 69(7) Decision’), was predicated on the absence of a causal nexus between the violation and the gathering of evidence.³ According to the Chamber, the Defence was previously unable to demonstrate that the gathering of evidence was “facilitated by” a breach of the Statute or violation of internationally recognised human rights.⁴ In reaching this conclusion, the Chamber defined the central issues as follows:⁵

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 the product of the interview, pursuant to the applicable law under the Statute.

¹ Rome Statute, art. 7(1)(f).

² United Nations, Office of the High Commissioner, ‘[Mr. Jan Mendez, Special Rapporteur on Torture, addressed the Human Rights Council on 10 March 2014 and outlined his thematic report on the “use of torture-tainted evidence and the exclusionary rule”](#)’, 10 March 2014 (last accessed 3 November 2022).

³ [ICC-01/12-01/18-1475-Conf](#), para. 40.

⁴ [ICC-01/12-01/18-1475-Conf](#), para. 41.

⁵ [ICC-01/12-01/18-1475-Conf](#), para. 45.

4. Since the date on which the Chamber issued the Article 69(7) Decision, the Chamber has received voluminous new facts and argument that demonstrate the existence of a real risk that the information obtained from Mr Al Hassan was facilitated by a breach of internationally recognised human rights, and further, that the reliability of this evidence was irremediably undermined as a result ('New Information'). This New Information is comprised of the sworn expert testimony of Dr Charles Morgan III (D-0502), the sworn expert testimonies of Dr Porterfield (D-0020) and Dr Cohen (D-0025), the sworn fact evidence of D-0006, and the Rule 68(2) statement of D-0627.⁶ This New Information must be viewed in conjunction with the totality of evidence in the record, including the Rule 68(2) statement of D-0628,⁷ the DGSE Rule 68 materials that were recently accepted by the Trial Chamber,⁸ and torture-related materials that are currently being introduced through the bar.⁹

II. Submissions

A. The legal threshold for reconsideration is met

5. The Chamber possesses the inherent power to reconsider its decisions, on an exceptional basis, if the decision in question:
- Is based on a clear error of reasoning;¹⁰
 - Is manifestly unsound or unsatisfactory, or would lead to an injustice;¹¹ or
 - New facts or arguments that require the Chamber to reconsider its previous ruling.¹²
6. The Chamber's duty to reconsider the Article 69(7) Decision is triggered by the fact that the Chamber has now received new and additional expert and fact evidence,¹³ which establishes a direct nexus between continuous psychological and physical torture

⁶ Admitted pursuant to [ICC-01/12-01/18-2378](#).

⁷ Admitted pursuant to [ICC-01/12-01/18-2378](#).

⁸ [ICC-01/12-01/18-2388-Conf](#).

⁹ [ICC-01/12-01/18-2399-Conf](#); [ICC-01/12-01/18-2400-Conf](#); [ICC-01/12-01/18-2401-Conf](#).

¹⁰ [ICC-02/04-01/15-1259](#), para. 12.

¹¹ [ICC-01/04-02/06-519](#), pp. 6-7, para. 12; [ICC-01/04-02/06-1049-Red](#), para. 12; [ICC-01/04-02/06-1282](#), pp. 6-7, para. 12. See also [ICC-02/04-01/15-468](#), para. 4; [ICC-01/05-01/13-1282](#), para. 8; [ICC-01/05-01/13-1552](#), para. 6; [ICC-01/05-01/13-1854](#), paras. 75-76.

¹² [ICC-01/05-01/08-1691-Red](#), para. 17; [ICC-02/04-01/15-1259](#), para. 12.

¹³ See [ICC-01/05-01/08-1691](#), para. 17; [ICC-02/04-01/15-1259](#), para. 12 concerning new/additional evidence constituting a basis for reconsideration.

at the DGSE and both the voluntariness and reliability of evidence that was collected either while the witness was detained at the DGSE or in close temporal proximity to such detention.

7. Given the mandatory nature of Article 69(7), the Chamber has an independent duty to ensure that its decision-making processes and ultimate judgment are not tainted through reliance on evidence that violates this provision.¹⁴ It follows that even if the Chamber considers that any part of the information is not ‘new’, the Chamber has an overarching power and duty to re-consider whether its Article 69(7) Decision should be reversed on the basis of the totality of evidence that is now before it, in order to avoid a result that “is manifestly unsound or unsatisfactory, or would lead to an injustice.”
8. In the specific context of the submission of evidence, this Chamber has also recognised that it has the power to issue new determinations as concerns the submission of evidence. The Chamber thus permitted the Prosecution to resubmit its Rule 68(2) application concerning P-0113:¹⁵ the Chamber further confirmed that it was not necessary for the Prosecution to demonstrate the existence of new facts or circumstances or to otherwise satisfy the threshold for reconsideration.¹⁶ Similarly, whereas the Chamber initially ruled that the entirety of P-0524’s evidence should be heard *viva voce*, the Chamber later allowed the Prosecution to submit the entirety of her evidence through Rule 68(2).¹⁷ The flexibility demonstrated in these precedents should particularly apply to the question of exclusion, which is based on preemptory norms of international law. This would also be consistent with ICC precedents, allowing the Defence to mount new Article 69(7) challenges based on evidence presented during the Defence case.¹⁸

¹⁴ [ICC-01/04-01/06-1981](#), para. 8. See also [ICC-01/05-01/08-424](#), para. 46, referring to independent power and duty of the Chamber to detect whether there are grounds for determining that evidence is inadmissible (see also para. 49), and [ICC-01/09-01/11-373](#), para. 62 referring to the same.

¹⁵ [ICC-01/12-01/18-1402-Conf-Red](#), para. 12; [ICC-01/12-01/18-1924](#), paras. 8-9.

¹⁶ [ICC-01/12-01/18-1924](#), paras. 8-9.

¹⁷ [ICC-01/12-01/18-2125-Conf](#), para. 5.

¹⁸ 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](#).

B. The factual threshold for reconsideration is satisfied by the New Information

The expert testimony of Dr Morgan

9. Dr Charles Morgan III (D-0502) provided cogent and unrebutted expert evidence, based in medical science, that:

- Uncontrollable stress causes release of cortisol, which is “damaging to the specific areas of our brain that are involved in memory”.¹⁹ Such uncontrollable stress directly impacts on cognitive functions, including volition and the reliability of memory: in essence, uncontrollable and/or unpredictable stress makes interviewees extremely compliant²⁰ and further triggers false and unreliable memories and responses.²¹ It leads to cognitive impairment, similar to the effects of a direct brain injury.²² It also diminishes and alters true memory recall.²³ False or corrupted memories can be implanted through stress producing environmental factors alone: that is, even if the interrogator does not intend to implant such memories.²⁴
- Past incidents of maltreatment are likely to trigger uncontrollable/unpredictable stress during subsequent interviews, particularly if there are ‘triggers’. These can include the use of handcuffs (‘restraint stress’), hooding/blindfolds, sleep-deprivation. Other triggers include the fact that the interviewee has been questioned by multiple interrogation teams.²⁵
- An individual who experiences ‘uncontrollable/unpredictable stress’ loses the ability to make rational protective choices.²⁶
- The nature and effects of unpredictable/uncontrollable stress are not altered or diminished by the ‘good intentions’ of interviewers.²⁷ Similarly, even if the interviewer

¹⁹ [ICC-01/12-01/18-T-179-CONF-ENG](#), p. 92, lines 1-12.

²⁰ [ICC-01/12-01/18-T-179-CONF-ENG](#), p. 17-18.

²¹ [ICC-01/12-01/18-T-179-CONF-ENG](#), p. 18.

²² [ICC-01/12-01/18-T-179-CONF-ENG](#), p. 12, lines 4-13.

²³ [ICC-01/12-01/18-T-179-CONF-ENG](#), pp. 13-14.

²⁴ [ICC-01/12-01/18-T-179-CONF-ENG](#), p.15, lines 11-14: “We find that this form of memory is very significantly affected. Without us doing anything to try and create a false memory or to negatively affect someone's memory, the exposure to uncontrollable stress we found in our elite soldiers will render at least 50 per cent of them inaccurate in their eyewitness identification.”.

²⁵ [ICC-01/12-01/18-T-179-CONF-ENG](#), p.21, lines 4-8: “when there are multiple security interrogation groups from different countries, each often has their own 6 agenda, and they often don't fully explain it to the person being interrogated. So it raises the ambiguity of the interrogation process and the information that the person's being asked about.”

²⁶ [ICC-01/12-01/18-T-179-CONF-ENG](#), p. 10, lines 10-21

²⁷ [ICC-01/12-01/18-T-179-CONF-ENG](#), p.29, lines 4-22.

is not responsible for good or bad conditions, if the interviewee has a subjective belief that the interviewer has the power to alter these conditions, that will result in a dynamic of psychological coercion.²⁸

- The detention conditions, which Mr Al Hassan described to the OTP investigators and which P-0626 described under oath to the Trial Chamber, would have been likely to have produced uncontrollable/unpredictable stress.²⁹

- It is possible to evaluate whether someone's memory or responses have been impaired through unpredictable/uncontrollable stress, through psychological testing.³⁰ However, these tests were not applied to either P-0626 or Mr Al Hassan.

- It is not possible to predict or assess the lasting impact of unpredictable/uncontrollable stress on the reliability of memory: false memories implanted during interrogations conducted under conditions of unpredictable/uncontrollable stress can remain and feel 'real', even after the interviewee has been released or transferred to a different environment, where stress is not present.³¹ Cognitive impairment from conditions of unpredictable/uncontrollable stress has been observed even 50 years afterwards.³²

- The interview transcripts of Mr Al Hassan and the testimonial transcripts of P-0626 exhibited indicia that are consistent with responses produced by uncontrollable and/or unpredictable stress.³³

- The conditions of unpredictable/uncontrollable stress in a detention interrogation setting, appeared to have affected the responses provided by Mr Al Hassan: that is, his responses did not appear to be based on true memory recall, but were made because of the context of questioning by the OTP.³⁴ Similarly, P-0626 appeared to be responding to the OTP under conditions of psychological coercion.³⁵ This appeared to impact on his suggestibility and willingness to accept propositions put to him, even though he did not appear to be doing so on the basis of true memory recall.³⁶ Dr Morgan concluded

²⁸ [ICC-01/12-01/18-T-179-CONF-ENG](#), p.51.

²⁹ [ICC-01/12-01/18-T-179-CONF-ENG](#), p. 22 (handcuffs = restraint stress); pp. 22-24 (blindfolds =light deprivation stress); pp. 24-25 (physical beatings/threats to beat =state of alarm); pp. 25-26 (incommunicado detention/fear for loved ones); p. 27 (being told by investigators that he was in a hostile environment), p. 48-49 (the different stressors that P626 was exposed to), p. 51 (deprived of access to food, water, a toilet, unable to take care of some basic hygiene needs).

³⁰ [ICC-01/12-01/18-T-179-CONF-ENG](#), pp.49-50.

³¹ [ICC-01/12-01/18-T-179-CONF-ENG](#), pp. 14-15.

³² [ICC-01/12-01/18-T-179-CONF-ENG](#), p. 12, lines 14-18.

³³ [ICC-01/12-01/18-T-179-CONF-ENG](#), pp. 19, 30, lines 3-17 (psychological indicators of stress),

³⁴ [ICC-01/12-01/18-T-179-CONF-ENG](#), pp. 34 -48. See also [MLI-D28-0006-4240-R01](#) at 4257-4258.

³⁵ [ICC-01/12-01/18-T-179-CONF-ENG](#), pp. 50-52.

³⁶ [ICC-01/12-01/18-T-179-CONF-ENG](#), pp. 54-56.

that “[t]he constellation of stressors make it far more within a medical certainty that [Mr. Al Hassan’s circumstances in DGSE detention created] a case of uncontrollable stress”.³⁷ And

- The Panel of Experts’ observations, compiled approximately three years after Mr Al Hassan’s ICC-OTP interviews, suggested that Mr Al Hassan suffers from a “significant psychiatric illness”³⁸ associated with PTSD. Dr Morgan further indicated that the observations set out in the report were consistent with his own conclusions that Mr Al Hassan had experienced unpredictable/uncontrollable stress at the time of the DGSE ICC-OTP interviews.³⁹

The expert evidence of Dr Porterfield and Dr Cohen

10. In the Article 69(7) Decision, the Chamber placed little weight on the expert findings of Dr Porterfield and Dr Cohen due to the Chamber’s concern that the experts had not reviewed certain portions of Mr Al Hassan’s transcripts.⁴⁰ The Defence subsequently provided these portions to Dr Porterfield and Dr Cohen and requested them to review their findings and conclusions in light of their portions. Dr Porterfield and Dr Cohen then provided sworn expert evidence, in which they explained their methodology and bases for their conclusion and further confirmed that the newly reviewed transcript portions that had been referenced in the Article 69(7) Decision, did not change their findings.⁴¹ Their subsequent sworn testimony thus constitutes ‘new or additional argument’ insofar as their evidence was informed by information that was not considered within the framework of the initial Article 69(7) litigation.

11. Dr Porterfield gave expert evidence that the symptomology that she observed (during the course of lengthy in-person evaluations – the ‘gold standard’ for such assessments)⁴² – was consistent with the sequelae of someone who had experienced unpredictable/uncontrollable stress throughout his detention, including at the time of

³⁷ [ICC-01/12-01/18-T-179-CONF-ENG](#), p. 91, lines 5-7.

³⁸ [ICC-01/12-01/18-T-180-ENG](#), p. 47, lines 13-19.

³⁹ [ICC-01/12-01/18-T-180-ENG](#), p. 47, lines 13-21.

⁴⁰ [ICC-01/12-01/18-1475-Conf](#), para.48.

⁴¹ Dr Porterfield: [ICC-01/12-01/18-T-173-CONF-ENG](#), p. 48, line 1- p. 49 line 5; Dr Cohen: [ICC-01/12-01/18-T-178-ENG](#), pp. 27-28.

⁴² [ICC-01/12-01/18-T-173-CONF-ENG](#), p. 7, lines 14-15.

the ICC-OTP interrogations.⁴³ In particular, Mr Al Hassan exhibited signs of ‘learned helplessness’, which is a product of unpredictable/uncontrollable stress.⁴⁴ This condition and related cognitive impairment, can persist for lengthy periods (years) after the initial causes.⁴⁵ It can also be aggravated by certain triggers (handcuffs/hearing keys, blindfolds).⁴⁶ Incommunicado detention was itself a significant source of uncontrollable/unpredictable stress: the level of stress would be augmented if the detainee receives visits from external interviewees, in circumstances where the detainee has not ability to predict or control the timing of the visits or to contact the interviewees in between the visits.⁴⁷ Stress events produce a cumulative effect and should be assessed in a cumulative manner: early incidents of harm do not cancel the effects of later maltreatment – instead, they augment the overall effects of stress experienced by the individual, even if the author of the stress event is different.⁴⁸

12. This latter aspect concerning the cumulative impact of stress evidence is consistent with international precedents, recognising that the question as to whether the threshold for torture has been satisfied, should be based on an assessment of the circumstances as a whole, and the cumulative impact of different forms of maltreatment.⁴⁹

13. Dr Porterfield further provided sworn expert testimony that in order to eliminate or mitigate the effects of unpredictable/uncontrollable stress, it is necessary to remove the individual from the triggering elements: interviewing the victim of unpredictable/uncontrollable stress with a ‘clean team’ would not, in itself, eliminate the environmental causes and triggers that gave rise to cognitive impairment.⁵⁰ Cognitive impairment caused by learned helplessness would be likely to impact

⁴³ [ICC-01/12-01/18-T-173-CONF-ENG](#), p. 12, lines 17-21, pp. 19-20, p. 23, pp. 26-27, p. 40.

⁴⁴ [ICC-01/12-01/18-T-173-CONF-ENG](#), pp. 18-19, 36-38. See further Dr Morgan, ICC-01/12-01/18-T-179-CONF-ENG, p. 10, for linkage between learned helplessness and unpredictable/uncontrollable stress.

⁴⁵ [ICC-01/12-01/18-T-173-CONF-ENG](#), p. 8, lines 8-14, p. 14, lines 5-12.

⁴⁶ [ICC-01/12-01/18-T-173-CONF-ENG](#), pp. 28-29, 43.

⁴⁷ [ICC-01/12-01/18-T-173-CONF-ENG](#), pp. 40-41.

⁴⁸ [ICC-01/12-01/18-T-173-CONF-ENG](#), p. 44-45.

⁴⁹ See *Miguel Castro-Castro Prison v Peru*, [Judgment of 25 November 2006](#), para. 293 (assessment of totality of acts and conditions in prison considered when concluding threshold for psychological torture met). See also A. Koenig, E. Stover, L. Fletcher, ‘[The Cumulative Effect: A Medico-Legal Approach to United States Torture Law and Policy](#)’, *Essex Human Rights Review*. Vol. 145, No. 6, 2009, p 154-155, and 161, concerning effects of exposure to pain over a period of time, leading to situation where “[even] an added mild or moderate trauma can become “the last straw that broke the camel’s back”, causing all previous trauma to come to the forefront”.

⁵⁰ [ICC-01/12-01/18-T-173-CONF-ENG](#), pp. 32, 34-35,

interview responses,⁵¹ and appeared to have done so in Mr Al Hassan's case.⁵² It would be very difficult for someone who was not a trained medical professional to recognise or identify the psychological symptoms of various stressors that Mr Al Hassan was subjected to (restraints/hooding).⁵³ Legal assistance and reading someone their procedural rights do not address the root of the problem and would not, therefore, lessen the psychological effects of unpredictable/uncontrollable stress.⁵⁴ In fact, Dr Porterfield testified that affirmation of detainee rights by the Prosecution was "overpowered" by the reality of abusive and torturous conditions of confinement at the DGSE.⁵⁵ The fact that the interviewers lacked the capacity to eliminate the causes of stress or improve the conditions of detention would have been likely to heighten the degree of stress experienced by Mr Al Hassan during the interrogations and thus the level of his cognitive impairment.⁵⁶

14. Dr Cohen gave sworn expert testimony that her physical examination of Mr Al Hassan was highly consistent with the sequelae of someone who had been subjected to the type of maltreatment which Dr Morgan testified would be likely to produce unpredictable/uncontrollable stress.⁵⁷ Dr Cohen also provided a new assessment of her overall conclusion, under paragraph 188 of the Istanbul Protocol, in which she raised her assessment from being "highly consistent" with the symptomology of torture, to being, at the very least, 'typical' of the reported causes.⁵⁸ Dr Cohen, who regularly provides expert evidence on fitness (including psychological aspects) also gave evidence that the type of conditions to which Mr Al Hassan was exposed would have

⁵¹ [ICC-01/12-01/18-T-173-CONF-ENG](#), p. 42.

⁵² [ICC-01/12-01/18-T-173-CONF-ENG](#), p. 46.

⁵³ [ICC-01/12-01/18-T-173-CONF-ENG](#), p. 21, lines 9-16: "However, for an individual who has been tortured for a long time and/or very severely, they often do not demonstrate those symptoms. In fact, they demonstrate the others I've been speaking about, the second part of that defensive cascade, which is flagging, fainting, dissociating, becoming absent. And in my experience - and I have this experience across a lot of context, unfortunately, so I've seen this in the context of other medical professionals who are not trained; lawyers, law enforcement - these symptoms are not very recognisable to people because they are often symptoms of absence and symptoms of disconnection". See also p. 30.

⁵⁴ [ICC-01/12-01/18-T-173-CONF-ENG](#), pp. 48-50.

⁵⁵ [ICC-01/12-01/18-T-173-CONF-ENG](#), p 50, line 25 – p. 51, lines 1-2

⁵⁶ [ICC-01/12-01/18-T-173-CONF-ENG](#), p.53, lines 14-19: "If you have been tortured, you're in an environment in which that has taken place and you speak to whomever, a doctor, a lawyer, a guard, a captain and say, "I'm afraid I'm going to be killed," and then you're not able to -- and the person says, "I cannot help you with that," then, yes, you're going to have more sense of learned helplessness, potentially more post-traumatic symptoms and more sense that the environment cannot be controlled".

⁵⁷ [ICC-01/12-01/18-T-178-ENG](#), pp. 23-26.

⁵⁸ [ICC-01/12-01/18-T-178-ENG](#), p. 95, lines 10-23.

been likely to generate psychological stress,⁵⁹ and mental impairment.⁶⁰ Dr Cohen further emphasised the importance of assessing the impact of these factors in a cumulative manner.⁶¹

15. In terms of the type of assessment that was conducted by ICC-OTP investigators, Dr Cohen explained that in order to conduct a detailed assessment of the effects of detention conditions on cognitive capacity, it would be necessary for the interviewee to be examined by a clinician.⁶² Specifically, a psychological assessment should have been conducted to determine whether Mr Al Hassan's symptoms "[were] making him liable to suggestibility."⁶³ It would not be possible for a layperson to evaluate potential cognitive impairment caused by sleep deprivation.⁶⁴ Given the type of maltreatment reported by Mr Al Hassan, there were grounds to believe that his cognitive capacity was impaired.⁶⁵ Cognitive impairment (food/water deprivation/restraint stress) could not be remedied by temporary improvements in conditions (*i.e.* taking off hand-cuffs, giving the interviewee water and meals, reducing interview hours).⁶⁶ In Dr Cohen's expert opinion, the specific steps that the ICC-OTP took to address Mr Al Hassan's situation would not have addressed the cognitive impairment caused by Mr Al Hassan's detention conditions.⁶⁷

The fact evidence of [REDACTED]

⁵⁹ [ICC-01/12-01/18-T-178-ENG](#), pp. 13-14 (wearing handcuffs for prolonged periods =akin to stress position), p. 14 (inability to wash/maintain hygiene =shame, humiliation and stress); pp. 14-15 (cramped confinement, sleep deprivation, generating extreme stress); p. 16 (being moved to a more crowded cell); p. 17 (food/water deprivation)

⁶⁰ [ICC-01/12-01/18-T-178-ENG](#), p. 15, lines 18-22.

⁶¹ [ICC-01/12-01/18-T-178-ENG](#), p. 17, lines 12-18: "I think it's very important to consider the cumulative effect of all of these conditions. The Committee for Prevention of Torture has listed these sorts of detention conditions, including cramped cells where a prisoner has less than 4 metres square per person in a shared cell, as well as the poor hygiene facilities, the lack of opportunity to exercise, the lack of proper ventilation, adequate food, adequate water, and states that, in combination, this is how they can be considered to compromise cruel, inhuman, degrading treatment." [NB- compromise should be read as comprise].

⁶² [ICC-01/12-01/18-T-178-ENG](#), p. 29, lines 17-19, see also p.32, lines 2-7.

⁶³ [ICC-01/12-01/18-T-178-ENG](#), p. 45, lines 5-6.

⁶⁴ [ICC-01/12-01/18-T-178-ENG](#), p.31,lines 8-23.

⁶⁵ [ICC-01/12-01/18-T-178-ENG](#), p. 36, lines17-20.

⁶⁶ [ICC-01/12-01/18-T-178-ENG](#), p. 32, lines17-24. See also p. 33, lines 22-25, p. 38, lines 5-8.

⁶⁷ [ICC-01/12-01/18-T-178-ENG](#), p. 38, lines 9-19, p. 39, lines 15-24.

16. The above expert conclusions have now been substantiated by sworn fact evidence from [REDACTED]. The evidence of [REDACTED] and [REDACTED] demonstrates that Mr Al Hassan was subjected to the specific types of maltreatment that would have triggered unpredictable/uncontrollable stress and severe cognitive impairment. They further describe specific practices and conditions that would have intersected with ICC-OTP interviews (blindfolding, cramped confinement, restraint stress, sleep deprivation, interrogation stress, food and water deprivation). They also corroborate Mr Al Hassan's account that he was physically beaten and starved just before the December 2017 interviews with the ICC-OTP.⁶⁸ P-0626⁶⁹ [REDACTED]⁷⁰ have given evidence that it was their understanding that speaking to the ICC-OTP would result in an improvement of their conditions. [REDACTED].⁷¹ Their evidence is probative as concerns the psychological difficulty faced by detainees – held in incommunicado detention – to make rational assessments based on the information provided to them.

[REDACTED]

17. [REDACTED],⁷² [REDACTED] gave evidence that Mr Al Hassan was subjected to various forms of physical and psychological maltreatment/torture. This included the specific types which Drs Morgan, Porterfield and Cohen explained would produce prolonged forms of severe cognitive impairment that affected both the voluntariness and reliability of Mr Al Hassan's statements to the interviewers.

18. In particular:

- [REDACTED] held in a very small, hot room and being beaten each time [REDACTED] tried to sit or move.⁷³ Very loud music was played.⁷⁴ [REDACTED]

⁶⁸ [REDACTED].

⁶⁹ P-626; [REDACTED]; [ICC-01/12-01/18-T-144-CONF-ENG](#), pp. 22,. 27, 33-3.

⁷⁰ [REDACTED].

⁷¹ [REDACTED]

⁷² [REDACTED].

⁷³ [REDACTED].

⁷⁴ [REDACTED].

heard someone nearby vomiting.⁷⁵ [REDACTED] was denied food and water the first day.⁷⁶ [REDACTED] was interrogated while blind-folded and told he was a terrorist.⁷⁷

- [REDACTED] was then taken to a second location. He stayed in an air-conditioned room. He was not tortured in second location. [REDACTED] was briefly kept in a room with Mr Al Hassan. [REDACTED] Mr Al Hassan looked like he had been physically tortured.⁷⁸ [REDACTED].⁷⁹
- [REDACTED]. [REDACTED].⁸⁰ [REDACTED].⁸¹ [REDACTED] Mr Al Hassan repeatedly saying that he was sick and falling down.⁸² [REDACTED] the guards tell Al Hassan that they would kill him slowly.⁸³ [REDACTED].⁸⁴
- [REDACTED].⁸⁵ [REDACTED]. [REDACTED]'s arms were tied up and he was beaten (he thinks it was with a car cable).⁸⁶ [REDACTED] was threatened with electrocution.⁸⁷ [REDACTED] could hear sounds of other people screaming crying and being beaten.⁸⁸ [REDACTED] lost consciousness several times.⁸⁹
- [REDACTED] the interrogations methods that were used by DGSE guards. [REDACTED] would be interrogated and then taken to another room to be beaten, and then interrogated again.⁹⁰ The interrogators forced [REDACTED] to stand during the interrogations (until the pain made him want to fall down).⁹¹ During questioning, they threatened to take [REDACTED] back to the other room to be beaten.⁹² They told [REDACTED] he was a mujahadeen and had to give information about mujahadeens.⁹³

⁷⁵ [REDACTED]

⁷⁶ [REDACTED].

⁷⁷ [REDACTED].

⁷⁸ [REDACTED].

⁷⁹ [REDACTED].

⁸⁰ [REDACTED].

⁸¹ [REDACTED].

⁸² [REDACTED].

⁸³ [REDACTED].

⁸⁴ [REDACTED].

⁸⁵ [REDACTED].

⁸⁶ [REDACTED].

⁸⁷ [REDACTED].

⁸⁸ [REDACTED].

⁸⁹ [REDACTED].

⁹⁰ [REDACTED].

⁹¹ [REDACTED].

⁹² [REDACTED].

⁹³ [REDACTED].

- [REDACTED] people had died from torture, in the room where [REDACTED] had been beaten.⁹⁴ [REDACTED].
- [REDACTED] the inhumane detention conditions at the DGSE. [REDACTED] was held in extremely cramped conditions. They had to sleep ‘stacked’ – [REDACTED] could not sleep very well and was on constant ‘alert’ due to the fear that someone might fight.⁹⁵ [REDACTED] was constantly bitten by mosquitos but couldn’t scratch the bites because of handcuffs.⁹⁶ [REDACTED] only had two buckets for 25 persons to defecate it. This was not enough: at night if the buckets were full, the detainees couldn’t urinate or defecate otherwise the contents of the buckets would spill over.⁹⁷ The smell was terrible. [REDACTED].⁹⁸ The detainees had insufficient water.⁹⁹ Sometimes the food was enough and other times it was not.¹⁰⁰ The guards also menaced them by reducing their access to water or sanitation.¹⁰¹
- The doctor would visit outside [REDACTED] cells only Friday.¹⁰² He did not conduct physical examinations.¹⁰³ Sometimes the doctor would give pills or medicine and other times he would not, but he would not give anyone anything more than once a week.¹⁰⁴ [REDACTED].¹⁰⁵ [REDACTED].¹⁰⁶ [REDACTED].¹⁰⁷ [REDACTED].¹⁰⁸ [REDACTED].¹⁰⁹ [REDACTED].¹¹⁰ [REDACTED].¹¹¹
- [REDACTED].¹¹² [REDACTED] they could hear the guards telling each other to take the detainees out and beat them.¹¹³

⁹⁴ [REDACTED].

⁹⁵ [REDACTED]

⁹⁶ [REDACTED].

⁹⁷ [REDACTED].

⁹⁸ [REDACTED].

⁹⁹ [REDACTED].

¹⁰⁰ [REDACTED].

¹⁰¹ [REDACTED].

¹⁰² [REDACTED].

¹⁰³ [REDACTED].

¹⁰⁴ [REDACTED].

¹⁰⁵ [REDACTED].

¹⁰⁶ [REDACTED].

¹⁰⁷ [REDACTED].

¹⁰⁸ [REDACTED].

¹⁰⁹ [REDACTED].

¹¹⁰ [REDACTED].

¹¹¹ [REDACTED].

¹¹² [REDACTED].

¹¹³ [REDACTED].

- [REDACTED].¹¹⁴ [REDACTED].¹¹⁵ [REDACTED].¹¹⁶ [REDACTED].¹¹⁷
[REDACTED].¹¹⁸ [REDACTED].¹¹⁹
- [REDACTED] description of specific incidents of maltreatment, [REDACTED],
are consistent with the account provided by Mr Al Hassan to Dr Porterfield and Dr
Cohen.¹²⁰

[REDACTED]

19. [REDACTED] corroborated core aspects of [REDACTED]'s evidence concerning Mr Al Hassan, either through evidence of similar fact patterns, or through direct evidence concerning the physical and psychological torture inflicted on Mr Al Hassan. [REDACTED] also corroborates specific descriptions of maltreatment that Mr Al Hassan recounted to Dr Porterfield and Cohen.¹²¹

20. [REDACTED] testified under oath that:

- [REDACTED];
- [REDACTED]. Cell 4 was described [REDACTED], as being like Taoudéni prison – a prison known for atrocities/torture.¹²² [REDACTED].¹²³
- [REDACTED] Mr Al Hassan being subjected to various forms of physical and psychological torture, [REDACTED].¹²⁴ [REDACTED].¹²⁵ [REDACTED].¹²⁶ [REDACTED].¹²⁷ [REDACTED].¹²⁸ [REDACTED] Mr Al Hassan being beaten with sticks and hung up.¹²⁹

¹¹⁴ [REDACTED].

¹¹⁵ [REDACTED].

¹¹⁶ [REDACTED].

¹¹⁷ [REDACTED].

¹¹⁸ [REDACTED].

¹¹⁹ [REDACTED].

¹²⁰ [REDACTED].

¹²¹ [REDACTED]

¹²² [REDACTED].

¹²³ [REDACTED].

¹²⁴ [REDACTED].

¹²⁵ [REDACTED].

¹²⁶ [REDACTED].

¹²⁷ [REDACTED].

¹²⁸ [REDACTED]

¹²⁹ [REDACTED].

- [REDACTED] described the conditions of cell [REDACTED] where Mr Al Hassan was confined [REDACTED].¹³⁰ [REDACTED].¹³¹ The floor was made of tiles: three tiles were a metre.¹³² Detainees had a tile and a half.¹³³ They had no access to sunlight, fresh-air, showers.¹³⁴ There was an air-conditioning unit and ventilators but they had broken down.¹³⁵ They had no toilets: instead they were given pots (sometimes 3, sometimes 4).¹³⁶ The pots were not always emptied at night.¹³⁷ They had no visitors and could make no calls.¹³⁸ The detainee was told that it was not possible for lawyers to visit.¹³⁹
- [REDACTED].¹⁴⁰ [REDACTED].¹⁴¹ [REDACTED].¹⁴² [REDACTED].¹⁴³ Mr Al Hassan was taken out and physically beaten.¹⁴⁴ [REDACTED].¹⁴⁵ The food rations were then reduced to a third for three days [REDACTED].¹⁴⁶ [REDACTED].¹⁴⁷
- [REDACTED] general atmosphere of terror and fear that existed at the DGSE at the time of Mr Al Hassan's detention. In 2017, a detainee was hit in the jaw and died. [REDACTED].¹⁴⁸ [REDACTED] died after being sent to the 'cold room' and then cell 4, which was extremely hot.¹⁴⁹ He had nose bleeds and fainting fits. The Presiding Judge recognised that: "It's clear that the conditions were very difficult and people died there".¹⁵⁰

¹³⁰ [REDACTED].

¹³¹ [REDACTED].

¹³² [REDACTED].

¹³³ [REDACTED]. The [European Committee for the Prevention of Torture](#) stipulates a minimum of 4 metres squared) with separate sanitary facilities for detainees in shared cells (p.3). The ECHR has found that anything less than 3 metres violates prohibition on cruel, inhumane and degrading treatment: [Muršić v. Croatia](#) [GC], no. 7334/13, para. 171.

¹³⁴ [REDACTED].

¹³⁵ [REDACTED].

¹³⁶ [REDACTED].

¹³⁷ [REDACTED].

¹³⁸ [REDACTED].

¹³⁹ [REDACTED].

¹⁴⁰ [REDACTED].

¹⁴¹ [REDACTED].

¹⁴² [REDACTED].

¹⁴³ [REDACTED].

¹⁴⁴ [REDACTED].

¹⁴⁵ [REDACTED]

¹⁴⁶ [REDACTED]

¹⁴⁷ [REDACTED].

¹⁴⁸ [REDACTED]

¹⁴⁹ [REDACTED].

¹⁵⁰ [REDACTED].

21. The evidence of [REDACTED] must also be considered in conjunction with the written statements of [REDACTED],¹⁵¹ [REDACTED],¹⁵² [REDACTED],¹⁵³ and the items currently submitted for admission through the bar.
22. The Chamber now has before it an extensive volume of mutually corroborating evidence concerning the existence and causes of continuing psychological and psychosomatic symptoms and cognitive impairment experienced by Mr Al Hassan during the course of the DGSE ICC-OTP interviews. Irrespective as to whether there may have been earlier causes of trauma, the body of evidence supports the conclusion that further trauma was inflicted on arrest in 2017 and during the course of Mr Al Hassan's detention at the DGSE. The totality of evidence also supports the conclusion that irrespective of the explanations given by the ICC-OTP to the detainees they interviewed in DGSE custody, detainees in Mr Al Hassan's position would have reasonably believed that speaking to the ICC-OTP would result in an improvement in their conditions, and further, that this was the only option available to these detainees to improve these life-threatening conditions. This conclusion undermines both the voluntariness and reliability of Mr Al Hassan's statements to the ICC-OTP.

C. The New Information undermines the bases for the Chamber's former conclusions

23. The New Information vitiates the bases for the Article 69(7) Decision: it proves that the content of Mr Al Hassan's statements to the ICC-OTP was fundamentally tainted by his experiences of psychological and physical torture. The cumulative criteria set out in Article 69(7) are fulfilled because the New Information demonstrates both the nexus between continuous forms of torture and the evidence gathering process and the impact on the voluntariness and reliability of the evidence obtained by the Prosecution.
24. In terms of the nexus element, the New Information demonstrates that at the time of the DGSE ICC-OTP interviews, Mr Al Hassan was suffering from severe cognitive impairment caused by ongoing forms of physical and psychological torture. The detention conditions alone, leading to extreme fatigue and weakness, impacted his concentration and memory. Torture reminders and triggers (blindfolds, handcuffs,

¹⁵¹ [REDACTED].

¹⁵² [REDACTED]: [ICC-01/12-01/18-2348-Conf](#), para. 13.

¹⁵³ [REDACTED]: [ICC-01/12-01/18-2348-Conf](#), paras. 16-18.

presence of DGSE guards involved in torture) engendered disorientation, anxiety and fear. The cumulative impact of these factors vitiated Mr Al Hassan's ability to make an informed, voluntary decision as to whether to participate in the interview process, as well as his capacity to make rational choices as to whether to exercise his right to silence.

25. The uncontrollable/unpredictable stress caused by continuous forms of maltreatment also made Mr Al Hassan compliant to suggestion and susceptible to false memories, thereby rendering his statements unreliable in the extreme. His responses were conditioned by past interrogations entailing physical abuse and verbal threats. Changing the identity of the interrogators or the physical location of the interrogations did not eliminate the existence of uncontrollable/unpredictable stress, since Mr Al Hassan continued to be detained at the DGSE, was brought to and from the interview by DGSE guards involved in his torture, and was reminded of past instances of torture by triggers (blindfolds, handcuffs). The evidence collected by the ICC-OTP was thus directly impacted by past and ongoing forms of torture/CIDT.¹⁵⁴
26. The New Information further demonstrates that the measures taken by the ICC-OTP were insufficient and ineffective in addressing the effects of cognitive impairment, and in some instances, would have been likely to aggravate the effects. As explained by Dr Morgan, whereas the existence and extent of Mr Al Hassan's cognitive impairment could have been evaluated through a clinical examination/mental test,¹⁵⁵ it could not have been effectively evaluated through simple verbal inquiries from investigators, however well-meaning. It is also not feasible for non-medical experts to assess the existence and extent of cognitive impairment by reading the transcripts.¹⁵⁶
27. Procedural explanations of the right to silence did not address or remedy the effects of unpredictable/uncontrollable stress.¹⁵⁷ The provision of temporary good treatment would not cure these effects. To the contrary, when juxtaposed with prolonged bad treatment, temporary good treatment can be experienced as a form of coercion, even if

¹⁵⁴ See [REDACTED].”

¹⁵⁵ A physical examination in December 2017 would also have revealed physical signs of torture (bruising): [REDACTED].

¹⁵⁶ [ICC-01/12-01/18-1475-Conf](#), paras. 52-53, 59-63.

¹⁵⁷ [ICC-01/12-01/18-1475-Conf](#), paras. 57 et seq.

it is not intended as such. This is because the detainees' "situation is so unpleasant to them that they wouldn't reasonably refuse what's offered" (...).¹⁵⁸ Even if Mr Al Hassan was told that his participation in the ICC-OTP interviews was voluntary, he could not reasonably refuse to speak to the ICC-OTP investigators.

28. The above factors are encapsulated in Dr Morgan's findings that:¹⁵⁹

It is within a reasonable degree of medical and scientific certainty that the conditions under which P-0398 and P-0626 were detained, confined, interrogated, and questioned, constitute exposure to uncontrollable stress. Uncontrollable stress has a profound and negative effect on the integrity of human cognition and memory - both of which are the foundation of information produced by these witnesses during their sessions with the ICC investigative team. It is within a reasonable degree of medical and scientific certainty that this stress exposure significantly reduced the accuracy and reliability of their memories. **As a result, it is within a reasonable degree of medical and scientific certainty that the information each of these witnesses provided to during their sessions with the ICC investigation team is subject to substantial error** (emphasis added).

29. Accordingly, this Chamber is bound by principle and informed by evidence in such a way as makes exclusion of Mr Al Hassan's interviews the proper course: "An OTP that can conduct independent and impartial investigations and build cases on solid evidence is one that will meet expectations and help foster fair trials."¹⁶⁰ In the present case, the evidence obtained from Mr Al Hassan by ICC-OTP is involuntary and unreliable; it is irrevocably tainted under Article 69(7). The Chamber must now act to safeguard the fairness of this trial, and exclude it.

¹⁵⁸ [ICC-01/12-01/18-T-179-CONF-ENG](#), p. 51, lines 13-15. For full explanation, see lines 12-24: "When we think about psychological coercion, what we refer to is the state in which a person either fears for their safety should they not make that decision, or their situation is so unpleasant to them that they wouldn't reasonably refuse what's offered. We think about this a great deal in research. It's been well articulated in the Helsinki and Belmont reports on the treatment of humans who participate in research. This element is also very important when interacting with prisoners and people who are detained. It isn't that we can't offer people something. That offer in and of itself is not coercive. It's within the context about whether or not a reasonable person would refuse the offer. And sometimes circumstances are so unpleasant for people, they don't say no to meeting with other people because they have nothing to lose. They feel everything is so terrible, I -- I will have to do this anyway".

¹⁵⁹ [MLI-D28-0006-4240-R01](#) at 4244.

¹⁶⁰ [Questionnaire for Candidates to the 2020 Election of the ICC Prosecutor: Karim A.A. Khan](#) (last accessed 2 November 2022).

III. Relief Sought

30. For the reasons set out above, the Defence for Mr Al Hassan respectfully requests the Honourable Trial Chamber to:

- **RECONSIDER** the Article 69(7) Decision; and
- **EXCLUDE** the Statements and Associated Materials, which were admitted into evidence through the Article 69(7) Decision.



Melinda Taylor
Counsel for Mr Al Hassan

Dated this 14th Day of November 2022
At The Hague, The Netherlands