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**International
Criminal
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17 December 2020

TRIAL CHAMBER X

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

SITUATION IN THE REPUBLIC OF MALI

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

Public

With confidential Annexes A and B

**Public redacted version of “Corrigendum to the “Prosecution Response to “Defence
Request to terminate the proceedings” (ICC-01/12-01/18-885-Conf-Exp-Corr)”,
29 July 2020, ICC-01/12-01/18-982-Conf-Exp-Corr**

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Introduction

1. The Defence's request that the proceedings against the Accused, Al HASSAN, be terminated, filed on the eve of trial ("Request") and after expiration of the time limit,¹ lacks merit. The Defence characterises its Request as a "termination" request based on alleged collusion by the Prosecution in the Accused's alleged torture and ill-treatment in Mali, as well as contamination of the evidentiary record. However, the Request is essentially an abuse of process application for which the Defence fails to meet its burden of proving the supporting facts.²
2. Terminating proceedings for abuse of process is an exceptional remedy. It requires proof that any alleged serious violations by a State, before the suspect was transferred to the International Criminal Court ("Court" or "ICC"), are attributable to the ICC. None of the alleged violations are attributable to the Office of the Prosecutor ("OTP") or to the ICC, more widely. The OTP did not perpetrate, collude in, or condone any of the prior alleged violations. Moreover, the proceedings against the Accused in Mali were completely separate from the process of bringing him to justice before the ICC: the Accused was never arrested or held by the French or Malian authorities at the behest, or even the knowledge, of the ICC's OTP. The OTP and the Court were not involved in, or responsible for, his place or conditions of detention, any security measures placed upon him, or any alleged ill-treatment, which he allegedly suffered whilst in detention.
3. The Defence's claim that the entire evidentiary record is tainted is equally without merit, and not a basis for terminating the proceedings. The issues raised by the Defence relate, at best, to the admissibility and ultimate weight of the evidence that will be assessed and determined at the end of the trial proceedings. In any event, the OTP interviews of the Accused [REDACTED] are safe and admissible.
4. The Accused [REDACTED] detained in Mali [REDACTED] properly assessed as having been fit to be interviewed. The record shows that [REDACTED] ICC interviews were conducted on a voluntary basis, and each interview involved counsel provided under articles 55 and/or 56 of the Statute. The evidence obtained is strongly supported and corroborated by a multitude of different, stand-alone, evidence - including contemporaneous documentary evidence, videos, reports, and anticipated testimony from insider, crime-base, and overview witnesses (including eye-witnesses).

¹ ICC-01/12-01/18-885-Conf-Exp-Corr ("Request"). The request was filed on 17 June 2020, while the deadline set by the Chamber was 16 June 2020.

² Similarly, even though the Defence is not seeking exclusion of evidence under article 69(7), under article 69(7), the burden of proof would fall on the Defence as the party challenging evidence to raise sufficient evidence to reasonably cast doubt on admission of that evidence.

5. The Defence fails to meet the burden of proving the supporting facts to establish the alleged abuse of process. The reports of four Defence consultants upon which the Defence largely rely in its Request are critically flawed: two of the consultants lack the relevant expertise for which they are being relied upon; they all use an unreliable methodology to base their conclusions; and the conclusions of two of them regarding the Accused are contradicted by two experienced Prosecution forensic experts (who confirm *inter alia* that the interviews were voluntary and indicate that Al HASSAN's scars could have been caused accidentally).
6. The Prosecution also notes that the Defence failed to effect full disclosure, and refused to grant access to the Prosecution's experts to the Accused for their assessment, thereby obstructing an independent assessment of their contentions, which would have undoubtedly assisted the Chamber in its determination. This approach only further undermines the probative value and reliability of the Defence consultants' reports.
7. Finally, the Request is replete with mischaracterisations and misleading assertions of fact, evidence, and law, which should further lead the Chamber to dismiss the Request and its underlying arguments.

Confidentiality

8. This filing is classified as confidential and *ex parte*, pursuant to regulation 23bis(1) and (2) of the Regulations of the Court ("RoC") as it refers to information that is classified as confidential *ex parte*. A confidential and a public redacted version will be filed in due course.

Background and Statement of Facts

9. On 16 January 2013, the OTP announced that an investigation had been opened into the situation in Mali since January 2012.³
10. In the context of its investigation into the Malian situation, and based on a cooperation agreement dated 13 February 2013, the OTP was authorised to have access to judicial files investigated by the Malian justice authorities.⁴ [REDACTED]
[REDACTED]⁵
11. On 15 February 2013, the Malian Government informed the OTP that national judicial authorities had initiated proceedings against individuals belonging to Ansar Dine,

³ Press Release, "ICC Prosecutor opens investigation into war crimes in Mali: 'The legal requirements have been met. We will investigate'", 16 January 2013,

⁴ Investigation note, [REDACTED], para. 1.

⁵ Investigation note, [REDACTED], para. 1.

MNLA⁶ and drug traffickers, in relation to crimes including: terrorism; sedition; crimes against the internal security of the State and national territorial integrity by war; illegal use of an armed force; pillage and destruction of public property; racial, religious and regional based crimes; and illicit international trafficking of drugs.⁷

12. On 5 March 2013, the OTP sent a request for assistance to the Malian authorities: a) to regularly provide information related to national proceedings by the Malian judicial authorities as described above; b) to facilitate contact between the OTP and relevant investigating judges and provide any judicial documents deemed relevant by the OTP; and c) to provide copies of judicial files and *Procès-verbaux d'audition* of detained individuals, [REDACTED].
13. On 8 November 2013, the OTP made a general written request for assistance, [REDACTED]
[REDACTED]⁸
14. On 21 April 2017, Al HASSAN was arrested by French forces of Operation Barkhane in the context of their military operations in Mali.⁹ The Prosecution became aware of that arrest in about May 2017 through public media reporting.¹⁰
15. On 2 May 2017, Al HASSAN was transferred from the French Barkhane force to the Malian authorities,¹¹ in accordance with the agreement between the French and Malian governments.¹²
16. Upon his transfer on 2 May 2017, Al HASSAN was examined by a medical doctor of the French Barkhane forces. The medical certificate entitled “*Certificat de santé en fin de rétention*” (Certificate of health at the end of detention), stated that the Accused was in [REDACTED] and a clinical examination indicated that the Accused’s condition was: [REDACTED]. In that medical certificate, the Accused confirmed that he had received food and drink at his convenience, and that he had not been ill-treated by the French authorities.¹³ In addition,

⁶ Mouvement national de libération de l’Azawad.

⁷ Investigation note, [REDACTED].

⁸ Investigation note, [REDACTED].

⁹ [REDACTED].

¹⁰ ICC-01/12-45-Conf-Exp-Red2, para. 5; Investigation note, [REDACTED]. See e.g. media article, *Tombouctou: Barkhane arrête trois proches du CJA soupçonnés de complicité avec des terroristes*, 22 April 2017, [REDACTED].

¹¹ [REDACTED].

¹² See [REDACTED]: Décret n° 2013-364 du 29 avril 2013 portant publication de l’accord sous forme d’échange de lettres entre le Gouvernement de la République française et le Gouvernement du Mali déterminant le statut de la force « Serval », signées à Bamako le 7 mars 2013 et à Koulouba le 8 mars 2013.

¹³ [REDACTED]
[REDACTED]
[REDACTED].

the file of transfer from the French Barkhane force to the Malian authorities contains photographs of the face and entire dressed body of Al HASSAN taken on the day of the end of his detention by the Barkhane forces on 2 May 2017.¹⁴

17. On [REDACTED], during a cooperation mission to Mali, two OTP staff members met with the OTP operational [REDACTED] at the Malian *Direction Générale de la Sécurité d'Etat* ("DGSE"). Referring to publically available information, the OTP staff inquired whether Al HASSAN [REDACTED] detained at the DGSE. The OTP operational [REDACTED] confirmed that [REDACTED] detained at the DGSE in Bamako.¹⁵
18. The OTP staff members informed the [REDACTED] of the OTP's interest in meeting with Al HASSAN with a view to interviewing him. The OTP [REDACTED] informed them that this was possible, provided it was requested through the then [REDACTED].¹⁶ The logistical aspects and the timing of a potential interview were then raised.¹⁷
19. On [REDACTED], two OTP staff met with [REDACTED], who agreed to facilitate access to Al HASSAN for the purpose of an OTP interview.¹⁸
20. Subsequent to the meeting with [REDACTED], on [REDACTED], the OTP staff met with the then Minister of Justice, [REDACTED] and informed him of steps being taken through [REDACTED] to interview Al HASSAN. The Minister of Justice stated that he was not aware of the individual case of Al HASSAN but expressed his willingness to assist if necessary.¹⁹
21. On 29 June 2017, the Single Judge of Pre-Trial Chamber I (PTCI) granted²⁰ the Prosecution's request under article 56(2)(d) of the Statute, filed on 20 June 2017,²¹ to appoint counsel during the interview with the Accused. The Prosecution considered that resort to article 56 procedures was warranted, since it could not rule out the possibility that the Accused, [REDACTED] could be released before a meeting with the OTP interviewers.²²

¹⁴ [REDACTED].

¹⁵ Investigation note, [REDACTED].

¹⁶ Investigation note, [REDACTED].

¹⁷ Investigation note, [REDACTED].

¹⁸ Investigation note, [REDACTED].

¹⁹ Investigation note, [REDACTED].

²⁰ ICC-01/12-47-Conf-Exp-tENG-Red.

²¹ [REDACTED].

²² ICC-01/12-01/18-1-Conf-Exp-Red2, para. 311; [REDACTED]. See also e.g. [REDACTED].

22. On [REDACTED], the OTP met the Accused for the first time in Bamako in the building of the [REDACTED] [REDACTED] in order to interview him. After an introduction and explanation of relevant ICC procedures, including voluntariness of the process, rights provided for under article 55(2) of the Statute and the separate nature of the Malian procedures and a security questionnaire [REDACTED] the Accused indicated his understanding and expressed his willingness to be interviewed. The interview of the Accused started on [REDACTED] and ended on [REDACTED], conducted in the course of 19 days, in the presence of his article 55(2) counsel and the article 56 counsel appointed by the Chamber. Specifically the sessions were held on [REDACTED] [REDACTED]. All sessions were conducted at a meeting room [REDACTED] and never at the DGSE.²³
23. On [REDACTED], the OTP also requested from the Malian authorities all of the information and material related to the arrest and surrender of Al HASSAN by the French Barkhane force, including any items seized during the Accused's arrest.²⁴ Furthermore, the OTP requested a copy of any records of interviews conducted with the Accused by the Malian authorities after he was handed over to them by the French Barkhane forces.²⁵ On [REDACTED], [REDACTED] after Al HASSAN's transfer to the ICC, the OTP received from the Malian authorities the notes of his interview by the DGSE²⁶ and the file of his transfer from the French Barkhane forces. On [REDACTED], the OTP also received the medical certificate from the Malian government.²⁷ No other material was received from the Malian government in relation to Al HASSAN.²⁸
24. Prior to that, on [REDACTED], the OTP had requested from the French authorities all notes of interviews following Al HASSAN's arrest, and to access the material and any

²³ See e.g. [REDACTED] ; Investigation note, [REDACTED] : Malian [REDACTED] was contacted by OTP investigators in advance of the interview sessions strictly for logistical arrangements (namely, confirmation of dates, move of the Accused from his place of detention to the place of interview, and provision of a meeting location).

²⁴ Investigation note, [REDACTED].

²⁵ Investigation note, [REDACTED].

²⁶ [REDACTED] and [REDACTED].

²⁷ See *Dossier de transfert Alhassane AG ABDOULAZIZ* dated 2 May 2017, [REDACTED] and *Certificat de santé de fin de rétention*, [REDACTED].

²⁸ Investigation note, [REDACTED].

- objects seized from him.²⁹ The OTP received the same file of transfer of Al HASSAN from the French government on [REDACTED]³⁰ and a better quality version on [REDACTED].³¹ The OTP did not receive any other materials in relation to Al HASSAN's arrest and detention from the French authorities.³²
25. On 20 March 2018, the OTP submitted a request for a warrant of arrest for Al HASSAN.³³ PTCI issued a warrant of arrest on 27 March 2018³⁴ pursuant to article 58 of the Statute.
26. On 28 March 2018, representatives of the Registry notified the Minister of Justice of Mali and the Prosecutor General of Bamako of the request for arrest of Al HASSAN.³⁵ The day after, representatives of the Registry and the OTP held a meeting with the Malian authorities during which the *Procureur de la République près le Tribunal de Grande Instance* [REDACTED] *du District de Bamako* ([REDACTED]) was designated by the Minister of Justice as the competent authority for the purposes of the arrest proceedings.³⁶ On 30 March 2018, representatives of the Registry notified the Malian authorities of the request for arrest and surrender as well as of the warrant of arrest for Al HASSAN.³⁷
27. On 31 March 2018, the Malian authorities handed over the Accused to the Registry for arrest, after having carried out a medical examination of the Accused and declared that he was fit to travel.³⁸ During the arrest proceedings, the Accused was assisted by Defence counsel, appointed by the Registry.³⁹ The Accused confirmed his identity and was notified of the warrant of arrest issued by the ICC through the assistance of an Arabic interpreter and in the presence of his Court-appointed Defence counsel. He was also informed of his rights to remain silent, to be assisted by counsel of his choice and to be examined by a doctor of his choice, and the possibility to apply for interim release.⁴⁰ The Malian authorities then transferred custody of Al HASSAN to the Court⁴¹ and a representative co-signed the Report, prepared by the Registry, on the Surrender and

²⁹ Investigation note, [REDACTED].

³⁰ See *Dossier de transfert Alhassane AG ABDOULAZIZ* dated 2 May 2017, [REDACTED].

³¹ See [REDACTED].

³² Investigation note, [REDACTED].

³³ [REDACTED].

³⁴ ICC-01/12-01/18-2-tENG.

³⁵ ICC-01/12-01/18-13-Conf-Exp-Red2, para. 5.

³⁶ ICC-01/12-01/18-13-Conf-Exp-Red2, para. 6.

³⁷ ICC-01/12-01/18-13-Conf-Exp-Red2, para. 7.

³⁸ ICC-01/12-01/18-13-Conf-Exp-Red2, para. 8 and [REDACTED], p. 1337-1339.

³⁹ ICC-01/12-01/18-13-Conf-Exp-Red2, paras. 9-10.

⁴⁰ ICC-01/12-01/18-13-Conf-Exp-AnxVI-Red and ICC-01/12-01/18-13-Conf-Exp-Red2, para. 11.

⁴¹ ICC-01/12-01/18-13-Conf-Exp-Red2, para. 13.

Transfer of the Arrested Person that indicated that the Accused had no signs of ill-treatment.⁴²

28. On the same day, on 31 March 2018, the Accused was transferred to the ICC Detention Centre in The Hague, the Netherlands. Upon his arrival, the representative of the Registry followed the admission procedure pursuant to Regulation 186 of the Regulations of the Registry (“RoR”), and *inter alia* provided the Accused with a folder containing the Court’s core legal documents and a certified copy of the warrant of arrest.⁴³ During his admission, the Accused was examined by a doctor from the Medical office MICT/ICC in accordance with Regulation 190 of the RoR. In the “Medical clearance fit on arrival”, the doctor concluded that, [REDACTED]
[REDACTED].⁴⁴ The Malian doctor examining the Accused in Mali prior to his transfer to the Court concluded that his [REDACTED]
[REDACTED]
[REDACTED].⁴⁵
29. Following the initial appearance on 4 April 2018,⁴⁶ and the confirmation of charges hearing held from 8 to 17 July 2019,⁴⁷ PTCI confirmed on 30 September 2019 charges against the Accused,⁴⁸ and amended them on 23 April 2020.⁴⁹
30. Trial Chamber X (“Chamber”) was constituted on 21 November 2019 and the case against the Accused referred to it.⁵⁰
31. On 6 January 2020, in its Decision Setting the Commencement Date of the Trial, the Chamber set 1 June 2020 as the deadline for the filing of all motions that require resolution prior to the commencement of trial.⁵¹
32. On 27 May 2020, the Defence requested extension of the time and page limits to make a Request.⁵² On 29 May 2020, the Chamber granted an extension of time until 16 June

⁴² ICC-01/12-01/18-13-Conf-Exp-AnxVIII-Red.

⁴³ ICC-01/12-01/18-13-Conf-Exp-Red2, para. 15.

⁴⁴ ICC-01/12-01/18-13-Conf-ExpRed2, para. 16 and [REDACTED].

⁴⁵ [REDACTED].

⁴⁶ ICC-01/12-01/18-T-001-CONF-ENG ET.

⁴⁷ ICC-01/12-01/18-T-003-ENG ET, p. 9, l. 21- p. 10, l. 23.

⁴⁸ See ICC-01/12-01/18-461-Conf-Corr (“Confirmation Decision”).

⁴⁹ See ICC-01/12-01/18-767-Conf-Corr (“Amendment Decision”).

⁵⁰ ICC-01/12-01/18-501.

⁵¹ ICC-01/12-01/18-548, para. 19, p. 9. See also ICC-01/12-01/18-789-AnxA, para. 1 (recalling that “all motions which require resolution prior to the start of trial shall be filed by 1 June 2020”, and also that by the same date, the Prosecution and the Defence shall also raise any objections or observations within the meaning of Rule 134(2) of the Rules.”)

⁵² [REDACTED].

2020,⁵³ and of the page limit to 50 pages.⁵⁴ The Request was originally filed on 17 June 2020.⁵⁵

33. Following the Prosecution's urgent request filed on 25 June 2020,⁵⁶ on 6 July 2020,⁵⁷ the Chamber granted the Prosecution's request to strike confidential Annex B to the Request from the record.⁵⁸ The Chamber allowed the Defence to apply for leave to file an amended version of Annex B.⁵⁹ It extended the time limit for the Prosecution's response to the Request until 27 July 2020, and the page limit to 50 pages.⁶⁰ The Defence requested to refile its Annex B on 10 July 2020,⁶¹ which the Chamber granted on 13 July 2020.⁶² The Defence filed its Annex B on 13 July 2020.⁶³
34. On 6 July 2020, the Prosecution filed a request for the Chamber to order the Defence to disclose material related to the Defence consultants' reports relied upon in the Request.⁶⁴
35. On 15 and 17 July 2020, the Defence disclosed some of the requested material, including medical records of the Accused, *curriculum vitae* (CVs) of Dr Porterfield and Mr Sangaré and instructions letters/emails to Dr Porterfield, Dr Crosby and Dr Cohen.⁶⁵
36. On 17 July 2020, the Defence responded to the Prosecution's request for disclosure, arguing that all disclosable material sought, which was in the possession of the Defence, had been disclosed.⁶⁶ The Defence continued to disclose various items related to the Request on 20 and 22 July 2020.⁶⁷ At the time of filing this Response, the Defence is yet to disclose some remaining requested material, such as the instruction letter and material provided to Mr Sangaré, which the Defence claims to be non-disclosable.⁶⁸

⁵³ ICC-01/12-01/18-833, para. 4, 17, p. 9.

⁵⁴ ICC-01/12-01/18-833, para. 18, p. 9.

⁵⁵ Notification by the Court Management Section of ICC-01/12-01/18-885-Conf-Exp indicating that it was received on 17 June 2020 at 00:44:56. A confidential redacted version was notified on the same day: ICC-01/12-01/18-885-Conf-Red. The corrected version of the Request (ICC-01/12-01/18-885-Conf-Exp-Corr) was notified on 25 June 2020.

⁵⁶ [REDACTED].

⁵⁷ ICC-01/12-01/18-932-Conf-Corr.

⁵⁸ ICC-01/12-01/18-932-Conf. The Defence response was filed on 1 July 2020: ICC-01/12-01/18-915-Conf. The Prosecution request for leave to reply, ICC-01/12-01/18-922-Conf, was rejected by the Chamber in its decision.

⁵⁹ ICC-01/12-01/18-932-Conf-Corr, para. 17.

⁶⁰ ICC-01/12-01/18-932-Conf-Corr, para. 26.

⁶¹ [REDACTED].

⁶² [REDACTED]

⁶³ ICC-01/12-01/18-885-Conf-AnxB-Corr.

⁶⁴ ICC-01/12-01/18-929-Conf.

⁶⁵ See Trial Rule 78 D28 package 06 disclosed on 15 July 2020; Trial Rule 78 D28 package 07 disclosed on 17 July 2020.

⁶⁶ ICC-01/12-01/18-965-Conf.

⁶⁷ See Trial Rule 78 D28 package 08 disclosed on 20 July 2020; Trial Rule 78 D28 package 09 disclosed on 22 July 2020; Trial Rule 78 D28 package 10 disclosed on 22 July 2020.

⁶⁸ ICC-01/12-01/18-965-Conf, para. 14 and 20.

Submissions

A. The Burden of Proof

37. The burden of proof to show an abuse of process or that evidence should be excluded under article 69(7) of the Statute squarely rests with the challenging party, in this case the Defence.
38. The Defence argues that under article 69(7) of the Statute, the Prosecution has the burden to demonstrate that the evidence was not obtained by means of a violation of the Statute or internationally recognised human rights, or that such violation did not cast doubt on the reliability of the evidence, or the admission of the evidence would not be antithetical to and would not seriously damage the integrity of the proceeding.⁶⁹
39. However, these arguments are erroneous and inconsequential for the following reasons: first, the Defence's request is not an application under article 69(7) of the Statute but a request to terminate the proceedings as a result of an abuse of process; and, second, in any event, under article 69(7) of the Statute, the burden lies with the challenging party.

1) *The burden of proof for abuse of process lies with the Defence*

40. The Defence requests the Chamber to terminate the case and release the Accused,⁷⁰ rather than exclude his statement under article 69(7) of the Statute. In the Defence's view, the "[e]xclusion of evidence is [...] not an appropriate remedy" in this case.⁷¹ Submissions about the burden of proof for article 69(7) of the Statute⁷² are thus misplaced and immaterial.⁷³
41. The correct question is, rather, which party has the burden of proof for *abuse of process applications aimed at terminating the proceedings*. According to the Court's case law, that burden lies with the party seeking termination, in this case, the Defence. As Trial Chamber III held in *Bemba*: "[t]he Rome Statute framework does not expressly provide where the burden of proof lies on an admissibility or abuse of process application, or to which standard. However, the compelling logic of the situation is that should an accused challenge the admissibility of the case under article 19(2)(a) of the Statute or argue that its continuation amounts to an abuse of the process of the Court, it falls to him to

⁶⁹ Request, para. 5.

⁷⁰ Request, para. 109.

⁷¹ Request, para. 102-108.

⁷² Request, para. 5.

⁷³ The Defence's submissions on this point are also erroneous, as explained in more detailed below.

establish the facts and other relevant matters that are said to support the argument. In both situations, the accused is arguing that the proposed trial before the ICC should not occur and the suggested result is, therefore, the same.”⁷⁴

42. While the Defence bears the evidentiary burden to establish on “a balance of probabilities” the facts and circumstances upon which the application rests, ultimately the Chamber will weigh the merit of the competing submissions and the result of the application is “simply dependent on a judicial assessment by the Court as to whether [...] the continued trial is not abusive”.⁷⁵

2) *The burden of proof for article 69(7) evidence exclusion applications lies with the Defence*

43. In any event, the Defence would in any event bear the evidentiary burden for excluding Mr. Al Hassan’s statement under article 69(7).⁷⁶
44. Contrary to the Defence’s argument, because article 69(7) is *lex specialis* vis-à-vis article 69(4),⁷⁷ it “represents a clear exception to the general approach”⁷⁸ regarding the admission of evidence. For instance, while “[a]rticle 69(4) enables the ‘probative value of the evidence’ to be weighed along with other considerations, [...] when addressing the exclusionary criteria of article 69(7), it is impermissible to introduce this further factor, namely adding the probative value of the evidence as a criterion of admissibility.”⁷⁹ So, while it is true that in the general context of *admission* of evidence under article 69(4), the Defence can raise issues relating to relevance or admissibility pursuant to rule 64 of the Rules,⁸⁰ this does not translate to shifting the burden when it comes to *seeking the exclusion* of evidence under article 69(7).
45. To the contrary, according to this Court’s jurisprudence, the burden to show that evidence should be excluded under article 69(7) lies with the challenging party: “[t]here is no burden on the Prosecution to prove that [...] the evidence in question was not obtained in violation of the Statute or internationally recognised human rights.”⁸¹ It is *the Defence* that should provide sufficient

⁷⁴ ICC-01/05-01/08-802, para. 201.

⁷⁵ ICC-01/05-01/08-802, para. 204.

⁷⁶ Request, para. 5.

⁷⁷ Request, fn.4 referring to ICC-01/04-01/06-1981, para. 34.

⁷⁸ ICC-01/04-01/06-1981, para. 34.

⁷⁹ ICC-01/04-01/06-1981, para. 43.

⁸⁰ Request, para. 5, fn. 3.

⁸¹ ICC-01/04-01/10-465-Red, para. 60. See also for instance para.62-64, 71; ICC-01/05-01/13-1284, para.32; ICC-01/05-01/13-1854, para. 62 where the Chambers rejected the Defence’s submissions for failing to provide factual support.

information that “reasonably casts doubt” as to whether the evidence should be excluded.⁸²

46. Further, the Defence appears to misunderstand the requirements that need to be established for the exclusion of evidence under article 69(7).⁸³ The wording of article 69(7) unequivocally indicates, as the Appeals Chamber has confirmed, that while the requirements under article 69(7)(a) and 69(7)(b) are in the alternative, the *chapeaux* of article 69(7) must always be established.⁸⁴
47. The Defence’s suggestion that it is sufficient to show *either* that there was a violation (*chapeaux* of article 69(7)) *or* that the violation casts doubt on the reliability of the evidence (article 69(7)(a)) *or* that its admission would be antithetical to and would seriously damage the proceeding (article 69(7)(a))⁸⁵ has no legal foundation.
48. The Defence cannot simply “raise [allegedly] founded complaints”⁸⁶ that evidence was obtained through torture or that torture took place. It must provide sufficient information to cast a reasonable doubt that the evidence was not obtained *by means of* torture or cruel, inhuman and degrading treatment (“CIDT”) *and* that such violations cast substantial doubt as to the reliability of the evidence *or* that its admission would be antithetical to or would seriously damage the integrity of the proceeding.

3) Defence’s failure to meet its burden of proof is further compounded by its late and incomplete disclosure of material relied upon and impacts on the Prosecution’s ability to fully respond

49. Contrary to the Defence’s contention that “all the critical information underpinning the Defence Request was disclosed contemporaneously with the filing of the Request”,⁸⁷

⁸² ICC-01/04-01/10-465-Red, para.59.

⁸³ Request, para. 5.

⁸⁴ The Appeals Chamber held that “[a]rticle 69(7) of the Statute envisages two consecutive inquiries. First, in accordance with the *chapeau* of this provision, it must be determined whether the evidence at issue was ‘obtained by means of a violation of the Statute or internationally recognised human rights’. An affirmative answer to this question is, however, not sufficient for the concerned evidence to be inadmissible. When the conditions of the *chapeau* of article 69(7) of the Statute are met, the second step is to consider whether ‘[t]he violation casts substantial doubt on the reliability of the evidence’ (article 69(7)(a) of the Statute) or ‘[t]he admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings’ (article 69(7)(b) of the Statute).” ICC-01/05-01/13-2275-Red, para. 280. See also ICC-01/05-01/13-1855, para. 10; ICC-01/05-01/13-1257, paras. 7, 9; ICC-01/05-01/13-1284, para. 17; ICC-01/05-01/13-1478-Red-Corr, para. 54. ICC-01/04-01/06-1981, para. 41; ICC-01/05-01/13-1854, para. 63; ICC-01/05-01/13-1948, 14 July 2016, para. 32.

⁸⁵ See Request, para. 5: “[T]he burden remains with the Prosecution to demonstrate *either* that the evidence was not obtained by violation of the Statute or internationally recognised human rights law, *or* that the violation does not cast doubt on the reliability of the evidence *or* otherwise seriously damage the integrity of the proceedings” (emphasis added).

⁸⁶ Request, para. 6-8.

⁸⁷ ICC-01/12-01/18-965-Conf, para. 5.

nearly a month after the filing of the Request, the Defence has seriously hindered the Prosecution by its belated and piecemeal disclosure, effected on 15, 17, 20 and 22 July 2020.⁸⁸ No justification whatsoever has been provided for the late disclosure.

50. There was a total of 176 newly disclosed items including some key material, such as the letters of instruction to Dr Porterfield⁸⁹ and Dr Crosby⁹⁰ and Dr Porterfield's CV⁹¹, disclosed on 15 July 2020, and two versions of Mr Sangaré's CV, disclosed on 17 and 20 July 2020.⁹² Nearly 100 items provided by the Defence to Dr Porterfield and Dr Cohen, including dozens of medical files related to the Accused from the ICC Detention Centre, were also belatedly disclosed on 15 July 2020.⁹³ The tardy disclosure of important material has significantly hampered the Prosecution's ability to prepare this Response.
51. In addition, despite the Prosecution's requests,⁹⁴ the Defence has refused to disclose relevant material related to their consultants' reports, thereby preventing the Prosecution to comment upon them.⁹⁵ Such material and information include, *inter alia*, the letters of instruction by the Defence to Dr Cohen (First and Second Reports) and Mr Sangaré,⁹⁶ notes of contact, including about the first contact and any subsequent communications and meetings with the Defence,⁹⁷ drafts of Defence consultants' reports sent to the Defence⁹⁸ and the photographs of the Accused's scars provided to Dr Porterfield.⁹⁹
52. This approach *vis-à-vis* highly relevant material that are significant for the evaluation of the consultants' reports, has prevented the Prosecution from fully addressing these reports, to the detriment of the Trial Chamber, which will unavoidably lack the benefit of complete submissions. The Prosecution submits that, far from assisting the Defence in its Request, this flawed approach only serves to further undermine the credibility of the Request and its supporting material.

⁸⁸ Trial Rule 78 D28 package 06 disclosed on 15 July 2020; Trial Rule 78 D28 package 07 disclosed on 17 July 2020; Trial Rule 78 D28 package 08 disclosed on 20 July 2020; Trial Rule 78 D28 package 09 disclosed on 22 July 2020; Trial Rule 78 D28 package 10 disclosed on 22 July 2020.

⁸⁹ Instruction letter to Dr Porterfield dated 23 September 2019, [REDACTED]; Second instruction letter to Dr Porterfield dated 20 January 2020, [REDACTED].

⁹⁰ Instruction letter to Dr Crosby dated 25 April 2020, [REDACTED]; Second instruction letter to Dr Crosby dated 1 May 2020, [REDACTED].

⁹¹ Dr Porterfield's CV, [REDACTED].

⁹² Mr Sangaré's CV, [REDACTED]. An updated version was disclosed on 22 July 2020: [REDACTED].

⁹³ Trial Rule 78 D28 package 06 disclosed on 15 July 2020.

⁹⁴ See in general ICC-01/12-01/18-929-Conf and ICC-01/12-01/18-929-Conf-Exp-AnxA.

⁹⁵ See e.g. ICC-01/12-01/18-929-Conf, para. 8-10, 12, 14, 16 f, g, h, i, j, k, 20, 21-22.

⁹⁶ ICC-01/12-01/18-965-Conf, para. 12, 14.

⁹⁷ ICC-01/12-01/18-965-Conf, para. 8-10.

⁹⁸ ICC-01/12-01/18-965-Conf, para. 21-22.

⁹⁹ ICC-01/12-01/18-965-Conf, para. 16, i.

B. The alleged torture or CIDT of the Accused is not attributable to the ICC's OTP and the Defence has not met its burden of proof to establish it

53. The Defence has sought to characterise its request as a “termination request”, based on alleged collusion or acquiescence of the OTP in his alleged torture, or CIDT, and a claim that the ICC case against him has been contaminated by evidence allegedly tainted by torture.¹⁰⁰
54. However, and as already advanced, notwithstanding this characterisation, and the lack of any explicit reference to abuse of process in the Request, the Defence Request is effectively premised on an alleged abuse of process. The Defence acknowledges this [REDACTED], when it described its forthcoming “termination” Request as an abuse of process application.¹⁰¹ The Defence cannot now seek to circumvent the legal requirements for an abuse of process application by being ambiguous in the remedies sought or by using equivocal language.

1) Alleged violations must be attributable to the Court under the abuse of process doctrine

55. Under the doctrine of abuse of process, where a suspect or an accused alleges that the proceedings against him should be terminated because of prior illegal conduct of a State, the test is whether the alleged violations are attributable to the Court,¹⁰² namely that:
- the alleged illegal conduct was directly perpetrated by the OTP;¹⁰³ or,
 - the alleged illegal conduct perpetrated by the national authorities was done with the OTP's concerted action,¹⁰⁴ collusion,¹⁰⁵ or at the OTP's behest;¹⁰⁶ or,

¹⁰⁰ See Request, para. 1, 109 (requesting termination of proceedings and immediate release of the Accused); see also Request, part 3 (arguing that “terminating the proceedings is the only suitable remedy”).

¹⁰¹ See [REDACTED]

¹⁰² ICC-02/11-01/11-212, para. 92. Emphasis added.

¹⁰³ ICC-02/11-01/11-212, para. 92 (violations of fundamental rights, however serious, can have the requisite impact on proceedings to constitute an abuse of process only insofar as they can be attributed to the Court. Attribution in this sense means that the act of violation of fundamental rights is: (i) either *directly perpetrated* by persons associated with the Court; or, (ii) perpetrated by third persons *in collusion* with the Court. Conversely, *when a violation of the suspect's fundamental rights, however grave, is established, but demonstrates no such link with the Court*, the exceptional remedy of staying the proceedings is not available”). Emphasis added.

¹⁰⁴ ICC-01/04-01/06-512, p. 10-11. PTCI in *Lubanga* found that there was *no concerted action* between the Court and national authorities before the Court's cooperation request and the arrest and surrender; and, the Chamber refused to examine the lawfulness of the arrest and detention prior to the request.

¹⁰⁵ ICC-02/11-01/11-212, para. 92: *Ibid fn.* 103.

- the alleged illegal conduct constituted torture or serious mistreatment connected with the arrest and surrender of the Accused to the ICC,¹⁰⁷ or in bringing him to justice for the crimes that form the subject-matter of the proceedings before the ICC.¹⁰⁸

56. The Appeals Chamber has confirmed that the remedy of termination of proceedings for abuse of process is an exceptional remedy that should be sparingly used;¹⁰⁹ and, that abuse of process is not a ground as such within the Court's statutory framework for not exercising jurisdiction.¹¹⁰
57. As the Defence acknowledges, citing the PTCI in *Gbagbo*, under article 55 of the Statute a suspect has a right not to be tortured, or ill-treated in connection with "*any investigative steps that are taken either by the Prosecutor or by national authorities at his or her behest*".¹¹¹ The Defence omits that PTCI went on to state: "[c]onversely, an investigation conducted by an entity other than the Prosecutor, *and which is not related to proceedings before the Court, does not trigger the rights under article 55 of the Statute*".¹¹²
58. The Defence in *Gbagbo* alleged that Mr. Gbagbo had suffered torture and inhuman and degrading treatment during his prior detention by the Ivorian authorities, and that the Prosecution had expressed an interest in interviewing him, were aware of the violations

¹⁰⁶ ICC-02/11-01/11-212, para. 108 ("there was *no evidence to suggest that the accused was held at the behest of the Court* nor did the Court have any involvement in domestic proceedings"). Emphasis added.

¹⁰⁷ ICC-01/04-01/06-512, p. 10. On the facts of the *Lubanga* case there was no evidence establishing torture or serious mistreatment "*in connection with the arrest and surrender of [Lubanga]*." See also *Nikolić*, IT-94-2-PT, Decision on defence motion challenging the exercise of jurisdiction by the tribunal, 9 October 2002, ("*Nikolić*"), para. 113. In *Nikolić*, where the accused had been unlawfully apprehended by third parties before being transferred to the SFOR, the ICTY Trial Chamber found that these acts could not be attributed to the Prosecution or SFOR. *Nikolić*, para.69: Nor could the Prosecution and SFOR be held liable for those acts. *Nikolić*, para.114: Instead, the Chamber stated that the Prosecution and SFOR could be held responsible for serious mistreatment of an accused only where the Prosecution was involved or such individuals acted on behalf of the SFOR.

¹⁰⁸ See e.g. ICC-02/11-01/11-212, para. 92. See below at fn. 109.

¹⁰⁹ ICC-01/04-01/06-772, para. 31 ("[t]he power to stay proceedings should be sparingly exercised[...]. Room for its exercise is provided where *either the foundation of the prosecution or the bringing of the accused to justice is tainted with illegal action or gross violation of the rights of the individual [...]*"). See also ICC-02/11-01/11-212, para. 89-91. PTCI in *Gbagbo* observed that a permanent stay of proceedings must be an exceptional remedy. E.g. where a fair trial becomes impossible because of "breaches of the fundamental rights of the suspect or the accused *by his/her accusers*." (Citing ICC-01/04-01/06-772, para. 30. See also ICC-02/11-01/11-212, para. 92 ([This]: (a) "logically entails that the breach of his or her rights *must be related to the process of bringing the person to justice* for the crimes that form the subject-matter of the proceedings before the Court"; and, (b) that "violations of fundamental rights, however serious, can have the requisite impact on proceedings to constitute an abuse of process only insofar as they can be attributed to the Court. Attribution in this sense means that the act of violation of fundamental rights is: (i) either *directly perpetrated* by persons associated with the Court; or, (ii) perpetrated by third persons *in collusion* with the Court. Conversely, *when a violation of the suspect's fundamental rights, however grave, is established, but demonstrates no such link with the Court*, the exceptional remedy of staying the proceedings is not available"). Emphasis added.

¹¹⁰ ICC-01/04-01/06-772, para. 20-24, 27, 37 ("[a]buse of process or gross violations of fundamental rights of the suspect are not identified as such as grounds for which the Court may refrain from embarking upon the exercise of its jurisdiction."). See also ICC-02/11-01/11-212, para. 88-89.

¹¹¹ Request, para. 9. Citing ICC-02/11-01/11-212, para. 96.

¹¹² ICC-02/11-01/11-212, para. 96.

of his rights, and had failed to request the Ivorian authorities to end the grave violations against him. PTCI rejected the request, finding the alleged ill-treatment was not attributable to the OTP. PTCI considered decisive the fact that the alleged torture or ill-treatment of Mr. Gbagbo was not perpetrated by the Prosecutor, or national authorities on behalf of the Prosecutor or any organ of the Court.¹¹³ Instead, Mr. Gbagbo was arrested by national authorities and detained on charges “seemingly unconnected to the proceedings before the Court”.¹¹⁴ Accordingly, PTCI concluded that article 55(1) of the Statute was not applicable to the alleged violations carried out by the national authorities.¹¹⁵

59. Similarly in this case, and contrary to Defence contentions, the alleged torture or CIDT of the Accused is in no way attributable to the OTP. As explained in more detail below, on the facts: (a) there was no connection between any of the alleged illegal conduct of the French and/or Malian authorities and the Accused’s arrest or surrender to the Court, or the process of bringing him to justice for the crimes that form the subject-matter of the proceedings before the ICC; in particular, he was not arrested or detained by the French or Malian authorities at the ICC’s request or behest; (b) the alleged torture and/or CIDT of the Accused was not perpetrated by the ICC’s OTP, or done at its request; and (c) there was no concerted action or collusion between the OTP and any national authorities in the alleged torture or CIDT of the Accused.
60. Accordingly, any alleged torture or mistreatment, by French or Malian authorities, provides no basis for the Chamber not to exercise its jurisdiction in the ICC proceedings against the Accused.

2) There was no connection between the Accused’s arrest and alleged torture and CIDT by the French/ Malian national authorities, and the process of bringing him to justice before the ICC

61. There was no connection between the alleged torture or CIDT of the Accused by the French and Malian authorities, and the process of bringing him to justice before the ICC.
62. Despite the Defence’s assertions, the Prosecution was not responsible for Al HASSAN’s detention by the Malian authorities during the periods of time that the Prosecution sought access to him for the specific purposes of interviewing him.¹¹⁶ At no stage did the Prosecution request the French or the Malian authorities to arrest or detain

¹¹³ ICC-02/11-01/11-212, para. 97.

¹¹⁴ ICC-02/11-01/11-212, para. 97.

¹¹⁵ ICC-02/11-01/11-212, para. 97.

¹¹⁶ Request, para. 30.

the Accused, prolong his detention, or to question, let alone ill-treat, the Accused on its behalf.

63. Al HASSAN was arrested and detained by the French Barkhane forces and the Malian authorities, for wholly unrelated purposes, separate to the proceedings before the Court. The French Barkhane forces arrested Al HASSAN as part of their military operations in Mali.¹¹⁷ He was transferred to the Malian authorities and detained by them. The Prosecution was never informed of precise reasons the Accused was detained by the Malian authorities.¹¹⁸ Suspected Ansar Dine members and members of other armed groups are arrested and may be subjected to investigation and prosecution by Malian authorities for the crimes attributed to them, *inter alia*, of terrorism and sedition, and for crimes against internal security of the State and national territorial integrity of the State by war, and illegal use of armed force.¹¹⁹ The record is clear that the arrest and detention of the Accused, effected by the French and Malian authorities without any prior knowledge of the OTP or the Court, was entirely for a different purpose.
64. The Prosecution learnt of the Accused's arrest from media articles related to his arrest.¹²⁰ The Prosecution requested cooperation from the Malians after his arrest and detention in Mali, only in relation to: (a) the logistical aspects of ICC OTP meeting him and possibly conducting its own interview; and, (b) seeking any information or material that had already been collected from the Accused by the French or Malian authorities during the Accused's arrest or detention.
65. Tellingly, one of the reasons that the Prosecution requested that the Accused be interviewed under article 56 of the Statute was because the Prosecution was unable to predict whether or not the Accused would be released at some point, for instance, because of political negotiations.¹²¹ [REDACTED],¹²² [REDACTED]

[REDACTED]

[REDACTED] 23 [REDACTED]

¹¹⁷ [REDACTED].

¹¹⁸ ICC-01/12-01/18-1-Red, para 311.

¹¹⁹ Investigation note, [REDACTED].

¹²⁰ See para.14 above. ICC-01/12-45-Conf-Exp-Red2, para. 5; Investigation note, [REDACTED]. See e.g. media article, *Tombouctou: Barkhane arrête trois proches du CJA soupçonnés de complicité avec des terroristes*, 22 April 2017, [REDACTED].

¹²¹ [REDACTED]: *Lettre No.002/MNLA-HCUA/2013 / Libération des détenus au Mali du fait du Conflit armé*; [REDACTED]: *LISTE DE PRISONNIERS PROPOSES PAR LES MOUVEMENTS ARMES / LISTE PROPOSEE PAR MNLA, HCUA, MNLA*.

¹²² [REDACTED]. And.

¹²³ [REDACTED].

- [REDACTED]
- [REDACTED]¹²⁴
66. As the Defence acknowledges, the Malians informed the Prosecution that it could not immediately interview the Accused because the Malians “still needed him”,¹²⁵ as they were still in the midst of conducting their own interviews with him for their own distinct process.
67. The separate nature of the proceedings of the national authorities against the Accused, and the lack of any collusion by the OTP with them, are further underscored by the incomplete nature of the information received from the national authorities in relation to him. The Prosecution notes that, in spite of repeated requests, the only material regarding the Accused shared with the ICC OTP by the French and Malian authorities was: (a) a copy of his file regarding his transfer from the French authorities to the Malian authorities;¹²⁶ (b) a copy of the notes of interview conducted by the Malian authorities with the Accused;¹²⁷ and (c) a copy of the medical certificate at the end of his detention by the Barkhane Force.¹²⁸ This was received only after the Accused’s transfer to the ICC.
68. During the introductory meeting and prior to his interview proper, the Accused was also clearly informed of the separate nature of the ICC proceedings from those of Mali,¹²⁹ and explained that the information provided to the OTP would not be shared with third parties or the public.¹³⁰

3) There was no torture or ill-treatment of the Accused by the ICC OTP or at its behest

¹²⁴ See [REDACTED] and [REDACTED]. See also, [REDACTED]; [REDACTED].

¹²⁵ Request, para. 31. See [REDACTED].

¹²⁶ [REDACTED].

¹²⁷ The notes of interview with Al Hassan [REDACTED] and [REDACTED] were received from the Malian authorities on 27 November 2018.

¹²⁸ [REDACTED].

¹²⁹ [REDACTED].

¹³⁰ [REDACTED]. He was informed that under the Statute any State may request information provided (as decided upon by a Chamber).

69. The Defence alleges that the Accused was tortured or suffered CIDT at the hands of the French Barkhane forces and the Malian authorities at the DGSE.¹³¹
70. There is no basis for attributing the alleged illegal conduct of the French or Malian authorities to the Court. The Defence concedes that ICC OTP staff did not torture or ill-treat the Accused.¹³² Moreover, the alleged torture or CIDT, if it ever took place, was not done at the OTP's behest. In contrast to what the Defence suggests, the OTP's interview of the Accused whilst he was in detention with the Malian authorities does not give rise to any responsibility for his custody at that time.¹³³ Lastly, the Defence is incorrect to state that the Prosecution obtained admissions or confessions from the Accused, in a situation where the latter was held in *incommunicado* detention with the complicity of the OTP.¹³⁴ The Defence fails to show any actual collusion, as would be required by the Court's legal framework.

4) *There was no concerted action or collusion by the OTP in the alleged torture or CIDT of the Accused while in detention*

71. The Defence asserts that the alleged torture or CIDT of the Accused was carried out with the OTP's "collusion" or complicity. However, contrary to the Defence's assertion, collusion by the OTP in the alleged torture or CIDT of the Accused, within the ICC's legal framework and case law, means actual collusion. In this context, collusion does not mean mere knowledge of alleged violations by a State actor,¹³⁵ alleged "acquiescence",¹³⁶ or any alleged failure by the OTP to prevent grave violations of the rights of the accused by a State actor.¹³⁷
72. The Appeals Chamber in *Lubanga* confirmed that: "mere knowledge on the part of the Prosecutor of the investigations carried out by the Congolese authorities is no proof of involvement on the Prosecutor's part in the way they were conducted or the means, including detention used for the purpose."¹³⁸ PTCI in *Gbagbo*, citing the Appeals Chamber in *Lubanga*, further stated: "the mere fact that the Prosecutor was in contact with the Ivorian authorities does not suggest that there was any involvement of the

¹³¹ Request, para.15-26.

¹³² Request, para. 38. *See also* para. 40. The Defence cites Dr Porterfield's report where she states: [REDACTED]

[REDACTED]".

¹³³ Request, para. 30.

¹³⁴ Request, para. 13-14.

¹³⁵ Request, para. 11.

¹³⁶ Request, para. 31.

¹³⁷ Request, para. 12-14.

¹³⁸ Emphasis added. ICC-01/04-01/06-772, para. 42. Citing *Delalić et. al*, IT-96-21, Decision on Zdravko Mucić's motion for the exclusion of evidence, 2 September 1997, para. 67.

Prosecutor in the detention of Mr. Gbagbo”.¹³⁹ That Pre-Trial Chamber also rejected the Defence’s argument that the Prosecution was under a duty of care *vis-à-vis* Mr. Gbagbo during his detention with the Ivorian authorities, and had to put an end to the grave violations perpetrated against him. PTCI stated: “the powers of the Prosecutor may only be exercised in the context of, or in relation to, proceedings before the Court”.¹⁴⁰

73. In *Nikolić*, the ICTY Trial Chamber rejected a similar argument raised by the Defence in that case, namely that the ICTY should be subject to the same duties or obligations as a State under international human rights law. The Chamber stated: “[t]he Chamber hesitates to apply this case law automatically *mutatis mutandis* to the issue at hand. Those cases were decided in the specific context of whether a State should be held responsible for the violation of the human rights it was duty-bound to respect.”¹⁴¹ The ICTY Trial Chamber further observed that: “[t]here is a balance between fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of International Humanitarian Law”.¹⁴²
74. Similarly in this case, although the Prosecution interviewed the Accused whilst he was held in detention by the Malian authorities, as described above, his arrest, detention, and interviews by the Malians were not related in any way to the proceedings before the Court. The Prosecution did not collude in, nor was it able to put an end to the alleged grave violations. The record is clear that when the Accused [REDACTED] [REDACTED] complained about conditions of detention and alleged violations of rights by the Malian authorities,¹⁴³ the Prosecution indicated that it would inform relevant Malian authorities, in particular [REDACTED], so that they could take any appropriate measures.¹⁴⁴ Indeed, the Prosecution systematically asked the Accused [REDACTED] [REDACTED] at every session, whether they had anything to raise regarding their detention. In this context, the Prosecution promptly informed the Malian authorities of the Accused’s complaints and concerns. The record also shows that [REDACTED] [REDACTED] met with the Accused in that context, and the latter was able to raise his concerns.¹⁴⁵

¹³⁹ ICC-02/11-01/11-212, para. 101.

¹⁴⁰ ICC-02/11-01/11-212, para. 111.

¹⁴¹ *Nikolić*, IT-94-2-PT, Decision on defence motion challenging the exercise of jurisdiction by the tribunal, 9 October 2002, para. 113.

¹⁴² *Nikolić*, IT-94-2, Decision on interlocutory appeal concerning legality of arrest, 5 June 2003, para. 30.

¹⁴³ Request, para. 33.

¹⁴⁴ Request, para. 38-39, 87.

¹⁴⁵ Investigation note, [REDACTED].

75. The Prosecution also clearly and repeatedly explained to the Accused, [REDACTED] that their conditions of detention including their place of detention, were under the responsibility of the Malian authorities, and that what the OTP could do, and actually did, was to inform relevant authorities of any complaints they might have and to request that any necessary and possible measures be taken to address them.¹⁴⁶

C. The evidentiary record in the ICC case against the Accused is not tainted by the so-called “fruits of torture” or ill-treatment

1) The ICC interviews with the Accused [REDACTED] voluntary

76. Contrary to the Defence’s suggestions,¹⁴⁷ the interviews with the Accused [REDACTED] conducted by the Prosecution were based on voluntary and informed consent and in full conformity with the Statute and the Rules, in particular, article 55(2) and rule 112.

77. Prior to the commencement of an interview with any potential witness, the Prosecution gives an introduction in which it explains in detail the voluntary nature of the interview process and if applicable, all the rights guaranteed under the Statute and the Rules. At the beginning of each subsequent interview session, witnesses are also reminded of these points and asked to confirm at the end of the session that they have answered questions voluntarily. This approach was applied to the interviews with the Accused [REDACTED] in the custody of the national authorities.

78. For example, throughout the interview process, the Accused was repeatedly informed and reminded of the voluntary nature of the interview with the Prosecution and his rights under the Statute. At the first interview session on [REDACTED], it was explained to him that he was free to answer or refuse to answer the investigators’ questions, that he should answer of his own free will and that he could stop at any time.¹⁴⁸ As mentioned above, he was reminded of these rights at the start of every interview session, and whenever applicable during the interview itself.

79. Contrary to the Defence’s suggestion, while the Prosecution initially indicated to the Accused that he was being interviewed as a witness,¹⁴⁹ it also duly informed him that the interview was conducted in particular pursuant to article 55(2) of the Statute, considering that there were grounds to believe that he had committed crimes under the Statute.¹⁵⁰ He

¹⁴⁶ Investigation note, [REDACTED]. See e.g. [REDACTED].

¹⁴⁷ Request, para. 41-43, 69, 82.

¹⁴⁸ [REDACTED].

¹⁴⁹ Request, para. 41.

¹⁵⁰ [REDACTED].

was reminded of this at the beginning of each subsequent session throughout his interview with OTP investigators,¹⁵¹ who also explained to him specific crimes he was suspected to have committed.¹⁵²

80. In particular, and in accordance with article 55(2) of the Statute, it was explained to the Accused that he had the rights to remain silent,¹⁵³ to have legal assistance and to be questioned in the presence of counsel.¹⁵⁴ The Accused then discussed in private with the duty counsel assigned by the Registry, [REDACTED], and subsequently indicated his decision to be assisted by the article 55(2) counsel.¹⁵⁵ He was informed that he had the right to change his decision at any point during the interview.¹⁵⁶ After consultation with [REDACTED],¹⁵⁷ the Accused confirmed that he understood all the questions of procedure and his rights as explained by the investigators and that he decided to proceed with the interview.¹⁵⁸ Subsequently, the investigators reminded Al HASSAN at the beginning of each session that he could speak to his lawyer.¹⁵⁹ They encouraged Al HASSAN to do so at any time.¹⁶⁰ The record of the interview shows that the Accused did speak to [REDACTED] on all 19 days of interview sessions, either before, or during the breaks between the interviews, and often at least twice a day.¹⁶¹ The Accused was also given an opportunity

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to consult with [REDACTED] when the latter intervened during an interview.¹⁶² Al HASSAN confirmed several times that he had the opportunity to speak to his lawyer.¹⁶³

81. The OTP investigators reminded the Accused of the voluntary nature of the interview and his right to remain silent at the start of each subsequent interview session in [REDACTED] [REDACTED],¹⁶⁴ as well as in the course of the interview sessions.¹⁶⁵ The investigators reminded him repeatedly that he was free not to respond to questions,¹⁶⁶ and stressed that it was his right¹⁶⁷ and that he could end the interview at any time.¹⁶⁸ For example:

- when discussing his participation in the flogging of a person, the investigators reminded the Accused that he was not obliged to say anything and that it was his right not to answer so as not to incriminate himself;¹⁶⁹ and
- on a separate occasion, the investigators asked the Accused if he was willing to rewrite by hand a text he claimed to have written, explaining that the process would allow graphological analysis of the documents, which he had been shown and on which he had recognised his handwriting and signature.¹⁷⁰

82. As Dr Lamothe pointed out in his expert report: [REDACTED]

162 [REDACTED]

163 [REDACTED]

164 [REDACTED]

165 [REDACTED]

166 [REDACTED]

167 [REDACTED]

168 [REDACTED]

169 [REDACTED]

170 [REDACTED]

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83. The Accused himself regularly confirmed, at the end of every interview session, that he answered questions of his own free will.¹⁷² During the interview session on [REDACTED], the Accused even clarified his motivation for speaking to the OTP investigators, stating that: *“Je me suis porté volontaire de vous donner cet ... ce témoignage [...] pour que la vérité soit claire de ce qui s’est passé ... parce que j’étais parmi les témoins. Parce que je... donc je vous demande de faire montrer la vérité de ce qui s’est passé vraiment. Et de ne pas ... euh ... faire du tort aux innocents.”*¹⁷³
84. The Accused was also informed that he could clarify or add to his statements,¹⁷⁴ and was asked if he wished to do so at the end of each interview session,¹⁷⁵ as well as during these sessions.¹⁷⁶ He exercised this right several times.¹⁷⁷
85. Overall, throughout the interview with the OTP, the Accused was in control of what he wished to say. On some occasions, he made use of his right to remain silent and refused to answer questions posed by OTP investigators. For example, on [REDACTED], he explicitly relied on his right to non-self-incrimination when refusing to answer questions on the attack against the Malian army and MINUSMA, stating that: *“Je veux clarifier quelque chose. Mon silence concernant ce qui s’est passé après 2012 ... vous m’avez dit que j’ai le droit de ne pas m’incriminer. Et je ne veux pas mentir. Et c’est pour ça que je ne veux pas rentrer dans les détails. Et je pense que c’est assez que [REDACTED]. Et je prépare... je préfère me ... retirer à ce stade là... pour ne pas ... euh... m’incriminer de plus.”*¹⁷⁸ Similarly, on [REDACTED], he decided not to answer the question regarding his reaction to the destruction of mausoleums and other sites, in the following

¹⁷¹ Annex B, Dr Lamothe’s report,

¹⁷² [REDACTED]

¹⁷³ [REDACTED]

¹⁷⁴ [REDACTED]

¹⁷⁵ [REDACTED]

¹⁷⁶ [REDACTED]

¹⁷⁷ [REDACTED]

¹⁷⁸ [REDACTED]

terms: “*Ma réaction je veux pas la...la dire, la prononcer*”.¹⁷⁹ On some other occasions, he was alleging not to remember events: “*je ne me souviens pas*”, “*j’ai peur de mentir*”. This refutes the Defence assertion that he spoke pursuant to a DGSE-prescribed script.¹⁸⁰

86. In the last interview session on [REDACTED], when asked if he had any concerns he wished to raise regarding the manner in which he had been treated during the interview with the Prosecution, he stated that it was “*un très bon traitement*”.¹⁸¹ Al HASSAN confirmed this and signed a document confirming that on the occasion of the interview with the OTP investigators, he had lunch meals throughout all interview sessions and his choices of meal were taken into consideration as much as possible.¹⁸² The two lawyers present during the interviews corroborated this statement made by the Accused. Article 56 Counsel commented at every session and repeatedly noted the fact that the Defence’s rights were strictly respected during the interview,¹⁸³ which was confirmed by the Accused’s article 55(2) Counsel.¹⁸⁴ Moreover, the interview recordings and transcripts reveal moments where the Accused was smiling or laughing with the investigators, which further attests to the voluntary, cordial and respectful manner in which the interview was conducted.¹⁸⁵

87. Based on the audio recordings of the [REDACTED] and interviews of the Accused and their transcripts, Dr Lamothe also concluded that: [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED],¹⁸⁶

¹⁷⁹ [REDACTED].

¹⁸⁰ Request, para. 62.

¹⁸¹ [REDACTED].

¹⁸² [REDACTED].

¹⁸³ [REDACTED].

[REDACTED].

¹⁸⁴ [REDACTED].

¹⁸⁵ [REDACTED].

[REDACTED] (“*Interprets : [...]ces gens-là veulent appliquer la charia et les autres veulent appliquer la démocratie ; Intervieweur 1 : Je vous vois dire ça avec un sourire [...]*”, emphasis added); Audio recording, [REDACTED]. See, e.g. United States of America, District Court, *United States v. Marzook*, 435 F. Supp. 2d 708, 8 June 2006, p. 770-771, dismissing the defendant’s challenge against the voluntariness, and therefore the admissibility of statements made to a member of the Israeli Security Agency during an interrogation on the 18 March 1993 on the grounds, *inter alia*, that “the transcript revealed a friendly, co-operative relationship” between the interrogator and the defendant and there was no evidence of coercion.

¹⁸⁶ Annex B, Dr Lamothe’s report, [REDACTED].

88.

[REDACTED]

187

89.

[REDACTED]

88

[REDACTED]

[REDACTED]

189

[REDACTED]

190

[REDACTED]

191

[REDACTED]

90.

[REDACTED]

None of the

statements by the Accused [REDACTED] resulted from “fear of prejudice and the hope of advantage” held out to him by the Prosecution.¹⁹² At no point in [REDACTED] interviews did the ICC investigators made any promises or inducements to obtain or [REDACTED] with the Prosecution.¹⁹³ As such, the mere *possibility* that the Accused [REDACTED] may have made the choice to cooperate with the Prosecution

¹⁸⁷ See, e.g. [REDACTED] confirming that: [REDACTED]

¹⁸⁸ [REDACTED]

¹⁸⁹ [REDACTED]

¹⁹⁰ [REDACTED]

¹⁹¹ [REDACTED]

¹⁹² See e.g. *Delalic et al.*, Decision on the motions for the exclusion of evidence by the accused, Zejnil Delalic, 25 September 1997, para. 29-32, 40 summarising the principle in the common law systems according to which a confession is deemed involuntary if it has been “obtained either from fear of prejudice or hope of advantage held out by a person in authority over the Accused”; *Halilovic*, Decision on Interlocutory Appeal Concerning Admission of Record Of Interview of the Accused from the Bar Table, Case: IT-01-48-AR73.2, 19 August 2005, para. 38, in which the ICTY Appeals Chamber held that: “Prosecutorial offers that serve as inducements to the accused’s cooperation may, if the inducement is sufficiently powerful, render statements made pursuant to that cooperation involuntary. In other cases, however, the inducement is simply an incentive; the fact that the accused may have taken this incentive into account when deciding whether to cooperate does not mean that the defendant was not acting voluntarily”.

¹⁹³ See e.g. *Sesay*, Decision on the admissibility of certain prior statements of the Accused given to the Prosecution, SCSL-04-15-T, 30 June 2008, para. 45-52, finding that the statements of the accused Sesay was not made voluntarily because of the promises and inducements made by the Prosecution in the course of the interviews in relation to protection and financial assistance for his family and reduced sentence.

in the hope of improving their detention conditions¹⁹⁴ or benefiting from witness protection measures¹⁹⁵ in no way vitiates the voluntary nature of their interviews.

91. The record is also clear that the conduct of interviews by the OTP investigators was in no way oppressive.¹⁹⁶ The Accused and, [REDACTED] were provided regular breaks, including at [REDACTED] request, for lunch and prayers,¹⁹⁷ food and drinks and the investigators spoke to [REDACTED] in a professional and respectful manner.¹⁹⁸ The Prosecution also systematically reminded [REDACTED] several times each day, of the possibility to take a break, have more drinks, talk to their counsel, pray or stop the interview.¹⁹⁹
92. In these circumstances, there is simply no basis for a termination of the proceedings or exclusion of any evidence (which is not requested). Rather, it falls on the Defence to explore during cross-examination, if it so wishes, any issues related to the reliability of [REDACTED], including the conduct of the interviews and [REDACTED] personal motivation to cooperate with the Prosecution.
93. It will then be for the Chamber to assess, in due course and in light of the totality of the evidence adduced at trial, the weight to ascribe the evidence obtained through the OTP interviews with the Accused [REDACTED] which the Prosecution may seek to submit.²⁰⁰

2) There was no factual or legal impediment to the interview of the Accused [REDACTED] - [REDACTED] fit to be interviewed

94. There is no provision under the Statute or the Rules establishing a minimum threshold below which a witness or a suspect should be considered unfit to be interviewed. However, with respect to the fitness to testify, rule 66(2) of the Rules allows persons whose judgment has been impaired to testify if he or she is “able to describe matters of

¹⁹⁴ Request, para. 82, citing Dr Crosby’s report, [REDACTED].

¹⁹⁵ Request, para. 42.

¹⁹⁶ For example, in *Delalic et al.*, the ICTY Trial Chamber held that similar to an involuntary confession, statements induced by “coercion, force or fraud, or oppressive conduct which saps the concentration and has sapped the free will of the suspect through various acts and weakens resistance, rendering it impossible for the suspect to think clearly” would be unreliable. It clarified that whether or not conduct is oppressive in each case will depend upon many factors, some of which may include the characteristics of the person making the statement, the duration and manner of the questioning and the facilities provided such as refreshments or rests between periods of questioning. *Delalic et al.*, [IT-96-21](#), Decision on Zdravko Mucic’s motion for the exclusion of evidence, 2 September 1997, para. 66-67.

¹⁹⁷ See e.g. regarding the Accused, [REDACTED].

¹⁹⁸ See e.g. *Sesay*, Decision on the admissibility of certain prior statements of the Accused given to the Prosecution, SCSL-04-15-T, 30 June 2008, para. 58, finding that the manner in which the questioning of Sesay was carried out did not render it oppressive.

¹⁹⁹ [REDACTED].

²⁰⁰ ICC-01/12-01/18-789-AnxA, para. 27-34. See also *Dragan Jokić*, Case No. IT-05-88-R77.1-A, Contempt Appeal Judgement, 3 July 2009, para. 35.

which he or she has knowledge and that the person understands the meaning of the duty to speak the truth.”²⁰¹ If basic capacity to understand questions and the duty to speak the truth is sufficient to be fit to testify, *a fortiori* it must suffice to establish fitness to be interviewed. In fact, trained and experienced investigators of the OTP routinely interview traumatised and vulnerable victims and witnesses of serious crimes, including rape and torture – as has been done in this case as well.²⁰²

95. In the course of the introduction and subsequent interviews conducted with the Accused [REDACTED], there was no indication that [REDACTED] lacked the ability required to be interviewed. Indeed, as discussed above, during his interview with the Prosecution, the Accused clearly demonstrated his ability to describe the facts of which he had knowledge and decided to talk about, as well as to understand the meaning of the duty to tell the truth.²⁰³ [REDACTED]

[REDACTED];²⁰⁴

96. The Defence’s contentions regarding alleged torture or CIDT of the Accused [REDACTED] [REDACTED] also questionable as they are based on a series of misrepresentations of the evidence on record and/or raised for the first time in the Request. For example, the Defence contends that the Accused was repeatedly beaten, threatened, subjected to sexual assault and other ill-treatment during his detention at the DGSE.²⁰⁵ This claim of continuous torture is inconsistent with: (i) the Accused’s own statements; (ii) his physical appearance, behaviour and recorded statements and [REDACTED] throughout the OTP meetings; (iii) the lack of any complaints or sign of physical injury or pain beyond [REDACTED] [REDACTED];²⁰⁶ (iv) his ability to move, walk, pray, and eat his meals;²⁰⁷ and (v) the evidence [REDACTED] [REDACTED].

97. As mentioned above, prior to his transfer and detention at the DGSE, a French medical doctor examined the Accused and concluded on 2 May 2017 that he was medically fit.

²⁰¹ The ICTY Appeals Chamber also found that fitness to testify “requires that the proposed witness has a basic capacity to understand the questions put to him and give rational and truthful answers to those questions.” See *Dragan Jokić*, Case No. IT-05-88-R77.1-A, Contempt Appeal Judgement, 3 July 2009, para. 35, observing that: It observed that “[t]his approach is broadly similar to that set out in Rule 90(B) of the Rules [of the ICTY], dealing with the testimony of children, which focuses on the ability of a child witness ‘to report the facts of which the child has knowledge and understands the duty to tell the truth’”. The AC also recalled that a similar approach was taken in *Vladimir Kovačević* (Case No. IT-01-42/2-I, Public Version of the Decision on Accused’s Fitness to Enter a Plea and Stand Trial, 12 April 2006).

²⁰² See, e.g. [REDACTED].

²⁰³ See above para. 82-85.

²⁰⁴ See above para. 88-89.

²⁰⁵ Request, para. 15.

²⁰⁶ [REDACTED].

²⁰⁷ [REDACTED].

The Accused, [REDACTED] taken to the infirmary upon [REDACTED] transfer in Bamako.²⁰⁸

98. The OTP first met with the Accused about 2 months and 10 days after his transfer to the DGSE, in the presence of two duty counsel appointed pursuant to article 55(2) and article 56 of the Statute, respectively. During his security assessment by the ICC and before his substantive ICC interview on [REDACTED], the Accused expressly stated when asked that he did not suffer from any pain, suffering or injury.²⁰⁹ He claimed that he was beaten and threatened by one man at the DGSE, “*le même jour où je suis venu à BAMAKO*”.²¹⁰ That person was the only individual whom the Accused alleged used violence and threats against him during questioning whilst he was at the DGSE.²¹¹ He did not inform the ICC investigators that he was ever subjected to any other violence or ill-treatment during questioning by the DGSE. In fact, when explicitly asked whether he was ill-treated, he confirmed that he had not been ill-treated, during the two or three other occasions when he was questioned and shown photographs at the DGSE.²¹²
99. Throughout the 19 days interview, the Accused was asked and did not hesitate to describe and complain about his conditions of detention and the limited specific incidents of alleged ill-treatment described above, and alleged beating of detainees following a mutiny.²¹³ He also complained about his [REDACTED] that he had been suffering from before his arrest and for which [REDACTED].²¹⁴ The OTP investigators in turn explained to the Accused *inter alia*, that if he had any injury because of ill-treatment or if he was sick, the OTP would not proceed with an interview and would seek to ensure that he could receive treatment.²¹⁵ The investigators also explained that if anything abnormal had happened and they were made aware of it, they would intervene and speak to the authorities.²¹⁶ Yet, despite this and the fact that he was regularly asked questions about his conditions of detention and had numerous occasions to do so in the course of the 19 days, the Accused never mentioned to the Prosecution or

²⁰⁸ [REDACTED]
²⁰⁹ [REDACTED]
²¹⁰ [REDACTED]
²¹¹ [REDACTED]
²¹² [REDACTED] : («Ah d’accord, c’est-à-dire vous avez... vous êtes en train de me dire que vous avez été interviewé par le service de sécurité malien [...]. Deux à trois reprises. [...]D’accord à deux ou trois reprise. Vous n’avez pas été maltraité ?[...]Non»).

²¹³ [REDACTED]
²¹⁴ [REDACTED]
²¹⁵ [REDACTED]
²¹⁶ [REDACTED]

even alluded to the other alleged ill-treatment, such as beating on his feet and sexual assault, now described by the Defence.

100. [REDACTED]
[REDACTED]²¹⁷ [REDACTED]²¹⁸ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]²¹⁹ [REDACTED]
[REDACTED]²²⁰ [REDACTED]
[REDACTED]
[REDACTED]²²¹ [REDACTED]²²² [REDACTED]
[REDACTED]. The Accused did not mention prison officer [REDACTED]
[REDACTED] on this or any other occasion when he met with the OTP; yet the Defence now suggests, that the Accused ([REDACTED]) initiated a mutiny and sought help from the same individual who allegedly tortured and threatened him.

101. Moreover, various aspects cast doubt about this alleged violent beating as described. [REDACTED]
[REDACTED]
[REDACTED]²²³ [REDACTED]
[REDACTED]
[REDACTED] The Accused, who was met by the OTP investigators only days/weeks after the alleged severe beating, also did not claim any pain, injury or difficulty during his OTP meetings on [REDACTED] when he reported the incident to the OTP.²²⁴ He indicated that he was ready to proceed with the interview and confirmed at the end of the day that he responded to questions on his free will.²²⁵ Also surprisingly, [REDACTED]
[REDACTED]²²⁶ [REDACTED]

²¹⁷ Request, para. 47.

²¹⁸ Request, para.20, 48.

²¹⁹ [REDACTED] referred to in fn.146 of the Request.

²²⁰ [REDACTED] referred to in fn. 146 of the Request.

²²¹ [REDACTED]

²²² [REDACTED]

²²³ [REDACTED]

²²⁴ [REDACTED]

²²⁵ [REDACTED]

²²⁶ Request, para. 23.

[REDACTED]²²⁷

[REDACTED]

[REDACTED]²²⁸ and did not mention any alleged beating of the detainees in [REDACTED]
[REDACTED], [REDACTED].

102. The Defence further misrepresents the evidence to claim the existence of “DGSE death threats concerning the contents of [the Accused’s] statements to the ICC”. Contrary to their contention, Al HASSAN’s indication at the end of the session on [REDACTED] that he would clarify a particular point on another occasion had nothing to do with the DGSE. Indeed, at the beginning of the following session on [REDACTED], the Prosecution invited the Accused to provide the clarifications he wished to make. The Accused declined to do so, but specified that his clarifications concerned the reasons for his exile and why he had joined the armed groups.²²⁹ Contrary to the Defence’s misleading assertion, there was also no link to the DGSE when the Accused raised security concerns at the end of the session on [REDACTED], as he was clearly referring to his security in relation to individuals and members of the groups against whom he gave evidence that he qualified as serious.²³⁰

103. [REDACTED]²³¹ [REDACTED]
[REDACTED]
[REDACTED]²³² [REDACTED]
[REDACTED]
[REDACTED]²³³ [REDACTED]
[REDACTED]²³⁴

104. Similarly, with respect to the alleged continuous handcuffing for 4 months and 20 days,²³⁵ contrary to Dr Cohen’s conclusion that the three lesions allegedly found on the Accused’s right wrist and forearm are “highly consistent with abuse of handcuffs”,²³⁶ Dr Ludes concluded that: [REDACTED]

²²⁷ [REDACTED]
[REDACTED]
[REDACTED]

²²⁸ Annex 1c to Mr Sangaré’s report, [REDACTED] disclosed separately as [REDACTED]
[REDACTED].

²²⁹ [REDACTED].

²³⁰ [REDACTED].

²³¹ Request, para. 15, c.

²³² [REDACTED].

²³³ [REDACTED].

²³⁴ [REDACTED].

²³⁵ Request, para. 15.

²³⁶ [REDACTED].

[REDACTED]

[REDACTED]²³⁷ [REDACTED], [REDACTED] also only confirmed that he had seen the Accused handcuffed but for an unknown duration.²³⁸

105. In fact, in the totality of the circumstances, the Accused's lesions claimed to be "highly consistent with" alleged injuries or beatings cannot be assumed or accepted to have been caused during his detention in Mali. It is not credible that the Accused was permanently handcuffed for 4 months and 20 days, suspended by his wrists from a metal rod, repeatedly beaten, subjected to so-called falaka, without any of these instances of ill-treatment leaving any clear physical scars or traces. Dr Cohen's assumptions and opinions, seemingly influenced by the Defence's leading narrative, including the denial of the Accused's activities with the armed groups, failed to effectively consider whether the lesions were the result of older injuries, including accidental injuries or injuries sustained in the course of the Accused's activities prior to his arrest.

106. The Defence's allegations of torture and CIDT against [REDACTED] include multiple other misrepresentations of facts and evidence. For example, evidence relied upon [REDACTED]²³⁹ fails to support the Defence claim that [REDACTED]

[REDACTED]

[REDACTED]²⁴⁰ Contrary to the Defence's assertion,²⁴¹ there is no reference to the use of a mast or pole against [REDACTED] in the investigation note cited.²⁴² [REDACTED]

[REDACTED]²⁴³ [REDACTED]

[REDACTED]

[REDACTED]²⁴⁴ [REDACTED]

[REDACTED]²⁴⁵ [REDACTED]

²³⁷ Annex A, Dr Ludes' report, [REDACTED].

²³⁸ Annex 1c to Mr Sangaré's report, [REDACTED].

²³⁹ Investigation note [REDACTED] and note [REDACTED].

²⁴⁰ Request, para.19.

²⁴¹ Request, para.20.

²⁴² Investigation note [REDACTED].

²⁴³ [REDACTED].

²⁴⁴ Request, para.32.

²⁴⁵ [REDACTED]

[REDACTED]

[REDACTED]²⁴⁶ [REDACTED] stated that DGSE agents advised him about how to deal with the OTP to avoid having problems with the armed groups he had worked with;²⁴⁷ contrary to the Defence's misleading assertion, upon request, [REDACTED] expressly said that the DGSE did not threaten him, but gave him the choice, even telling him that they cannot prevent him from talking to the OTP and offered to advise him.²⁴⁸

107. For his part, Dr Lamothe stated that: [REDACTED]

[REDACTED]

[REDACTED]²⁴⁹ Dr Lamothe concluded that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]²⁵⁰ [REDACTED]

[REDACTED]

[REDACTED]²⁵¹ [REDACTED]

108. Contrary to the Defence's allegations that the Accused was forced to recount a "coerced script" to the Prosecution, Dr Lamothe also considered that [REDACTED]

[REDACTED]

[REDACTED]²⁵² [...] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²⁴⁶ Request, fn. 228. [REDACTED]

²⁴⁷ [REDACTED]

²⁴⁸ [REDACTED]

²⁴⁹ Annex B, Dr Lamothe's report, [REDACTED]

²⁵⁰ Annex B, Dr Lamothe's report, [REDACTED]

²⁵¹ Annex B, Dr Lamothe's report, [REDACTED]

²⁵² Annex B, Dr Lamothe's report, [REDACTED]

[REDACTED]

[REDACTED] »²⁵³

109. Overall, Dr Lamothe further concluded that: [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] »²⁵⁴

3) *There is no factual or legal impediment for [REDACTED] to testify*

110. There is no concrete indication [REDACTED]

[REDACTED] unfit to testify. Due to the limited time available, the Prosecution was unable to obtain counter expert evidence regarding the alleged ill-treatment [REDACTED] described by the Defence and its consultants.²⁵⁵ As described below,²⁵⁶ the Defence consultants' opinions are based on a partial record of the interactions between the [REDACTED] and the Prosecution, and are unreliable.

111. In any event, except for [REDACTED] ([REDACTED]

[REDACTED]
[REDACTED]),²⁵⁷ [REDACTED]
[REDACTED]

[REDACTED]²⁵⁸ Should there be any concrete concerns regarding [REDACTED] fitness to testify, they could be assessed by the VWU before [REDACTED] testimony and addressed by the application of in-court and/or special measures as appropriate. Any issues regarding the fitness [REDACTED] to testify are no basis for a termination of the proceedings and can be explored by the Defence in cross-examination.

²⁵³ Annex B, Dr Lamothe's report, [REDACTED]

²⁵⁴ Annex B, Dr Lamothe's report, [REDACTED].

²⁵⁵ Request, para. 105. *See also* [REDACTED].

²⁵⁶ *See below* para. 141-149.

²⁵⁷ [REDACTED] ([REDACTED]), confirmed by the Chamber in its decision, ICC-01/12-01/18-968.

²⁵⁸ ICC-01/12-01/18-805-Conf-AnxA, p. 2-3.

4) *The Accused is fit to testify should he choose to do so*

112. As discussed above, fitness to testify only requires that the person be capable of describing the facts of which he or she has knowledge and his or her understanding of the meaning of the duty to tell the truth. While the Defence relies on Dr Porterfield's report to allege the Accused's inability to testify "without risking significant trauma",²⁵⁹ a full passage of her report shows that the "post-traumatic physical and cognitive reactions to being questioned" allegedly manifested by the Accused relates to questioning about his alleged past abuse.²⁶⁰ Tellingly, Dr Porterfield's report states that: "Mr. Al Hassan provided great detail and consistency regarding the events of his imprisonment in Mali, as well as of his interrogations".²⁶¹

113. As noted below in paragraph 161, contrary to Dr Porterfield's opinion that the Accused has five types of [REDACTED],²⁶² Dr Lamothe disagreed with her findings regarding four of them and concluded that his [REDACTED] has no irreversible effect on his capacities to testify, follow the debates and participate in his defence.²⁶³ Any concerns regarding traumatising may be addressed by appropriate treatment and support prior to and during his testimony in case he chooses to testify.

5) *A multitude of evidence supports the charges brought against the Accused*

114. As discussed above, evidence provided by the Accused [REDACTED] is reliable and not tainted by torture or any form of ill-treatment.²⁶⁴

115. In any event, as indicated during the opening of the trial²⁶⁵ and explained in its Trial Brief,²⁶⁶ the Prosecution's case is based on a multitude of evidence, including: (i) testimonial evidence from victims and other witnesses who were present in Timbuktu and its region at the relevant time such as [REDACTED], [REDACTED], [REDACTED] or [REDACTED]; (ii) documentary evidence collected from relevant locations in Timbuktu, including reports of

²⁵⁹ Request, para. 106-107.

²⁶⁰ [REDACTED].

²⁶¹ [REDACTED].

²⁶² [REDACTED]. Dr Porterfield's diagnosis was apparently based on Diagnostic and Statistical Manual of Mental Disorders (DSM-5). See p. 0570. With respect to the DSM, see also Annex B, Dr Lamothe's report, [REDACTED]: [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

²⁶³ Annex B, Dr Lamothe's report, [MLI-OTP-0078-7832-R01](#), p. 7841.

²⁶⁴ *Contra* Request, para. 95, arguing that the arrest warrant application, charges and Trial Brief are based predominantly on "tainted evidence" from the Accused and other "tortured [REDACTED]".

²⁶⁵ See, in particular, the presentations on 15 July 2020, ICC-01/12-01/18-T-018-CONF-ENG.

²⁶⁶ ICC-01/12-01/18-819-Conf-AnxA.

the Islamic Police authored and/or signed by the Accused and judgments of the Islamic Tribunal; (iii) videos and photographs [REDACTED]; (iv) expert evidence; and (v) reporting by international organisations, NGOs and the media. In large part, evidence provided by the Accused and other insider witnesses corroborates evidence from other sources. Reliance on this evidence does not undermine the integrity of the proceedings – rather, it will contribute to the determination of the truth.²⁶⁷

6) *An evidentiary hearing is unnecessary at this stage*

116. In the Request, the Defence asks the Chamber to convene a public evidentiary hearing “to allow for testimony from Drs Porterfield, Cohen and Crosby, and Mr Sangaré, and the introduction and authentication of their expert reports”.²⁶⁸ The Prosecution submits that the Chamber can decide on the basis of the record before it, without the need for an evidentiary hearing—with the caveats that due to the late/lack of disclosure these reports have limited weight, the Accused should not be entitled to give unsworn testimony (without cross-examination) through the consultant reports, and that the Prosecution should be given an opportunity to supplement its response if the Chamber considers necessary.

D. Misrepresentations of facts and evidence

117. As discussed throughout this Response, the Request is replete with misrepresentations of facts and evidence, which have been used to support the Defence’s assertions and misleading narrative on the alleged continuous torture and CIDT of the Accused [REDACTED] in detention. Similarly, the claim that he was not involved with the armed groups and terrorist activities at the time of his arrest is based on a number of misrepresentations.

118. Contrary to Defence’s contention,²⁶⁹ the record shows that Al HASSAN spontaneously provided detailed information about his role within the armed groups that was not part of any alleged DGSE-prescribed “script”. Al HASSAN volunteered and confirmed at various points during his OTP interview, information regarding his movements and active involvement with Ansar Dine (under Iyad Ag GHALY [REDACTED]) and AQIM (under Yahia Abou HAMMAM) before his arrest.

119. First, the record shows that Al HASSAN was and in fact accepted that he was a member of the groups. [REDACTED] knew before their arrest that Al HASSAN was suspected of

²⁶⁷ *Contra* Request, para. 89, 97.

²⁶⁸ Request, para. 8.

²⁶⁹ Request, para.35.

terrorism.²⁷⁰ [REDACTED]

[REDACTED]

[REDACTED]

120. Al HASSAN also voluntarily provided the Prosecution with many specific and personal details that could not have been part of any DSGE-prescribed script. For instance, Al HASSAN provided detailed information regarding his family and his life in Oubari, Libya up until the arrival of a man sent by Iyad Ag GHALY to fetch him in 2014. He described in detail what he did during the time he was in Iyad Ag GHALY's camp, the first aid training he gave, people he met there, etc. Al HASSAN subsequently confirmed the same information about his role and activities with the armed groups up until his arrest and detention in April 2017,²⁷¹ while he was at the same time responsible for a CJA military base.²⁷²

121. There is no basis to believe that all these utterances were dictated by the DGSE. The information provided is also not in the "DGSE interview file", which the Prosecution received well after the closure of Al HASSAN's OTP interview and after his arrest and transfer to the ICC. The "DGSE interview file" also contained information Al HASSAN simply did not share with the OTP, regarding in particular specific attacks or operations he was involved in.

122. Second, the contention regarding the reasons why Al HASSAN did not give the OTP more details about his activities with Iyad Ag GHALY [REDACTED] is based on a misrepresentation of the evidence. Contrary to the Defence's contention,²⁷³ Al HASSAN clearly stated that the reason for his silence was not because he did not have details or said anything that was false, but that the evidence he had provided on the matter was sufficient and he preferred to withdraw to not incriminate himself more.²⁷⁴

123. Al HASSAN never disavowed what he had said. The record is clear that Al HASSAN confirmed all that he had previously said at different times during his OTP interview about Ansar Dine,²⁷⁵ Iyad Ag GHALY,²⁷⁶ who ordered him to [REDACTED]
[REDACTED],²⁷⁷ etc.²⁷⁸

²⁷⁰ [REDACTED]

[REDACTED]

²⁷¹ [REDACTED]

²⁷² [REDACTED]

²⁷³ Request, para. 38.

²⁷⁴ [REDACTED]

²⁷⁵ [REDACTED]

²⁷⁶ [REDACTED]

²⁷⁷ [REDACTED]

124. Contrary to the Defence's contention,²⁷⁹ Al HASSAN used the phrase "*c'est vrai*", not because he was "broken", but because he was simply confirming propositions that were repeated back to him from what he himself had already said.

125. Indeed, when asked to describe further these activities Al HASSAN indicated his decision to not provide any further details.²⁸⁰ The Prosecution then acknowledged and recalled, once more, Al HASSAN's right to respond or not, and also his right to stop the interview at any time.²⁸¹ Whenever he decided to exercise his right, as explained to him, he did so.²⁸² For instance, he said that he considered that what he had said so far on the issue and his own role in [REDACTED] sufficed, and he would speak no further on the topic.²⁸³ He also reminded the Prosecution of his preference to only talk about the events that occurred in 2012.²⁸⁴

126. [REDACTED]
[REDACTED]²⁸⁵ [REDACTED]
[REDACTED]
[REDACTED]²⁸⁶ [REDACTED]
[REDACTED]
[REDACTED]²⁸⁷

127. Likewise, [REDACTED]
[REDACTED]²⁸⁸ In [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]²⁸⁹

128. Contrary to the Defence's allegations that the Prosecution [REDACTED]
[REDACTED]

²⁷⁸ [REDACTED].

²⁷⁹ Request, para. 39.

²⁸⁰ "*Je préfère ne pas donner ou dire ou parler de détails.*" [REDACTED].

²⁸¹ [REDACTED].

²⁸² [REDACTED].

²⁸³ [REDACTED].

²⁸⁴ [REDACTED].

²⁸⁵ Request, para. 52.

²⁸⁶ [REDACTED].

²⁸⁷ [REDACTED].

[REDACTED].

²⁸⁸ Request, para. 62.

²⁸⁹ Request, fn. 182. Citing, [REDACTED]. See [REDACTED]

[REDACTED]
[REDACTED].

DSGE,²⁹⁰ Malian judicial documents show [REDACTED]

[REDACTED] In fact, while the Defence in its re-filed Annex B only makes reference to *procès-verbaux* and a *mandat de dépôt* in relation to [REDACTED],²⁹¹ [REDACTED]

[REDACTED]²⁹²

[REDACTED]²⁹³

[REDACTED]

[REDACTED]²⁹⁴

E. The Defence consultants' reports are unreliable

129. A party may challenge another party's experts and their reports,²⁹⁵ including by impugning their competence, and/or arguing that the report provided does not fall within their expertise,²⁹⁶ or lacks relevance and/or probative value.²⁹⁷

130. The Prosecution considers that two of the Defence consultants lack the necessary qualifications to be considered experts in the field for which their expertise is relied upon in the Request. In addition, the reports of the Defence consultants suffer from a series of methodological defects, which make them unreliable.

²⁹⁰ Request, para. 73. See also para. 68-69.

²⁹¹ Annex B to the Request, p. 12, 20, 24, referring to [REDACTED]. While the Annex also mentions at p. 3 that [REDACTED] was interviewed as part of a *procès-verbal* on [REDACTED], [REDACTED]

²⁹² *Procès-verbal d'interrogatoire de première comparution* dated [REDACTED] in relation to [REDACTED]; *Procès-verbal d'interrogatoire au fond* dated [REDACTED] in relation to [REDACTED]; *Procès-verbal d'interrogatoire de première comparution* dated [REDACTED] in relation to [REDACTED]; *Procès-verbal d'interrogatoire de première comparution* dated [REDACTED] in relation to [REDACTED]; *Procès-verbal d'interrogatoire au fond* dated [REDACTED] in relation to [REDACTED]; *Procès-verbal d'interrogatoire au fond* dated [REDACTED] in relation to [REDACTED].

²⁹³ *Mandat de dépôt* dated [REDACTED] and *ordonnance de maintien en detention* dated [REDACTED] in relation to [REDACTED]; *Mandat de dépôt* dated [REDACTED] and *ordonnance de maintien en detention* dated [REDACTED] in relation to [REDACTED]; *Mandat de dépôt* dated [REDACTED] and *ordonnance de maintien en detention* dated [REDACTED] in relation to [REDACTED]; *Mandat de dépôt* dated [REDACTED], in relation to [REDACTED]; *Ordonnance de maintien en detention* dated [REDACTED] in relation to [REDACTED] and [REDACTED] (who was transferred in [REDACTED], shortly before his first interview session with the Prosecution), [REDACTED].

²⁹⁴ Request, para. 14.

²⁹⁵ See e.g. ICC-01/12-01/18-789-AnxA, para. 68.

²⁹⁶ See e.g. *Bemba et al.*, Decision on Prosecution Request to Exclude Defence Witness D-22-0004, 24 February 2016, ICC-01/05-01/13-1653, para. 11.

²⁹⁷ See e.g. *Popović et al.*, Decision on Expert Witness, IT-05-88-AR73.2, 30 January 2008, para. 21 (ICTY trial chambers have established the following requirements for the admissibility of expert statements or reports: (1) the proposed witness is classified as an expert; (2) the expert statements or reports meet the minimum standards of reliability; (3) the expert statements or reports are relevant and of probative value; (4) the content of the expert statements or reports fall within the accepted expertise of the expert witness).

133. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

³⁰⁴ See ICC-01/12-01/18-680-Conf-Red, para. 17 (Defence requested consultant to prepare abridged version “addressing his current conditions of detention, including her assessment of the psychological treatment made available to him at the Detention Centre”), 23 (“updated version of her prior assessment, taking into account the changes in Mr. Al Hassan’s detention regime”). See also ICC-01/12-01/18-680-Conf-AnxF; ICC-01/12-01/18-680-Conf-AnxK. See further ICC-01/12-01/18-T-015-CONF-ENG, p. 29, l. 14-17 (“In March 2020, we filed further particulars in our interim release request concerning Dr Porterfield’s assessment that Al HASSAN’s treatment needs had not been met and his situation had worsened due to ongoing restrictions imposed because of COVID”).

[REDACTED]

[REDACTED]³⁰⁷

134. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]³⁰⁸ (*see also* paragraph 160 below).

135. To date, the Defence has only disclosed part of the material related to Mr Sangaré's report,³⁰⁹ despite the Prosecution request in this regard.³¹⁰ It has refused to disclose the instruction letter and the material provided to him by the Defence on the grounds that they contain "confidential identifying information pertaining to Defence witnesses and innocent third parties".³¹¹

136. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]³¹²

³⁰⁵ ICC-01/12-01/18-942-Conf.

³⁰⁶ ICC-01/12-01/18-942-Conf-AnxA, p. 2.

³⁰⁷ ICC-01/12-01/18-942-Conf-AnxA, p. 4.

³⁰⁸ Annex B, Dr Lamothe's report, [REDACTED].

³⁰⁹ [REDACTED].

³¹⁰ See ICC-01/12-01/18-929-Conf, Email to the Defence regarding Mr Sangaré's report on 26 June 2020 at 19:45 in ICC-01/12-01/18-929-Conf-Exp-AnxA, p. 6-7.

³¹¹ ICC-01/12-01/18-965-Conf, para. 14 and 20.

³¹² See para. 24, fn. 58 and 60 of the Request. See also [REDACTED], explaining the mission assigned to Mr Sangaré by the Defence: [REDACTED]

140. In light of his lack of relevant qualification and expertise as well as his arguable lack of neutrality and objectivity, Mr Sangaré cannot be accepted as an expert on the matters addressed in his report and his opinions expressed therein are unreliable.

2) *The Defence consultants' reports are based on a partial record*

141. The report of Dr Porterfield, the second report of Dr Cohen and the report of Dr Crosby are all based in part on portions of transcripts of [REDACTED] and interviews with the Accused [REDACTED] as selected by the Defence³²⁹ and translated into English by Defence team members,³³⁰ rather than on the entire record of the Prosecution's interactions with him, which is audio-recorded and transcribed, and disclosed to the Defence.³³¹ Their conclusions, based as they are on a partial access to the record, are therefore unreliable.

142. For example, Dr Porterfield's conclusion regarding the Accused's purported "learned helplessness" and the "examples of Al HASSAN's reports of mistreatment being disregarded, ignored, or used to further his cooperation" derive from a review of the partial record of his interactions with the OTP.³³²

143. Similarly, in her second report, Dr Cohen analysed [REDACTED]

³²⁸ [REDACTED]

³²⁹ For example, it appears that Dr Porterfield was not provided with any transcripts of the Accused interview having taken place on [REDACTED]. See [REDACTED] (not mentioning any transcripts for [REDACTED]). Compare with [REDACTED] ([REDACTED]) and [REDACTED] ([REDACTED]).

³³⁰ See [REDACTED] (See [REDACTED] was also provided to Dr Porterfield). The Prosecution has since received e-mail confirmation from the Defence that these excerpts contain unofficial translations prepared by Defence team members. See also [REDACTED] ("Translation of extracts from transcripts of Al Hassan's interviews with the ICC Prosecution", shared by the Defence with the expert on 2020-05-07 and 2020-05-18).

³³¹ Audio-recordings of the interviews and [REDACTED] related to the Accused were also disclosed in October 2018 and February 2019, respectively.

³³² [REDACTED]. Compare with [REDACTED] (conclusions on the Accused's "treatment after his arrest came primarily from [her] interviews with him, conducted in [REDACTED], and from some clarifications he made to [her] in phone calls in [REDACTED]"; at [REDACTED] (the Accused's "emotional and psychological functioning was assessed using a combination of observation, interview, and record review").

██████████ and interviews with the ICC, and linked medical examination reports.”³³³ Dr Cohen’s observations regarding the Accused were made on the basis of the same partial and incomplete record that was apparently used by Dr Porterfield.³³⁴ ██████████

██████████ Dr Cohen’s observations were made, in addition to medical reports and related documents, on the basis of non-official translations of excerpts of ██████████ transcripts included in the investigation notes disclosed by the Prosecution as well as of excerpts of interview transcripts, selected by the Defence, representing only a portion of their interview records.³³⁵

144. Dr Crosby’s analysis regarding whether ██████████
 ██████████ subjected to torture or CIDT and whether voluntary informed consent was obtained for the purpose of interviews with the OTP is similarly based on a partial and incomplete record of interviews and ██████████³³⁶ According to the information disclosed to the Prosecution to date, Dr Crosby was provided with the same series of non-official translations of excerpts of ██████████ transcripts and interview transcripts as that provided to Dr Cohen,³³⁷ as well as a second set of non-official translations of excerpts ██████████

██████████³⁴⁰

145. Neither Dr Cohen nor Dr Crosby interviewed or evaluated ██████████ in person.³⁴¹
 Their observations are based on an incomplete record of the information provided by ██████████
 ██████████ interactions with the OTP investigators.

³³³ ██████████.

³³⁴ ██████████ (referring to “Non-official translation of biographical and security questionnaires and interviews with the ICC from 13.07.2017 to 08.03.2018”). See also ██████████.

³³⁵ See ██████████
 ██████████
 ██████████.

³³⁶ See, fn.11 of ICC-01/12-01/18-965-Conf, clarifying the extracts listed in Appendix A of Dr Crosby’s reports are disclosed as ██████████.

³³⁷ See fn. 25 of ICC-01/12-01/18-965-Conf in which the Defence indicated that: “The extracts of interviews disclosed to Dr. Cohen for the purposes of her second report were identical to that provided to Dr. Crosby (as documented at fn. 11 above), with the exception that Dr. Cohen received extracts in respect of Mr. Al Hassan (which have been disclosed as ██████████) and did not receive ██████████”. The Prosecution notes, however, that according to the chain of custody metadata of ██████████, the document was transmitted to both Dr Cohen and Dr Crosby on 22 May 2020, and it appears to correspond to “Al Hassan statements Extracts.docx” listed in Appendix A of Dr Crosby’s report, ██████████.

³³⁸ ██████████.

³³⁹ ██████████.

³⁴⁰ ██████████.

³⁴¹ Dr Crosby’s report, ██████████.

146. There are also other documents provided to the Defence consultants that cast doubt on the neutrality and impartiality of their analysis.³⁴² For example, a “chronology” of “events”, including dates and locations of the arrest and detention of the Accused in Mali but also indicating “[t]reatment issues”, prepared by the Defence,³⁴³ was “provided to Dr Porterfield in advance of her interview with Mr. Al Hassan to assist her discussions”.³⁴⁴

147. The description of material shared by the Defence with Dr Porterfield indicates that following Dr Porterfield’s examination of the Accused, a member of the Defence team “transcribed the handwritten notes to word and sent these notes back to Dr Porterfield”.³⁴⁵ The Defence has refused to disclose them.³⁴⁶ The photographs of the Accused’s scars taken “by a member of the Defence team” have also not been disclosed.³⁴⁷ In addition, while the Prosecution has requested from the Defence the identity and CV of persons who served as an interpreter when Dr Porterfield and Dr Cohen communicated with the Accused, none has been provided to date. At least in one instance of Dr Porterfield’s exchanges with the Accused, this role was apparently assumed by a Defence team member.³⁴⁸

148. According to the instruction letter to Dr Crosby³⁴⁹ and the instruction email to Dr Cohen and Porterfield,³⁵⁰ the Defence has transmitted to them a “memorandum” or a “summary” detailing various complaints raised [REDACTED] [REDACTED] with the ICC Prosecution and the reaction of the ICC Prosecution to these complaints. This document has not been disclosed to the Prosecution to date.

149. Due to lack of proper disclosure by the Defence, the Prosecution has been unable to fully explore the quality and objectivity of the information provided by the Defence to its consultants.³⁵¹ In any event, the information disclosed to date indicates that the Defence consultants’ reports are based on an incomplete or a partial record of the information

³⁴² *Ntaganda*, Decision on Defence Preliminary challenges to Prosecution’s expert witnesses, ICC-01/04-02/06-1159, 9 February 2016, para. 9.

³⁴³ See e.g. [REDACTED].

³⁴⁴ ICC-01/12-01/18-965-Conf, para. 16(e).

³⁴⁵ See [REDACTED], providing that this document was shared with Dr Porterfield on “2019-07-08”. According to Dr Porterfield’s report, her evaluation of the Accused took place between [REDACTED].

³⁴⁶ See ICC-01/12-01/18-965-Conf, para. 16(g).

³⁴⁷ ICC-01/12-01/18-965-Conf, para. 16(i).

³⁴⁸ [REDACTED].

³⁴⁹ [REDACTED].

³⁵⁰ [REDACTED].

³⁵¹ See e.g. ICC-01/12-01/18-965-Conf, para. 16(f) (further chronology of detention of Mr. Al Hassan in Mali), 16(k)(i) (a memorandum prepared by the Defence in advance of the provisions of the translated extracts from transcripts provided in May 2020).

relevant to the issues at stake, which raises serious issues regarding the reliability of these reports.

3) *The Defence consultant's analysis are based [REDACTED] to the interviews and medical examinations conducted by the Prosecution*

150 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

151. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] 356

152. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] 359

352 [REDACTED]
Tre [REDACTED]
353 [REDACTED]
354 [REDACTED] (referring to [REDACTED]
[REDACTED] para. 187, 188).
355 See Dr Cohen's second report, [REDACTED]. See also the email from the Defence to Dr
Cohen and Dr Porterfield, [REDACTED].
356 [REDACTED]
357 See [REDACTED], p. 1 (Introduction).
358 See [REDACTED], p. 1 (Introduction). See also para. 77, 78.
359 See [REDACTED], p. 1 (Introduction).

156. As discussed above, the opinions of Dr Porterfield, upon which the Defence heavily relies, are starkly contradicted by Dr Ludes, who received the audio recordings of [REDACTED] and not merely the incomplete record provided to Dr Porterfield.

157. In her report, Dr Cohen concludes that the Accused has “physical evidence of the assaults” and that her findings regarding lesions found on the Accused were “highly consistent with the torture described”.³⁶⁸

158.As pointed out by Prosecution Expert, Dr Ludes,³⁶⁹

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159.As mentioned above, Dr Ludes, having analysed each of Dr Cohen's findings, concluded that: [REDACTED]

[REDACTED]

██████████³⁷¹ (emphasis added).

160. Dr Lamothe, who received the audio recordings of [REDACTED] and interviews, also strongly criticised the methodology and approach adopted by Dr Porterfield. He stated that:

“_____”

³⁶⁸ Request, para. 16-17, citing

369 Annex A, Dr Ludes' report,

370 [REDACTED]

371 Annex A, Dr Ludes' report,

[REDACTED] ³⁷² (emphasis added).

161. Dr Lamothe further concluded that: [REDACTED]

[REDACTED] ³⁷³

F. Request for leave to add the reports of Drs Lamothe and Ludes and some limited material to the List of Evidence (LoE)

162. Following the tardy disclosure by the Defence of key material related to Dr Porterfield's report and Dr Cohen's first report on 15 July 2020, the Prosecution requested Dr Bertrand Ludes ([REDACTED]³⁷⁴) to analyse Dr Porterfield's report on the psychological evaluation of the Accused,³⁷⁵ and Dr Pierre Lamothe ([REDACTED]³⁷⁶) to analyse Dr Cohen's first report on the physical examination of the Accused.³⁷⁷ Both experts were provided with, among other material, the Defence consultants' reports relating to the Accused, his medial files and audio recordings and transcripts of his [REDACTED].³⁷⁸ Dr Lamothe was additionally provided with audio recordings and transcripts of all interview sessions with the Accused.³⁷⁹ While noting the constraints involved, including the limited time available, the lack of a possibility to examine the Accused and/or the absence of some key material, such as photographs of the Accused's scars, Dr Ludes and Dr Lamothe completed the requested tasks,³⁸⁰ and sent their reports, as well as their latest CVs, on 23 and 24 July 2020, respectively.³⁸¹

³⁷² Annex B, Dr Lamothe's report, [REDACTED].

³⁷³ Annex B, Dr Lamothe's report, [REDACTED].

³⁷⁴ See ICC-01/12-01/18-842-Conf, para. 34-39; [REDACTED].

³⁷⁵ Mission letter to Dr Ludes dated 16 July 2020, [REDACTED].

³⁷⁶ See ICC-01/12-01/18-842-Conf, para. 57-59; [REDACTED].

³⁷⁷ Mission letter to Dr Lamothe dated 16 July 2020, [REDACTED].

³⁷⁸ See Annexes to the mission letters containing lists of items provided to each expert: [REDACTED].

³⁷⁹ Annex A to the Mission letter to Dr Lamothe dated 16 July 2020, [REDACTED].

³⁸⁰ Annex B, Dr Lamothe's report, [REDACTED]; Annex A, Dr Ludes' report, [REDACTED].

³⁸¹ Annex A, Dr Ludes' report, [REDACTED] and his CV, [REDACTED]; Annex B, Dr Lamothe's report, [REDACTED] and his CV, [REDACTED].

163. Dr Pierre Lamothe is a medical doctor who is a forensic psychiatrist. He was Head of the Medical Unit of Mental Health of Detainees and Forensic Psychiatry from one of the most important academic psychiatric hospitals in France.³⁸² He is retired but still provides expertise in the field of his speciality, including forensic psychiatry, clinic of psychological trauma, care organisation and ethics in prison as well as care of mental patient detainees. As part of the Medical-Psychological Emergency Cell, Dr Lamothe provided psychological support to radicalised detainees and studied their behaviour.³⁸³ He was one of the founding members as well as the President of the Ethics Committee of the International Council of Prison Medical Services (ICPMS).³⁸⁴ He was a national expert at the highest court of France, the *Cour de Cassation*.³⁸⁵ He was nominated for missions at the ICTY and at the ICC as an expert.³⁸⁶

164. Dr Bertrand Ludes is a medical doctor and expert in forensic medicine. He has decades of experience as a practicing doctor, professor of medicine and expert before French courts, including at the Colmar Appeals Court of France since 1989,³⁸⁷ and at the *Cour de Cassation* since 2005.³⁸⁸ He is currently Professor in the Faculty of Medicine in Paris³⁸⁹ and head of the *Paris Institut de médecine légale*.

165. The Prosecution requests, in accordance with regulation 35(2) of the RoC, the Chamber's authorisation to add to its LoE the reports of Drs Lamothe and Ludes,³⁹⁰ their latest CVs³⁹¹ as well as the mission letters sent to the two experts by the Prosecution³⁹² and contact notes.³⁹³ These items could not be included in the LoE for reasons they were previously outside the Prosecution's control because (i) the relevant reports of Drs Porterfield and Cohen were only disclosed to the Prosecution after the 12 May 2020 deadline, as late as 15 July 2020;³⁹⁴ and (ii) the significance of these reports only became

³⁸² Dr Lamothe's CV, [REDACTED]; Annex B, Dr Lamothe's report, [REDACTED].

³⁸³ Annex B, Dr Lamothe's report, [REDACTED].

³⁸⁴ Annex B, Dr Lamothe's report, [REDACTED].

³⁸⁵ Annex B, Dr Lamothe's report, [REDACTED].

³⁸⁶ See transcripts of his testimony in *Gbagbo*, [REDACTED].

³⁸⁷ Dr Ludes' CV, [REDACTED].

³⁸⁸ Dr Ludes' CV, [REDACTED]. See also [list of experts at the Cour de Cassation](#).

³⁸⁹ Dr Ludes' CV, [REDACTED].

³⁹⁰ Annex A, Dr Ludes' report, [REDACTED]; Annex B, Dr Lamothe's report, [REDACTED].

³⁹¹ Dr Ludes' CV, [REDACTED]; Dr Lamothe's CV, [REDACTED].

³⁹² Mission letter to Dr Ludes dated 16 July 2020, [REDACTED]; Mission letter to Dr Lamothe dated 16 July 2020, [REDACTED]. Some other contact notes are being disclosed under rule 77.

³⁹³ [REDACTED].

³⁹⁴ While Dr Porterfield's report and Dr Cohen's first report were disclosed on 20 and 22 May 2020, respectively, many of the relevant items were only disclosed on 15 July 2020.

apparent after the filing by the Defence of the Request on 17 June 2020. Granting the delayed addition to the LoE will be in the interests of justice as their reports will be of significant assistance to the Chamber's adjudication of the Request and any potential challenge on admissibility of the Accused's transcripts of interview. The Prosecution also requests the Chamber's leave to add to its LoE two investigation notes, which contain information relevant to the cooperation between the OTP and Malian authorities and the separate nature of the ICC and Malian proceedings.³⁹⁵ The relevance of the information only became apparent after the Defence filed its Request on 17 June 2020.

Conclusion

166. Even if there had been any mistreatment by third parties of the Accused [REDACTED] [REDACTED] which does not appear to be based on any clear and tangible evidence, such mistreatment would not be attributable to the OTP in any shape or form. The Prosecution was not complicit in any such alleged abuse, nor was the alleged abuse connected in any way to the ICC proceedings. The interviews of the Accused and the [REDACTED] voluntary and in full conformity with the Statute and the Rules. All persons approached by the OTP were fit to be interviewed.³⁹⁶ The evidence obtained from those persons was free from any form of coercion or undue pressure. There is simply no ground justifying the exceptional remedy sought by the Defence.

167. The Prosecution accordingly requests the Chamber to dismiss the Request in its entirety. It also requests the Chamber's leave to add to its LoE the material discussed in paragraph 165, pursuant to regulation 35(2) of the RoC.



Fatou Bensouda
Prosecutor

Dated this 29th day of July 2020

At The Hague, The Netherlands.

³⁹⁵ Investigation notes, [REDACTED].

³⁹⁶ ICC-01/05-01/13-1854, 29 April 2016, para. 68 and 69; ICC-01/05-01/13-1948, 14 July 2016, para. 36 and 39.