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November 2020**

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 leave to appeal the “Decision on
Defence’s objections to the Prosecution’s list of material for P-0620”’**

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. On 24 September 2020, pursuant to paragraph 57 of the ‘Directions on the Conduct of Proceedings’,¹ the Office of the Prosecutor (‘Prosecution’) provided its list of material to be used with Witness P-0620 *via* email (‘List of Material’).
2. On 7 October 2020, pursuant to paragraph 60 of the Directions, the Defence provided its objections to the List of Material *via* email (‘Objections’)
3. On 8 October 2020, Trial Chamber X (‘Chamber’) provided its ‘Decision on Defence’s objections to the Prosecution’s list of material for P-0620’ (‘Decision’), rejecting the Objections.
4. The Defence seeks leave to appeal² the Decision in relation to the following issues (‘the Two Issues’):
 - a. Whether the Chamber erred in holding that its preliminary Rule 68(3) decision precluded it from being required to make a separate determination in respect of issues raised under paragraph 60 of Annex A of the Decision on the Conduct of Proceedings (‘First Issue’); and
 - b. Whether the Chamber erred in concluding that the prohibitions on the use of torture-tainted evidence only apply to the **admission** of evidence, as distinct from its **use** (‘Second Issue’).
5. The Defence notes that the Decision was sent *via* email on Thursday 8 October 2020 at 22:48. Pursuant to Regulation 33(3) of the Regulations of Court (‘RoC’), unless otherwise ordered, decisions received or filed after the filing time of 4pm (under Regulation 33(2)) are notified on the next working day of the Court, being Friday 9 October 2020. Pursuant to Regulation 33(1)(c), given that the day of notification was a Friday, the time limit (five days after notification, pursuant to Regulation 155(1)) did not begin to run until the next working day of the Court (being Monday 12 October 2020). Pursuant to Regulation 33(1)(d), documents shall be filed with the Registry, at the latest, by 4pm on the first working day of the Court following expiry

¹ ICC-01/12-01/18-789-AnxA.

² Article 82(1)(d) of the Statute.

of the time limit. Therefore, the deadline for the filing of this request for leave to appeal falls on Monday 19 October 2020, being the first working day of the Court following expiry of the time limit.

II. Confidentiality

6. This request has been filed on a confidential basis as it relates to aspects of the litigation concerning the Termination Request³ which remain confidential.⁴ The Defence considers that it may be appropriate for the Chamber to order public redacted versions of the portions of the Termination Request litigation which remain confidential only, in the interests of publicity.

III. Submissions

The Two Issues arise from the Decision

7. The Appeals Chamber has held that “[a]n issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.”⁵

The First Issue: Whether the Chamber erred in holding that its preliminary Rule 68(3) decision precluded it from being required to make a separate determination in respect of issues raised under paragraph 60 of Annex A of the Decision on the Conduct of Proceedings

8. The issue arises out of the Decision and its resolution was essential for the determination of the matters arising in the judicial causes under consideration. In the Decision, the Trial Chamber indicated that it considered that its 5 August 2020 decision on expert witness evidence⁶ obviated the need to consider the Objections raised by the Defence on 7 October 2020. In the Decision, the Chamber stated:

³ ICC-01/12-01/18-885-Conf-Exp-Corr; ICC-01/12-01/18-885-Corr-Red3.

⁴ See e.g. ICC-01/12-01/18-1009-Conf.

⁵ [ICC-01/04-168](#), para. 9.

⁶ ICC-01/12-01/18-989-Conf.

The Chamber recalls that it has previously authorised the use of the report drafted by P-0620 and [REDACTED] while clarifying that ‘any authorisation to introduce the joint expert report and related material pursuant to this provision, is without prejudice to the Chamber’s eventual determination on the admissibility of the evidence analysed by the experts, including pursuant to Article 69(7) of the Statute’ (ICC-01/12-01/18-989-Conf, para. 87).

9. Clarity of the issue is aided by noting the four step process adopted in the proceedings by the Trial Chamber for the reception of evidence like P-0620’s report:

1. *A decision upon the modality of testimony with reference to Rule 68(3).* At this stage, the Trial Chamber decides whether parts of the evidence will be heard *viva voce* and whether the witness can be qualified as an expert;
2. *A decision on objections to the use of material during testimony but prior to the testimony.* This affords the parties an opportunity to make submissions to avoid prejudice by the Trial Chamber hearing certain evidence;
3. *At the point of submission following testimony, a decision upon exclusionary rules which mandate that certain evidence is inadmissible in the proceedings.* The Directions on the Conduct of Proceedings note for example that “Rule 63(3) of the Rules mandates that rulings on admissibility shall be made by the Chamber when an application is made by a party or the Chamber by its own motion under Article 69(7) of the Statute.”⁷ Such a decision might also concern whether the Rule 68(3) conditions have been met; and finally
4. *Considerations of the Article 69 criteria at the end of proceedings,* whereby, for example, irrelevant evidence or evidence where the prejudice outweighs the probative value obliges the Trial Chamber to put the material aside as inadmissible.

10. In the ‘Defence response to the Prosecution expert witness requests’, the Defence had explicitly stated that P-0620’s report⁸ was tainted by torture:⁹

⁷ [ICC-01/12-01/18-789-AnxA](#), para. 32.

⁸ [REDACTED] (**‘Report’**).

⁹ ICC-01/12-01/18-895-Conf, para. 47.

P-620's report is based on documents and information obtained through interviews that were conducted with Mr. Al Hassan while he was detained at the DGSE. The underlying foundation of the Report is thus based on tainted evidence, and is impacted by the pending Defence Termination Request. Any consideration of this expertise should therefore be deferred pending the outcome of the Defence Termination Request.

11. In the 'Decision on Prosecution's proposed expert witnesses', the Chamber does not address objections to the use of material in testimony but does carve out a space for objections thereto. It held:¹⁰

The Chamber disagrees with the Defence and does not consider that the pending Termination Motion prevents the Chamber from making a judicial determination on the expertise of P-0620 and [REDACTED] or whether it is appropriate to call them as experts in this case. Accordingly, the Chamber will assess whether these individuals possess sufficient expertise, whether their joint report would assist the Chamber, and whether introduction via Rule 68(3) of the Rules is appropriate.

The Chamber notes that P-0620 and [REDACTED] have relevant academic and professional expertise in document and handwriting authentication in the context of police investigations and judicial proceedings. The Chamber considers 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. The Chamber therefore finds that P-0620 and [REDACTED] may be called to testify as expert witnesses.

Turning now to the request to introduce their report and related material pursuant to Rule 68(3) of the Rules, the Chamber notes the Defence's objections as to the admissibility of some of the evidence relied upon by the experts. **However, the Chamber clarifies that the authorisation to introduce the joint expert report and related material pursuant to this**

¹⁰ ICC-01/12-01/18-989-Conf, paras. 85-87 (emphasis added).

provision, is without prejudice to the Chamber’s eventual determination on the admissibility of the evidence analysed by the experts, including pursuant to Article 69(7) of the Statute. In this regard the Chamber stresses that the Prosecution will introduce this documentary evidence material through other witnesses. Moreover, as stated above, the Defence will have a full opportunity to question the expert witnesses during cross-examination, which remains unaffected by the introduction of the prior recorded testimony via Rule 68(3) of the Rules.

Accordingly, the Chamber considers that the introduction pursuant to Rule 68(3) of the Rules of P-0620 and [REDACTED]’s joint report will expedite proceedings, whilst not prejudicing the rights of the accused to test the expert evidence fully in cross-examination. Moreover, as noted above, the related material, including the material the Defence submits relates to its Termination Motion, will be introduced through other witnesses and not through these witnesses.

12. Thus, the decision on proposed expert witnesses indicates that in authorising the Rule 68(3) mode of testimony regarding the Report, the Chamber explicitly stated that this was without prejudice to the Chamber’s determination on admissibility.
13. That notwithstanding, the 8 October 2020 Decision seems to suggest that it does not have to decide upon the issue of use arising from the Objections because the issue had already been determined previously. The issue thus arises at which procedural stage such objections to use are to be considered. It is therefore worth referring to the ‘Directions on the conduct of proceedings’¹¹ which establish a two-stage process to objections to evidence used with, and submitted through, witnesses:

- a. Objections to the **use** of material with a witness are provided prior to the start of the witness’s testimony;¹² and

¹¹ [ICC-01/12-01/18-789-AnxA](#).

¹² [ICC-01/12-01/18-789-AnxA](#), paras. 60-61.

- b. Objections to the **submission** of material through a witness as evidence are provided after the witness has concluded testimony and the tendering party has indicated the material to be submitted.¹³

14. Objections to the use of material in advance of testimony are separate threshold issues that are distinct from the mode of testimony. The prejudice that arises from discussing an item in testimony before the Trial Chamber is different from the prejudice that may arise from the formal consideration of an item as evidence and is distinct from the manner by which evidence is presented to the Trial Chamber (e.g. *viva voce* or not). While the same subject matter may be raised, the content and nature of the arguments may differ. This point is strengthened by the Conduct of Proceedings acknowledgement that objections to the specific uses of materials *in* testimony are not precluded by pre-testimony objections to use.¹⁴ The Decision suggests that a decision on the mode of evidence presentation (e.g. Rule 68(3)) is equivalent to a conclusion on whether the material can be used (that is, that it encompasses both the first and the second steps set out above). This position was not set out, or otherwise clarified in the earlier Rule 68 decision: it arose from the manner in which the Trial Chamber resolved the issues set out in the Defence email dated 7 October 2020.

15. The fact that the issue arose from the 8 October 2020 Decision, and not the earlier Rule 68/expert ruling, is also supported by prior decisions by other ICC Chambers, which have made clear that acceptance of expertise, or a preliminary finding that a person may testify under Rule 68(3), does not foreclose the issues which can be raised in respect of the witness, or the items to be used with that witness.

16. In respect of expert witnesses, decisions by other Trial Chambers indicate that the initial decision to allow a party to call a particular individual as an expert does not prejudge their ultimate determination as to whether the evidence was of an ‘expert’ nature, nor does it entail the automatic reception of their reports. Trial Chamber VI in the *Ntaganda case* found that certain witnesses could be called to testify as expert

¹³ [ICC-01/12-01/18-789-AnxA](#), para. 34(iii).

¹⁴ [ICC-01/12-01/18-789-AnxA](#), para. 60: “The opposing party shall provide, by way of email, no later than two days prior to the start of the witness’s testimony, notice of its objection to the use of any material with the witness. *This is without prejudice to the possibility to object, during the testimony, to the manner in which the material is presented to the witness.*” (emphasis added)

witnesses, but made no findings about the admission of their reports.¹⁵ Similarly, in *Prosecutor v. Ruto and Sang*, Trial Chamber V(a) clarified that since the trial had not yet commenced, it would be premature to provide a definitive ruling as to whether the individual was in fact an expert, and the admissibility of their report.¹⁶ In *Prosecutor v. Ongwen*, Trial Chamber IX was considering both expert witnesses and Rule 68(3) and made findings only to the extent that a person could be heard as a witness and that a report was suitable for introduction under Rule 68(3).¹⁷

17. Furthermore, in *Prosecutor v. Gbagbo and Blé Goudé*, the Appeals Chamber discussion suggests that, in the context of Rule 68(3) a preliminary assessment is one focusing upon *prima facie* considerations regarding the most appropriate mode of introducing the evidence, rather than substantive considerations of legality and exclusion. The Appeals Chamber stated:¹⁸

In the Appeals Chamber's view, rule 68 (3) of the Rules requires a Chamber to carry out a **preliminary assessment** of the evidence in question in order to determine whether its **introduction** under that provision is appropriate. This assessment, which includes an analysis of the relative importance of the evidence, is without prejudice to the weight that the Trial Chamber will ultimately attach to a witness's evidence, which indeed can only be determined once the Trial Chamber has heard all of the evidence.

18. To that end, the Chamber's decision in August 2020 to permit Witness P-0620 to testify under Rule 68(3) was only a preliminary assessment concerning the mode of testimony in the sense that it allowed the Prosecution to introduce the report through Rule 68(3), rather than through *vive voce* testimony; it did not, and cannot, fetter the Chamber's power and duty to rule on objections to the use of the Report, that are linked to the evidential foundation of the Report, and the items included on the Prosecution's list of evidence. The indication in the Decision that the Chamber considered that it was precluded from hearing objections to the use of the Report, and

¹⁵ [ICC-01/04-02/06-1159](#), paras. 17, 27, 32.

¹⁶ [ICC-01/09-01/11-844](#), para. 29.

¹⁷ [ICC-02/04-01/15-1199-Red](#), paras. 41, 69.

¹⁸ [ICC-02/11-01/15-744](#), para. 72 (emphasis added).

related items, as evidence appear to be in legal error, as the witness had not yet testified.

19. The First Issue therefore arises from the Decision.

The Second Issue: Whether the Chamber erred in concluding that the prohibitions on the use of torture-tainted evidence only apply to the admission of evidence, as distinct from its use

20. In the Decision, the Chamber stated:

For these reasons, the Chamber confirms that the material in question may be used with P-0620. This is without prejudice to any eventual determination on admissibility pursuant to Article 69(7) of the Statute, which will be made at the appropriate time and in due course.

21. In the Decision, the Trial Chamber therefore separated the question of the use of evidence in testimony with P-0620 from the question of the determination of admissibility of that material following testimony. The issue therefore arises from the decision. This issue directly draws in the interpretation and application of range of important substantive human rights norms and standards that bind the Trial Chamber.

22. The Chamber's discretion as concerns evidentiary rulings is subject its duty to, under Article 64(2) of the Statute, to ensure that the "trial is fair and expeditious" and "conducted with full respect for the rights of the accused". This duty, in turn, must be construed in a manner, which is consistent with internationally recognised human rights law (as *per* Article 21(3) of the Statute).

23. Article 15 of the United Nations Convention against Torture states:

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

24. The Inter-American Court of Human Rights has also found that the use of statements obtained in circumstances constituting CIDT was inappropriate, and that such statements should have been excluded.¹⁹
25. The Committee against Torture has consistently interpreted Article 15 broadly, as reflected in its recommendations to State Parties to the UNCAT that ‘all evidence obtained directly or indirectly by torture be strictly prevented from **reaching the cognizance of the deciding Judges** in all judicial proceedings.’²⁰
26. This idea of evidence reaching the ‘cognizance’ of Judges is further supported by jurisprudence of the European Court of Human Rights in *Jalloh v. Germany*, in which Judge Zupančič, concurring with the majority judgment, stated that Article 15 ‘mandates the strict exclusion of all evidence from the **direct or indirect cognizance of the judges if it is obtained through torture**.’²¹
27. Similarly, in *Gäfgen v. Germany*, the European Court of Human Rights made similar findings about the circumstances where torture evidence was ‘**used**’.²²

173. The Court is therefore called upon to examine the consequences for a trial’s fairness of the admission of real evidence obtained as a result of an act qualified as inhuman treatment in breach of Article 3, but falling short of torture. As shown above (see paragraphs 166-67), in its case-law to date, it has not yet settled the question whether the use of such evidence will always render a trial unfair, that is, irrespective of other circumstances of the case. It has, however, found that both the use in criminal proceedings of statements

¹⁹ IACtHR, *Cabrera García v. Mexico*, [Judgment](#), para. 177: “For all the above reasons, the Court concludes that the domestic courts, which heard the case at all stages of the proceeding, should have completely excluded the statements rendered before the Public Prosecutor’s Office and the confessions made on May 7, 1999, given that the existence of cruel and inhuman treatment disqualified the use of such evidence, according to the international standards previously mentioned. *Therefore, the Court declares the violation of Article 8(3), in relation to Article 1(1) of the American Convention, to the detriment of Messrs. Cabrera and Montiel.*”

²⁰ Committee against Torture, Concluding Observations on Germany, [UN Doc A/53/44](#), para. 193 (emphasis added). See similarly regarding **Georgia** and **Poland**: Committee against Torture, Summary Record of the Public Part of the 279th Meeting, [CAT/C/SR.279](#), para. 15: ‘The Committee recommends that statements obtained directly or indirectly under torture be not produced as evidence in the courts’ and **Finland**: Committee against Torture, Summary Record of the Public Part of the 250th Meeting, [CAT/C/SR.250](#), Recommendations, para. 18: ‘The Committee recommends that a special provision be incorporated into the State party’s criminal procedure concerning the exclusion from judicial proceedings of evidence which has been obtained, directly or indirectly, as a result of torture, as provided for by article 15 of the Convention.’

²¹ *Jalloh v. Germany*, [54810/00](#), pg. 43.

²² *Gäfgen v. Germany*, [22978/05](#), paras. 173 and 175. See more generally paras. 170-188.

obtained as a result of a person's treatment in breach of Article 3 – irrespective of the classification of that treatment as torture, inhuman or degrading treatment – and **the use of real evidence obtained as a direct result of acts of torture made the proceedings as a whole automatically unfair**, in breach of Article 6 (ibid.).

...

175. The Court is further aware of the different competing rights and interests at stake. On the one hand, the exclusion of – often reliable and compelling – real evidence at a criminal trial will hamper the effective prosecution of crime. There is no doubt that the victims of crime and their families as well as the public have an interest in the prosecution and punishment of criminals, and in the present case that interest was of high importance. Moreover, the instant case is particular also in that the impugned real evidence was derived from an illegal method of interrogation which was not in itself aimed at furthering a criminal investigation, but was applied for preventive purposes, namely in order to save a child's life, and thus in order to safeguard another core right guaranteed by the Convention, namely Article 2. **On the other hand, a defendant in criminal proceedings has the right to a fair trial, which may be called into question if domestic courts use evidence obtained as a result of a violation of the prohibition of inhuman treatment under Article 3, one of the core and absolute rights guaranteed by the Convention. Indeed, there is also a vital public interest in preserving the integrity of the judicial process and thus the values of civilised societies founded upon the rule of law.**

28. The practice of the Extraordinary Chambers in the Courts of Cambodia also demonstrate that the phrase 'invoked as evidence' is not limited to the formal submission of evidence but its use in Court as a foundation for questions. As the

ECCC, referring to Article 15, held in *Co-Prosecutors v. Khieu Samphan & Nuon Chea (Case 002)*:²³

Even if more practical or efficient, the Chamber cannot defer until a determination of the merits its assessment of which documents were obtained by torture (...) Such a proposal runs contrary to the plain language of Article 15, which provides that torture-tainted evidence "shall not be invoked as evidence in any proceedings." **The language of the Article is not limited to the judgement phase but applies with equal force to the presentation of evidence and the questioning of witnesses during the trial.** Furthermore, if the Chamber were to allow the parties to invoke possibly torture-tainted evidence throughout this trial, the damage to the integrity of the proceedings will have been done. Removing from consideration, torture-tainted evidence at the judgement phase cannot remedy that damage. For the parties and the public will have seen the product of torture relied on for its truth, normalising the acquisition and invocation of that evidence at trial and diverting the Chamber's inquiry into the ascertainment of the truth.

29. The ECCC made consistent rulings in other phases of the same case, again relying on Article 15:²⁴

A party requesting the use of evidence derived from torture or wishing to tender such evidence must first demonstrate that it is being introduced only for the reason permitted by Article 15 of the CAT. For the reasons stated above, the Supreme Court Chamber considers that both NUON Chea and the Co-Prosecutors fail to so demonstrate, and has accordingly decided that none of the S-21 Statements may be used during the hearing of SCW -3, SCW-4, and SCW-5.

30. These findings of the Committee against Torture, the European Court of Human Rights and the Extraordinary Chambers in the Courts of Cambodia are particularly

²³ ECCC, *Co-Prosecutors v. Khieu Samphan & Nuon Chea*, [Decision on Evidence Obtained Through Torture](#), Case 002, E350/8, para. 41 (emphasis added).

²⁴ ECCC, *Co-Prosecutors v. Khieu Samphan & Nuon Chea*, [Decision on Objections to Document Lists: Full Objections](#), Case 002, F26/12, para. 69 (emphasis added).

apposite as they concern trials, and systems of justice, composed of professional judges, like the Trial Chamber.

31. The special nature of the prohibition on the use of torture-tainted evidence, and its implications as detailed in the case law extracted above, raise the issue as to whether the Chamber's obligation to exclude evidence that fulfils the criteria of Article 69(7), when read with its duty to ensure that a trial is fair and expeditious under Article 64(2), requires the Chamber to consider these issues at the stage of use of the evidence, rather than deferring consideration until the stage of admission, as the use of that evidence with the witness will result in irremediable prejudice, a 'bell that cannot be unrung'. As explained by Guariglia,²⁵

while Rule 64(1) imposes on a party a duty to raise issues related to relevance and admissibility of evidence 'at the time when the evidence is submitted to a Chamber', there is no guarantee that the Chamber will rule at that time. It may decide to do so, or it may decide to allow the evidence into the process, and consider admissibility and the factors enumerated in Article 69(4) as part of its overall evaluation of the evidence presented at trial. The only explicit exception to this system appears to be the exclusionary rule enshrined in Article 69(7) of the Statute: Rule 63(3) mandates a Chamber to rule, on an application of a party or on its own motion, on a matter of admissibility that concerns the grounds set out in Article 69(7). Thus, when faced with a motion seeking inadmissibility of the evidence on this basis, a Trial Chamber is not free to defer its determination to the deliberations stage but must immediately rule on the matter. This is a logical consequence of the protective nature of Article 69(7): if indeed the objective of the provision is to protect the integrity of the proceedings from the pernicious effect of evidence which has been obtained via a violation of the Statute or of internationally recognized human rights, then it follows that the required remedial action (exclusion) must take place as soon as the flaws of the evidence are known in order for that protective effect to flow.

²⁵ F. Guariglia, "'Admission' v. 'Submission' of Evidence at the International Criminal Court: Lost in Translation?" JCIJ 16 (2018) 315 -339, at 319-320.

32. Given that international mechanisms applying both human rights and international criminal law have issued decisions that have a legal relevance through the application of Article 21(3) to the issue arising from the Decision of Trial Chamber X, and given that those decisions suggest other possible resolutions of the issue, the Second Issue as to whether the Trial Chamber resolved this issue correctly arises from the Decision and merits appellate review.

The Two Issues affect the fair and expeditious conduct of the proceedings, and the outcome of the trial, and an immediate resolution of the issues by the Appeals Chamber would materially advance the proceedings

a. The fairness and expeditiousness of proceedings

33. Exclusion of evidence which has been obtained in the course of arbitrary detention, torture and cruel, inhuman and degrading treatment is essential to maintaining the fairness of the trial and the integrity of the Court. The citations from various international bodies offered above make clear that legal issues relating to the inclusion or exclusion of such evidence are among the most core and elemental considerations in relation to the provision of a fair-trial.
34. The Appeals Chamber's guidance on the Two Issues would also promote expedition in the proceedings for four reasons. While the Two Issues for which leave is sought concern material in relation to P-0620, the resolution of these issues if un-addressed will reverberate through numerous other aspects of the case against Mr Al Hassan.
35. *First*, the specific evidence (the handwriting samples) in the subject of the Objections was also relied upon by Witness [REDACTED] in preparing his report²⁶ and will be the subject of Witness [REDACTED]'s evidence (testifying under Rule 68(2)(b)).²⁷ It is therefore likely that the same legal questions will be raised in respect of this evidence again being relied upon. *Second*, the admissibility of this evidence directly impacts on any testimony which relies on the Islamic Police Reports, the provenance of which was purportedly authenticated by P-0620 and [REDACTED]'s report. To

²⁶ ICC-01/12-01/18-740-Conf-AnxB, pgs. 1194-1195.

²⁷ ICC-01/12-01/18-740-Conf-AnxB, pg. 668.

that point, Witness [REDACTED] (currently scheduled as Witness #30 in Block 2²⁸) is expected to testify concerning the Islamic Police Reports which supposedly bear Mr. Al Hassan's signature.²⁹ The fact that Witness [REDACTED] himself is not in a position to authenticate Mr. Al Hassan's signature on the reports embodies the prejudice suffered by the Defence arising from the issue, as the use of the Report ([REDACTED]) may mean that the Prosecution may lead evidence from him premised on the confirmation that the signature does in fact belong to Mr. Al Hassan. The reports are contained on the list of exhibits to be shown to this witness and the Prosecution may seek their tender through this witness.³⁰

36. *Third*, evidence obtained in the course of Mr. Al Hassan's detention in Mali in circumstances constituting arbitrary detention and psychological torture has not only been relied upon by Witness P-0620. It was also relied upon by a number of expert witnesses who have recently testified, or will testify soon, in the proceedings, including:

- a. Witness P-0655, who testified on 15 October 2020, whose findings were based on the recordings of Mr. Al Hassan's interviews with the Prosecution while detained at the Sécurité d'État; and
- b. Witness [REDACTED], who was originally scheduled to testify on 16 October 2020 but will now testify in Block 2 in early 2021, whose findings were based on handwriting samples obtained from Mr. Al Hassan during his interviews with the Prosecution while detained at the Sécurité d'État.

37. *Fourth*, these issues also directly impact on the testimony of [REDACTED], including:

- a. Witnesses [REDACTED], [REDACTED], [REDACTED] and [REDACTED], who will testify in Block 2 in early 2021; and
- b. Witness [REDACTED], who will testify in Block 3 in 2021.

²⁸ ICC-01/12-01/18-805-Conf-AnxA.

²⁹ ICC-01/12-01/18-740-Conf-AnxB, pg. 1071.

³⁰ ICC-01/12-01/18-740-Conf-AnxB, pg. 1076-1077.

38. As such, the Chamber is likely to be seised with issues tightly related to those for which leave to appeal is sought at least over the course of the next few months. These could lead to extensive litigation concerning objections to the use and submission of material and responses thereto, decisions on the objections, and potential requests to appeal such decisions. Resolution of the legal issues as concerns the impact of the [REDACTED] on the ability of the parties to put evidence, and questions, to witnesses in light of the [REDACTED], will therefore best serve the parties and the Chamber in ensuring Mr. Al Hassan his Statutory right to a fair trial, and ensuring expedition and efficiency for all parties and participants.

b. The impact on the outcome of the trial

39. Resolution of the issues to which the evidence upon which the present request is based will have a substantial impact on the outcome of the trial, as it is through the evidence of Witness P-0620 by which the authorship of the Islamic Police Reports is purported to be established.³¹ These documents represent a significant corpus of the documentary evidence in this trial. In *Prosecutor v. Lubanga*, the Defence objected to the use of three photographs by the Prosecution and the Prosecution responded arguing that the Defence had failed to demonstrate the extent of the **impact** of the photographs.³² In that case, Trial Chamber I held:³³

In the Chamber's view it is unrealistic to expect the defence to undertake an analysis of this kind, which potentially may involve an examination of the entirety of the evidence in the case. Instead, it will usually suffice simply to analyse the potential impact of the disputed evidence and in this instance the Chamber is of the view that introducing these particular pieces of incriminating evidence into the trial may have an impact on its outcome.

40. In this case, in circumstances in which these evidentiary items have an ostensible and significant impact on the case, the justification for granting leave to appeal is greater.

³¹ ICC-01/12-01/18-740-Conf-AnxB, p. 1055.

³² [ICC-01/04-01/06-2404](#), para. 30.

³³ [ICC-01/04-01/06-2404](#), para. 30.

c. Immediate resolution by the Appeals Chamber may materially advance the proceedings

41. The Appeals Chamber held this criterion will be satisfied if the relevant Chamber rules that an authoritative determination on the appeal would “move forward” the proceedings and remove “doubts about the correctness of the decision or [map] a course of action along the right lines.”³⁴ Leave should be granted under the present circumstances described above. The core of the Two Issues – the exclusion of evidence obtained through torture – is one which should not be left unresolved to fester. For this reason, it is also respectfully suggested that resolution of the issues are also in the interests of the Prosecution and victims.
42. Beyond the importance of excluding evidence which would seriously damage the integrity of the proceedings and also the fairness of the trial, the myriad ways that the Two Issues touch upon different parts of the case mean that if the material should be excluded then it will have a significant impact upon how defence resources and focus can be re-allocated. The comparative shrinking of the case against Mr Al Hassan would materially advance the proceedings by shortening its duration and narrowing the issues under litigation.
43. The issues at stake must also 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 the outcome of the trial.”³⁵ It is difficult to conceive of issues drawing in more core considerations of fairness than the present ones. Thus, settling the Two Issues will materially advance the proceedings.
44. Similarly, the resolution of the procedural aspect of the first issue, which concerns the procedure for raising objections to material related to Rule 68(3) will also materially advance the proceedings. The Trial Chamber’s decision on experts has made reference to a range of exhibits and the Prosecution continues to file Rule 68(3) applications.³⁶ Thus, quite beyond the issue of illegally obtained evidence, the

³⁴ [ICC-01/04-168](#), paras 14-15.

³⁵ [ICC-01/04-168](#), para. 14.

³⁶ ICC-01/12-01/18-1109-Conf.

resolution of the first issue will materially advance the proceedings given that it concerns procedural matters touching upon much of the Prosecution case.

IV. Relief Sought

45. For the reasons set out above, the Defence for Mr. Al Hassan respectfully requests the Trial Chamber to grant leave to appeal, in relation to the Two Issues identified above.



Melinda Taylor
Counsel for Mr. Al Hassan

Dated this 19th Day of October 2020
At The Hague, The Netherlands