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TRIAL CHAMBER X

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

SITUATION IN THE REPUBLIC OF MALI

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

Public

**With Confidential *ex parte* Annexes A and C [Prosecution and Defence only] and
Confidential Annex B**

**Public redacted version of “Defence reply to “Corrigendum to the “Prosecution
Response to “Defence Request to terminate the proceedings” (ICC-01/12-01/18-885-
Conf-Exp-Corr)”, 27 July 2020, ICC-01/12-01/18-982-Conf-Exp” - ICC-01/12-01/18-
982-Conf-Exp-Corr”**

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

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

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Introduction¹

1. The Prosecution's response² to the Termination Request³ ('Response') constitutes a naked adversarial rebuttal of its own evidence, which detailed systematic complaints and indicia of torture and cruel, inhuman and degrading treatment ('CIDT'), demonstrating why the constituent elements of a fair trial (which includes the right to fair investigation and prosecution) cannot be pieced together in this case. The Prosecution has requested the Trial Chamber to *first*, adopt a standard of proof incompatible with ICC case law, and peremptory rules of international law; *second*, adopt an arbitrary and unscientific approach to expert evidence, while accepting highly subjective, irrelevant, and emotive arguments, from Prosecution experts, including one with a blatant conflict of interest; and *third*, adopt a standard of complicity narrower than the modes of liability set out in Article 25, and incompatible with applicable standards of responsibility, set out in peremptory rules of international law, internationally recognized human rights law and domestic practice. But, even if these artificial and arbitrary standards were to be adopted, a stay would still be warranted, on the basis of key uncontested facts, which establish that the proceedings have been irrevocably tainted by the Prosecution's knowing use of evidence and information obtained directly from torture. As concluded by Trial Chamber I, "[c]lear examples of situations where a stay may be necessary include the material mistreatment of the accused in order to obtain evidence (e.g. by use of torture)".⁴ This is such a case where a stay is necessary to preserve the integrity of the ICC. To hold otherwise would undermine the precepts of justice, fairness, and integrity woven into the Statute.

A. The Prosecution has misstated and misapplied the burden of proof as concerns the determination of a real risk that Prosecution evidence was obtained from torture

2. The Prosecution has misstated the burden of proof for abuse of process applications, based on torture arising within the context of Article 55 interviews, and failed to consider the impact of peremptory rules of international law (as set out in Article 15 of the

¹ Pursuant to regulation 23bis(2) of the Regulations of the Court, this reply is filed confidentially, as it responds to filings of the same classification.

² ICC-01/12-01/18-982-Conf-Exp-Corr.

³ ICC-01/12-01/18-885-Conf-Exp-Corr. A stay of proceedings can be temporary or permanent. A request to terminate proceedings amounts to an unequivocal expression of the position that a permanent stay is required.

⁴ [ICC-01/04-01/06-2690-Red2](#), para. 195. See also Louise Arbour, 'In Our Name and On Our Behalf', *The International and Comparative Law Quarterly* Vol. 55, No. 3 (Jul., 2006), pp. 511-526 at 518: "abductions and incommunicado detention (...) will likely be viewed as an abuse of process, and evidence obtained by torture will be viewed (...) as "unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice"."

UNCAT) on the interpretation and application of the burden of proof to factual findings related to the existence, and non-investigation of torture. There is, in particular, a distinction between the burden of justifying the imposition of a particular remedy, as compared to the burden which might apply to the establishment of facts or circumstances underpinning the requested remedy. The Termination Request rests on the extent to which the record has been corrupted through the collection, use, and introduction of evidence tainted by torture and CIDT. It is the Prosecution which bears the burden of demonstrating that the evidence was collected in a manner consistent with the Statute (including Article 55(1)). For this reason, the case law cited by the Prosecution,⁵ concerning the admission of evidence at the confirmation hearing is inapposite, and inconsistent with Trial Chamber rulings, which have considered Article 69(7) issues, as part of their assessment as to whether the Prosecution had satisfied the standard for admission into evidence.⁶ The Response also ignores the special context of Article 55 interviews, in relation to which ICC Chambers have required the Prosecution to demonstrate that the procedural requirements were fulfilled, and provide full justifications in case of deficiencies.⁷ ICL case law also establishes that the Prosecution must exercise a particularly high standard of diligence to safeguard the interview process against issues of undue influence or improper or equivocal waiver of rights, where the witness is held in custody;⁸ failure to satisfy this threshold triggers exclusion.⁹ This includes circumstances where the defendant was interviewed by domestic authorities outside the framework of Article 55, or by third parties.¹⁰

3. Even if the ICC has no clear position as concerns the burden of proof for Article 69(7), the Chamber has a separate and overriding duty to construe the Statute in a manner

⁵ Response, para. 45.

⁶ [ICC-01/04-01/07-2635](#), paras. 55-65; [ICC-01/09-01/11-1753-Red](#).

⁷ [ICC-01/09-01/11-1753-Red](#), paras. 25-26, 29-30 (finding averments of the Prosecution's investigators were insufficient).

See *Prosecutor v. Sesay*, [Decision on the Admissibility of Certain Prior Statements of the Accused given to the Prosecution](#), paras. 42-43 ('*Sesay*'). *Prosecutor v. Bagasora*, [Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89\(c\)](#), para. 17 ('*Bagasora*'), referring to the obligation, on the part of the Prosecution, to demonstrate the voluntariness of interviews, to the standard of beyond reasonable doubt.

⁸ *Sesay*, paras. 6, 43, 46; *Bagasora*, paras. 17, 19, 63. An additional layer of caution applies in relation to detained accomplice witnesses: *Prosecutor v. Nzabonimana*, [Trial Judgment](#), para. 81.

⁹ "[A]s a matter of law, statements by an accused person in a custodial setting which are not voluntary must be excluded under Rule 95": *Sesay*, para. 38; [ICC-01/04-01/07-2635](#), paras. 63-65.

¹⁰ [ICC-01/04-01/07-2635](#), paras. 63-65; *Co-Prosecutors v. Kaing Guek Eav alias "Duch"*, [Decision on the Admissibility of Evidence in the Case File as Evidence](#), para. 19 (noting in context of statement taken by the UN without a Counsel present, that "exclusion is the usual remedy" as concerns breaches of right to silence/privilege against self-incrimination).

consistent with peremptory rules of international law. This includes the non-derogable and thus binding obligations stemming from the normative content of Article 15 of the UNCAT,¹¹ which according to the ECCC Trial Chamber, are best reflected by the following burden of proof:¹²

After the Chamber has made a preliminary determination that there is a real risk that torture was used to obtain a statement, any party seeking to rely upon such evidence may rebut this preliminary determination in particular upon a showing of specific circumstances negating this risk. The Chamber considers this allocation of burden will effectively reduce the risk that tainted evidence will be impermissibly invoked at trial.

4. In line with Article 7(3) of UNCAT, no distinction or derogation is permitted from this standard, simply because Mr. Al Hassan has been charged with allegations of torture: the legal imperative of *prosecuting* alleged acts of torture does not exempt States from complying fully with the obligation to ensure ‘fair treatment’ to the defendant.¹³ And, whereas the Prosecution has suggested that issues concerning coercion should be assessed “in due course” in light of the totality of evidence heard by the Chamber,¹⁴ on the basis of the same peremptory principles deriving from CAT, the ECCC rejected this possibility, underscoring that:¹⁵

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

5. These findings, and concerns regarding the normalization of torture are of particular importance to the current case given that [REDACTED].¹⁶ The Response does not refer to

¹¹ *Co-Prosecutors v. Khieu Samphan & Nuon Chea*, [Decision on Objections to Document Lists Full Reasons](#), para. 34.

¹² *Co-Prosecutors v. Khieu Samphan & Nuon Chea*, [Decision on Evidence Obtained Through Torture](#), para. 36 (‘Case 002’).

¹³ Article 7(3): “Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.” The commentary states: “The obligation of Article 7(3) continues through all stages of the criminal investigation up to the extradition proceedings and/or the criminal trial. During interrogation, the alleged torturer, of course, should not be subjected to any torture or [CIDT]. During custody, he or she must enjoy the right to *habeas corpus* and other minimum rights of persons deprived of liberty (...)”. See M. Nowak, M. Birk and G. Monina (eds.), [The United Nations Convention Against Torture and Its Optional Protocol: A Commentary](#) (2nd edn, OUP 2019).

¹⁴ Response, paras. 92-93.

¹⁵ [Case 002](#), para. 41.

¹⁶ [REDACTED] Annex A.

any steps the Prosecution will take to secure the safety of these persons, or otherwise protect them from risk of retaliation, and the ongoing psychological torture [REDACTED].¹⁷ There is thus no indication that the continuing effects of torture and coercion have been eliminated. The scope of the exclusion rule applies not only to the introduction of tainted evidence, but the use of tainted evidence (which extends to framing questions [REDACTED] on the basis of the content of tainted evidence).¹⁸ [REDACTED] intersects with the testimony of several other witnesses, and the Defence and the Prosecution have a clear interest in confronting [REDACTED] with contradictory information. But since it is impermissible to identify the source of information to the witness, the court record will not reflect the extent to which tainted evidence is used through the trial, and it will thus be impossible to fully identify and eliminate the taint on a retrospective basis.

B. The Prosecution's submissions concerning expert evidence are irrelevant and misplaced, and no weight should be afforded to their expert reports

6. The Response seeks to apply the standard of fitness to stand trial, to an abuse of process application, which concerns the cumulative impact of violations, which are attributable to the Court,¹⁹ and to divorce the Chamber's adjudication of the Termination Request from relevant and applicable legal and medical standards concerning the objective assessment of physical and psychological indicia of torture. Abuse of process determinations rest on an assessment of the fairness of the proceedings as a whole, and necessarily encompass an assessment of the prejudice caused by separate, and in some cases, reinforcing violations. The introduction of tainted evidence undermines the integrity and fairness of the proceedings and causes additional re-traumatisation to Mr Al Hassan. Similarly, his cognitive impairment, and inability to testify, exacerbates the prejudice stemming from the fact that the Defence cannot rely on the exculpatory aspects of tainted evidence. The Response nonetheless disregards the distinction between the circumstances of a defendant, whose cognitive functions have been impaired, in part, due to the conduct of actors who initiated the proceedings against him, as compared to a defendant whose capacities have been impaired for entirely unrelated reasons. This direct association clearly occasions a higher degree of trauma, than the situation where no such association

¹⁷ Diplomatic assurances have long been held patently inadequate as a safeguard against torture: [Arbour](#) at 521.

¹⁸ "[C]onfessions obtained contrary to the provisions of the Convention Against Torture cannot be used as evidence or for the basis for questioning. Therefore, the Chamber will remind the parties that it will permit no questions on the content of the confession nor will it use such information in its verdict": [Case 002](#), para. 21.

¹⁹ *Prosecutor v. Barayagwiza*, [Decision of 3 November 1999](#), paras. 108-109.

exists. The overarching integrity of the proceedings would be violated, if the Prosecution were able to benefit from an inequality of arms occasioned, at least in part, by their own conduct and role, in extracting evidence from Mr. Al Hassan, while he was experiencing the ongoing effects of torture.²⁰

7. The Prosecution's opposition to Dr. Cohen's reliance on the Istanbul Protocol and Mandela Rules,²¹ also fails to acknowledge that these instruments reflect internationally recognized human rights norms concerning the investigation and evaluation of torture (including in a custodial setting),²² and have thus been applied by the ICC Presidency and Chambers,²³ and the Registry.²⁴ Dr Ludes' 'analysis' of Dr Cohen's reports is thus wholly unsound, as he has replaced the objective, and specialised criteria for assessing the existence of torture, set out in the Istanbul Protocol, with arbitrary and unexplained diagnostic criteria.²⁵ Dr. Ludes' critique also pertains to the threshold applied by Dr. Cohen: apart from the fact that he misstates her findings,²⁶ given that the evidential threshold for an abuse of process application cannot rise above a balance of probabilities, it is clearly inappropriate to insist on a diagnostic conclusion of certainty, while ignoring mutually corroborating evidence from [REDACTED] (*infra*), and credible UN and NGO reports.²⁷ Such an evidential threshold would effectively exceed the requirements applied by the ICC to a beyond reasonable doubt determination.²⁸ By critiquing the lapse of time between Dr. Cohen's physical examination of Mr. Al Hassan, and the date on which the acts of mistreatment occurred, the Prosecution seeks to benefit from its own failure to conduct a full and independent medical examination of Mr. Al Hassan, when Mr. Al Hassan first conveyed allegations of mistreatment, on 13 July 2017. The Prosecution's arguments only serve to demonstrate the multiplier effect, and multi-faceted nature of the prejudice caused by the violations of Mr. Al Hassan's rights.

²⁰ [Tarasov v. Ukraine](#), paras. 98-101.

²¹ Response, paras. 150-155.

²² [A/69/387](#), paras. 23-24, confirming that Istanbul Protocol "reflects existing obligations of States under international treaty and customary international law", and further, that the principle set therein constitute the minimum standard, and apply with full force to public authorities.

²³ [ICC-02/04-01/15-1444](#), para. 28; [ICC-RoR220-01/19-2-Red](#), fn. 24.

²⁴ [ICC-01/05-01/08-1960-Red](#), fns. 34-35.

²⁵ [MLI-D28-0003-2059](#) at 2060, paras. 2, 5, 2061, paras. 6, 9, 2062, para. 14, 2063, paras. 14, 17, 2064, paras. 20, 22.

²⁶ [MLI-D28-0003-2059](#) at 2060, para. 5, 2061, paras. 6-9, 2062, paras. 10-14, 2063, paras. 14-17, 2064, para. 22.

²⁷ Termination Request, para. 24 and fns. 58-60.

²⁸ See [ICC-01/05-01/13-1989-Red](#), para. 221, where an expert finding as to the 'likely' provenance of CDRs, was found to be sufficient in light of the body of evidence as a whole.

8. The Prosecution's submissions concerning Dr. Porterfield lack any legal or medical foundation. Dr. Porterfield possesses specialized knowledge, skills and training in the assessment of trauma as concerns torture survivors. She has been appointed as an expert in a range of domestic and international cases, in relation to the same issues before the Trial Chamber (evaluating the consistency of psychological responses with accounts of torture, and assessing extent of trauma and its impact on cognitive processes).²⁹ The scope of her report is directly within her field of expertise: (impact of torture/trauma):she was not asked to assess, nor would it have been relevant for her to assess, Mr. Al Hassan's personality or relationship to the charges; if assessing arterial blockage, one does not do a leg x-ray. The Prosecution emphasised the fact that Dr. Porterfield is not a 'forensic' psychologist, but the term 'forensic' means merely that the person specializes in testifying in legal proceedings. And since forensic psychologists or psychiatrists tend to testify in relation to a range of different issues, their knowledge is necessarily less specialized, than that of a specialist, who focusses exclusively on a specific field (i.e. trauma evaluations of torture survivors). CAT has, moreover, underscored that medical professionals involved in redress procedures must have specific methodological training in the field of torture "in order to prevent re-traumatization".³⁰ Further, "many symptoms attributable to torture or other ill-treatment are not physical. In those cases, psychological assessment displaces medical evaluation as the main source of information".³¹ An in person psychological evaluation,³² conducted by a specialist in assessing psychological sequelae of torture, thus constitutes the best expert evidence.
9. In contrast, Dr. Lamothe's report is of highly dubious quality, and lacks an objective scientific foundation. Dr. Lamothe's criticism of Dr. Porterfield's reliance on the DSM in diagnosing Mr. Al Hassan with PTSD,³³ should be rejected as the DSM is suggested as a diagnostic tool by the Istanbul Protocol, and Dr. Porterfield has, in any case, confirmed

²⁹ See e.g. [El-Masri v. United States](#), IACHR, Report No. 21/16, Case Petition 419-08 (Apr., 2016); [El-Masri v. Macedonia](#) (ECtHR, 13 December 2012), para. 36; [United States v. Caesar](#), 388 F. Supp. 3d 194 (E.D.N.Y. 2019); [United States v. Ghailani](#), S10 98 Crim. 1023 (LAK) (S.D.N.Y. 2010); [United States v. Pestana](#), 865 F. Supp. 2d 357 (S.D.N.Y. 2011); [In re Williams](#), No. 77460-3-I (Wash. Ct. App. 2019).

³⁰ [CAT/C/GC/3](#), para. 35.

³¹ [A/69/387](#), para. 41.

³² In person examinations are considered to be the 'gold standard' regarding the assessment of the psychological sequelae of torture: T. Wenzel, A. Frewer and S. Mirzaei, '[The DSM 5 and the Istanbul Protocol: Diagnosis of Psychological Sequels of Torture](#)', *Torture* Vol. 25, No. 1 (Jan., 2015), pp. 51-61 at 53. See also P. Zapf, A. Beltrani and A. Reed, '[Psychological Assessment in Forensic Settings](#)' in M. Sellbom & J.A. Suhr (eds.), *The Cambridge Handbook of Clinical Assessment and Diagnosis* (CUP 2019) pp. 462-471 at 463.

³³ [REDACTED].

that her diagnosis would be the same applying ICD-11.³⁴ Furthermore, the report is inappropriately insulting to both Dr. Porterfield and Mr. Al Hassan. His language, which includes repeated references to “Madame” “Potterfield” [*sic*] (and various other misspelled versions of her name), exclamation marks, and demeaning unscientific terms,³⁵ display a subjective animus against the defendant, which is unsurprising given Dr. Lamothe’s highly subjective views concerning ICC defendants in general³⁶ and his conflict of interest arising from the fact that he [REDACTED],³⁷ and, by the Prosecution in this case for a report on the psychic trauma of Prosecution victims.³⁸ Whereas medical experts should not opine on legal issues,³⁹ Dr. Lamothe comments on Defence ‘legal strategy’,⁴⁰ in a manner which suggests an intimate knowledge of, and vested interest in the proceedings. Of crucial importance, Dr. Lamothe drafted his report on the assumption that Mr. Al Hassan was interrogated while detained at the ICC. While the Prosecution notified him of his error on 24 July 2020,⁴¹ a comparison of his two reports demonstrates that he did not give any consideration of the impact of Mr. Al Hassan’s conditions of detention in the DGSE on his psychological and physical welfare.⁴² Prosecution investigators recognised the gross disparity between detention conditions at the ICC compared to the DGSE,⁴³ and described the DGSE conditions as like “Guantanamo”⁴⁴ and ‘deplorable’.⁴⁵ Dr. Lamothe’s apparent view, that being held in such conditions was irrelevant to his conclusions, speaks volumes as concerns the credibility of his report. His conclusions on substance do not, in any case, displace the validity of Dr. Porterfield’s conclusions: he does not disagree that Mr. Al Hassan experiences PTSD or its linkage to torture: he merely disagrees that it impairs Mr. Al Hassan, an assessment that cannot be

³⁴ [MLI-D28-0003-2071](#) at 2071.

³⁵ See e.g. the use of ‘zombie’: [REDACTED].

³⁶ [REDACTED]

³⁷ [REDACTED]

³⁸ [REDACTED]

³⁹ Gary Melton et al., *Psychological Evaluations for the Courts, Fourth Edition: A Handbook for Mental Health Professionals and Lawyers* (4th edn, Guilford Publications 2017) at 45.

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² Annex B.

⁴³ [REDACTED].

⁴⁴ [REDACTED].

⁴⁵ [REDACTED].

made without an in person evaluation.⁴⁶ Indeed, Dr. Lamothe recognises the own deficiencies of his approach.⁴⁷

10. And, whereas the Prosecution have complained that transcript review conducted by Defence experts was ‘partial’,⁴⁸ this complaint should be given no weight given that:

- The Defence experts were provided the materials which the Prosecution identified as relevant to the Termination Request, in disclosure litigation,⁴⁹ and given the late disclosure of medical reports and verbatim records of the [REDACTED] sessions,⁵⁰ and the Prosecution’s awareness of Defence complaints concerning the resulting impact on the ability of the Defence experts to review all relevant materials,⁵¹ the Prosecution cannot now arbitrarily expand the definition of relevance, particularly as the Prosecution has not explained how the entire record would have affected the outcome of the experts’ analysis;⁵² and
- The Prosecution’s own experts have not cited all the material which the Defence identified as being relevant,⁵³ and, apart from the fact that as a non-Arabic speaker, Dr. Lamothe would have no ability to evaluate the intonations of Mr. Al Hassan’s language, he fails to specify the particular DGSE interview recordings that he listened to, in reaching his conclusions.⁵⁴

11. The Prosecution was also not entitled to examine Mr. Al Hassan, at this stage, in order to discharge its burden of proof, or rebut Defence evidence. In an analogous situation in *Mohammad et al*, the US Military Commission rejected a Government request to compel a defendant to undergo a mental evaluation conducted by government psychiatrists, and further affirmed that the absence of such a compulsory examination did not disqualify or

⁴⁶ M. Nesca and T. Dalby, *Forensic Interviewing in Criminal Court Matters: A Guide for Clinicians* (C.C. Thomas, 2013) 15-16: “[a]n interview with the subject of the evaluation is both necessary and important when the evaluator is expected to give an opinion regarding the mental health or other functioning of the evaluatee”.

⁴⁷ [REDACTED].

⁴⁸ Response, paras. 110, 141-149.

⁴⁹ ICC-01/12-01/18-699-Conf, para. 4.

⁵⁰ Per ICC-01/12-01/18-915-Conf, para. 21, [REDACTED]

⁵¹ ICC-01/12-01/18-T-11-Conf-ENG, p. 54.

⁵² ICC-01/12-01/18-885-Conf-Exp-Corr, paras. 9, 29-30, 73. In any event, material concerning Article 55(2) was before the experts: [REDACTED] provided to the Defence experts as [MLI-D28-0003-0843](#).

⁵³ For example, Dr. Ludes only cites to 5 detention unit medical reports concerning Mr. Al Hassan, and Dr. Lamothe merely references two in passing, without taking into account the Detention Unit’s independent diagnosis of PTSD [REDACTED].

⁵⁴ The report only references the ‘13 July 2017’ recording, and does not specify whether all sessions of this day were reviewed: [REDACTED].

undermine the weight of the defendant's own medical expertise.⁵⁵ The Statute also sets out Mr. Al Hassan's absolute and unqualified right not to cooperate with or assist the Prosecution. Given the concerns expressed by the Defence concerning re-traumatisation, it was inappropriate for the Prosecution to have insisted that Mr. Al Hassan should have subjected himself to such an evaluation, while failing to disclose that they intended to utilize a conflicted expert, who had already expressed highly subjective views concerning the defendant and the allegation in this case.⁵⁶

C. The Response reinforces the evidential foundation for terminating the case

12. The Prosecution has **expressly** conceded the following allegations:

- a. Mr. Al Hassan was interviewed by the Prosecution over the course of 19 days, while held at the DGSE,⁵⁷ and informed the Prosecution on the first day of interview, that he had been beaten and threatened with death at the DGSE and in later interviews, described and complained about his conditions and detention, specific incidents of alleged ill-treatment, an alleged beating of detainees following a protest regarding detention conditions and his toothache and headaches;⁵⁸
- b. The Prosecution promised Mr. Al Hassan if he had an injury or was ill, the Prosecution would seek to ensure that he had treatment, and if anything abnormal had happened and they were made aware of it, they would intervene and speak to the authorities, and similarly repeatedly promised Mr. Al Hassan [REDACTED] that the ICC Prosecution could inform relevant authorities [REDACTED] of any complaints [REDACTED] might have and to request that any necessary and possible measures be taken to address them;⁵⁹
- c. The Prosecution requested cooperation from the Malian authorities in relation to the logistical aspects of the Prosecution meeting with Mr. Al Hassan and conducting its own interviews, and seeking any information or material already collected from Mr. Al Hassan by the French or Malian authorities;⁶⁰ and

⁵⁵ *United States v. Mohammad et al*, Government Motion to Compel Mental Health Evaluations, 16 October 2019, AE 655D, p. 9.

⁵⁶ On 5 July, the OTP indicated that it was unable to furnish the Defence with the names of its proposed experts (Annex C), even though it had contacted Dr. Lamothe, on 20 June as concerns his availability for this expertise: [REDACTED].

⁵⁷ Response, paras. 22, 80.

⁵⁸ Response, paras. 98, 99.

⁵⁹ Response, para. 99.

⁶⁰ Response, para. 64.

- d. The Prosecution did not conduct its own independent investigations into the multiple complaints of torture that it received from [REDACTED] concerning the DGSE.⁶¹
13. The Prosecution has also **impliedly** conceded the following allegations, by not addressing them in their Response:
- a. Mr. Al Hassan was denied access to the outside world, held outside the Malian judicial system (and the awareness of the Minister of Justice), and there were no judicial proceedings against Mr. Al Hassan;⁶²
 - b. The Prosecution had the power to organise an examination for Article 55(2) suspects,⁶³ and yet failed to request such a medical examination for Mr. Al Hassan;⁶⁴
 - c. The Prosecution were in possession of reports concerning the illegal nature of detention, and incidents of death and torture, at the DGSE from November 2015;⁶⁵
 - d. [REDACTED] could be tortured at any time, felt unsafe, was living in a threatening environment and “very very difficult” living conditions before the Prosecution submitted its Article 56 application in respect of Mr. Al Hassan,⁶⁶ and there were grounds for treating [REDACTED] death at the DGSE with suspicion;⁶⁷
 - e. [REDACTED] use of hooding taken to interviews or interrogated by other authorities,⁶⁸ [REDACTED] hooded when taken to meet the Prosecution;⁶⁹ and responded with extreme gratitude and utter despair in interacting with the Prosecution;⁷⁰
 - f. [REDACTED] had water thrown on him, and one of the French guards electrocuted [REDACTED];⁷¹
 - g. [REDACTED] examinations failed to comply with the requirements of the Istanbul Protocol and effectively excluded consideration of psychological torture and trauma;⁷²

⁶¹ The Prosecution claims that its ability to investigate any allegations of torture and detention abuses was very limited and dependent on local authorities (Response, para. 155) is contradicted the [Agreement between Mali and the ICC](#) (noting that the OTP could undertake any investigative step in Mali with 48 hours’ notice), and falls foul of the position, under human rights law, that is impermissible to rely on assurances of effective protection from national authorities in the face of allegations of a risk of torture:: [Agiza v. Sweden](#), para. 3.14; [CAT/C/GC/4](#), paras. 19-20.

⁶² Termination Request, para. 29. [REDACTED] was unaware of Mr. Al Hassan’s arrest and detention on 17 June 2017, some 72 days into Mr. Al Hassan’s detention at the DGSE.

⁶³ Termination Request, para. 43.

⁶⁴ Termination Request, paras. 33, 43, 48.

⁶⁵ Termination Request, para. 29.

⁶⁶ Termination Request, para. 31.

⁶⁷ Termination Request, para. 81.

⁶⁸ Termination Request, para. 20.

⁶⁹ Termination Request, para. 30.

⁷⁰ Termination Request, para. 87.

⁷¹ Termination Request, para. 25.

- h. Mr. Al Hassan raised concerns concerning whether it was lawful for the Prosecution interview him given the conditions at the DGSE; and requested the Prosecution to intercede so that he could be transferred to a lawful detention facility;⁷³
- i. The ICC Prosecution relayed complaints concerning torture based on prolonged solitary confinement, to the authority responsible for implementing this measure, and whose response (that solitary confinement was justified), demonstrated a clear unwillingness to investigate and remedy such matters;⁷⁴
- j. [REDACTED];⁷⁵
- k. The Prosecution has relied on statements given by Mr. Al Hassan to the DGSE in filings in this case, and its investigations.⁷⁶

14. The Prosecution has made the following **positive assertions** of fact which are contradicted by the Prosecution's own evidence or unsupported by evidence:

- a. That when Mr. Al Hassan [REDACTED] indicated any issue regarding [REDACTED] treatment and detention conditions, the Prosecution reported those matters to the relevant authorities⁷⁷ when, in fact, the Prosecution stated [REDACTED] that they could not do anything to improve [REDACTED] conditions;⁷⁸ and despite the bare allegation in an investigator's note that these complaints were communicated verbally to [REDACTED],⁷⁹ the first dated instance of the Prosecution contacting [REDACTED] to pass on Mr. Al Hassan's complaints as per its own investigator's note is in an email of 1 March 2018;⁸⁰
- b. That [REDACTED]⁸¹ [REDACTED],⁸² and
- c. That the basis underpinning Mr. Al Hassan's arrest, detention, and interviews by the Malians were not related in any way to the proceedings before the Court,⁸³ when the ICC Prosecution's interviews frequently discussed matters about which Mr. Al Hassan had

⁷² Termination Request, para. 84. The Response merely rejects the Protocol's applicability at paras. 150-155.

⁷³ Termination Request, para. 45, 46.

⁷⁴ Termination Request, para. 12. [REDACTED]. See [A/69/387](#), para. 30: "in cases where prison medical staff, including doctors under prison authorities, report allegations of torture to prison officials before reporting to the judiciary, there is inadequate protection of the alleged victim".

⁷⁵ Termination Request, para. 88.

⁷⁶ Termination Request, para. 93.

⁷⁷ Response, paras. 74, 75, 155.

⁷⁸ [REDACTED].

⁷⁹ [REDACTED].

⁸⁰ [REDACTED].

⁸¹ Response, para. 65.

⁸² [REDACTED].

⁸³ ICC-01/12-01/18-982-Conf-Exp-Corr.

been questioned by the DGSE;⁸⁴ the RFAs submitted by the ICC Prosecution to Ireland and France refer to common allegations between the DGSE statements and the ICC Prosecution's interviews regarding [REDACTED];⁸⁵ and the ICC Prosecution cited the DGSE statements in the DCC filed in this matter.⁸⁶

15. The reliance by the Prosecution in the Response on the fact that some of the detainees at the DGSE were involved in Malian domestic proceedings to deny the incommunicado nature of detention at the DGSE⁸⁷ fails to appreciate that this did not occur for [REDACTED] Mr. Al Hassan and that the mere act of detainees being brought before a judge or order being made for detention is not sufficient to counter the evidence documenting the illegal nature of detention at the DGSE and incidents of death and torture which was in the Prosecution's possession⁸⁸ from the outset of their investigations.
16. The Prosecution's interpretation of its own evidence, and claim that its investigators were never aware of the specific allegations of torture made by Mr. Al Hassan is manifestly unsound, as the Prosecution:
 - i. cannot discharge its duty to independently investigate allegations of torture,⁸⁹ on the basis of an unsworn avowal,⁹⁰ particularly as concerns 'negative' facts;⁹¹
 - ii. advances an assumption that torture must leave openly visible marks, which is medically incorrect and legally unsound,⁹² and fails to address the issue of psychological torture, and the various ways in which it was manifested throughout the interview process;⁹³

⁸⁴ See e.g. the matters discussed at [REDACTED].

⁸⁵ ICC-01/12-01/18-936-Conf, paras. 9 and 10.

⁸⁶ ICC-01/12-01/18-885-Conf-Exp-Corr, para. 92; ICC-01/12-01/18-885-Conf-Exp-AnxG.

⁸⁷ Response, para. 128.

⁸⁸ Termination Request, para. 29 and fn. 68 referred to therein.

⁸⁹ [A/69/387](#), para. 24: "Articles 12 and 13 (...) expressly require prompt or immediate investigations upon receipt of complaints of torture. (...) The authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including inter alia forensic evidence. Any deficiency in the investigation that undermines its ability to establish the cause of injury or the person responsible falls foul of this standard."

⁹⁰ [ICC-01/09-01/11-1753-Red](#), para. 30; [ICC-01/05-01/13-2275-Red](#), para. 306: See also Amnesty International, [Judges and Torture](#), January 2003: "When hearing cases in which defendants claim that they were tortured during investigation, some judges refuse to consider the defendant's allegations of torture and, instead, ask the defence lawyers to 'prove' that their clients have been tortured. Some judges simply accept without further examination the statements made by police denying that torture has occurred. **These responses to serious allegations, however, do not constitute acceptable standards of justice.**"

⁹¹ [United States v. Karake](#), 443 F. Supp. 2d 8 (D.D.C. 2006): "The government attempts to deflect attention (...) by arguing that Kibingo's testimony was corroborated by U.S. investigators who claimed not to have observed any visible signs of torture during their interrogations. (6/19 p.m. tr. at 39, 62-63.) In the end, however, the government cannot prove a negative." The Court found the approach was deficient as "No U.S. investigator ever examined a defendant's body for signs of abuse other than what may have been visible to them."

⁹² [A/69/387](#), paras. 7 and 31: "judges wrongfully establish prerequisites, such as visible or recognizable marks, before ruling that evidence obtained under torture or other ill-treatment is invalid. (...) Detainees are held for

- iii. relies on the Barkhane medical report,⁹⁴ which, far from disproving his torture, gives rise to an assumption of torture at the hands of the DGSE, as it does not detail any scars or injuries prior to his transfer to the DGSE.⁹⁵
- iv. ignores its own evidence concerning the DGSE's usage of handcuffs and chains for continuous periods during the first months of detention,⁹⁶ hooding,⁹⁷ threats (similar to those described by Mr. Al Hassan),⁹⁸ the use of 'cell 4' as a torture room,⁹⁹ and examples of detainees dying from torture/thirst,¹⁰⁰ and further misconstrues [REDACTED],¹⁰¹ and its mutually corroborating nature.

17. It is also unfair and improper for the Prosecution, to advance positive submissions, on the basis of testimonial omissions [REDACTED], in circumstances where the Prosecution failed to question [REDACTED] the relevant issue. The Prosecution justified its continued reliance on the DGSE interviews by reference to the contents of its interviews [REDACTED].¹⁰² The Defence disputes this interpretation [REDACTED] evidence, but of particular importance, the Prosecution never questioned [REDACTED] the truth of the contents of the DGSE records, even though the Prosecution possessed them at the time of the interview. And, although Mr. Al Hassan had claimed at the initial appearance, to have been mistreated by Barkhane, the Prosecution never raised these issues [REDACTED]. Since the Prosecution is continuing to insist on the veracity and reliability of the DGSE records and related information, the Defence submits, in rebuttal, [REDACTED],¹⁰³ [REDACTED] Mr. Al Hassan in the CJA, which had no relationship with JNIM, and which did not [REDACTED].¹⁰⁴ [REDACTED] Mr. Al Hassan often in April, who had been in Erinterjeft preparing for a CJA meeting, and on the day of their arrest, Mr. Al

long periods in unacknowledged detention until the signs of torture have disappeared (...) As a result, even if forensic examination might identify some signs of torture or other ill-treatment, it may fail to establish the time of the abuse or its cause ... many torture methods used are becoming increasingly sophisticated and designed to be as painful as possible without leaving physical marks."

⁹³ **Mr. Al Hassan:** [REDACTED].

⁹⁴ Response paras. 16, 158.

⁹⁵ [A/69/387](#), para. 28: "There is a presumption of ill-treatment in detention if an individual's injuries were not present at the time of arrest"; See also ECHR: [Tomasi v. France](#); [Selmouni v. France](#).

⁹⁶ [REDACTED].

⁹⁷ [REDACTED].

⁹⁸ [REDACTED].

⁹⁹ [REDACTED].

¹⁰⁰ [REDACTED].

¹⁰¹ [REDACTED].

¹⁰² Response, para. 126.

¹⁰³ [REDACTED].

¹⁰⁴ [MLI-D28-0003-2049](#)-R01 at 2050.

Hassan was helping [REDACTED].¹⁰⁵ [REDACTED] (Erinterjeft base), he had water poured on his face during questioning (while handcuffed), and he was denied food and water.¹⁰⁶ When shown the Barkhane report of his interrogation, [REDACTED] was false.¹⁰⁷ [REDACTED].¹⁰⁸ The DGSE and Barkhane reports [REDACTED] are included in the Prosecution's list of evidence.¹⁰⁹

18. Whereas the Prosecution has, for the first time, sought to controvert allegations concerning the detainees being beaten by guards at the end of 2017, this disbelief is not reflected by the contemporaneous transcripts, including exchanges likening the DGSE to 'Guantanamo'.¹¹⁰ And whereas the Prosecution was obliged to investigate the beatings, [REDACTED].¹¹¹ [REDACTED] had been beaten (and had bruises) [REDACTED].¹¹² [REDACTED].¹¹³ P[REDACTED] that DGSE guards had beaten detainees with whips.¹¹⁴ The Prosecution made no further inquiries about the incidents. Given that all such inquiries corroborated the occurrence of the beating or the existence of such practices, there is no foundation to deny its existence, two and a half years later.

D. The Prosecution's conduct engages the responsibility of the ICC, as it satisfies the threshold for perpetration, collusion or complicity, under the Statute, rules of international law applying to international organisations and domestic practice

19. The Response relies heavily on a decision in *Gbagbo*, to claim that an abuse of process will only be found in three circumscribed situations,¹¹⁵ and fails to recognise the specific 'carve out', set out in decisions of the ICTY/ICTR, and *Lubanga*, establishing that where the violations are not attributable to the Prosecution, or brought about by concerted action between the Prosecution and the national authorities, the proceedings should be terminated, where instances of torture or CIDT are involved,¹¹⁶ the Response also fails to acknowledge that the *Gbagbo* decision turned on the absence of any factual or legal link between the domestic proceedings and those before the ICC,¹¹⁷ and can thus be

¹⁰⁵ [MLI-D28-0003-2049](#)-R01 at 2051.

¹⁰⁶ [MLI-D28-0003-2049](#)-R01 at 2052.

¹⁰⁷ [MLI-D28-0003-2049](#)-R01 at 2053.

¹⁰⁸ [MLI-D28-0003-2049](#)-R01 at 2055.

¹⁰⁹ [REDACTED].

¹¹⁰ [REDACTED].

¹¹¹ [REDACTED].

¹¹² [REDACTED].

¹¹³ [REDACTED].

¹¹⁴ [REDACTED].

¹¹⁵ Response, para. 55.

¹¹⁶ *Prosecutor v. Nikolić*, [Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal](#), para. 114; *Prosecutor v. Barayagwiza*, [Decision of 3 November 1999](#), para. 73; [ICC-01/04-01/06-512](#), p. 10.

¹¹⁷ [ICC-02/11-01/11-212](#), para. 97. See further [ICC-01/12-01/18-936-Conf](#), para. 24 et seq.

distinguished from the current case. But, even if this carve out is set aside, and even if the stricter standards of individual criminal responsibility were to be applied, the Prosecution's conduct would amount to a form of complicity/concerted action/collusion. Within the ICC's legal framework, a 'common plan' to commit crimes need not have a criminal objective; it is sufficient that the commission of crimes is a virtually certain outcome of the implementation of the common plan.¹¹⁸ Contributions need not be made at either the planning or execution stage of the offence, but may extend to *post facto* contributions,¹¹⁹ and can include 'omissions', including where a public official has a positive duty to take certain steps, and by failing to do so, allows for the continued commission of crimes. Within the context of Article 25(3)(c) and (d) of the Statute, the Pre-Trial Chamber found that no minimum threshold of contribution was required to trigger liability.¹²⁰ The elements of complicity are thus satisfied. There was an agreement between the Malian authorities and the ICC Prosecution to investigate the events of 2012, by obtaining evidence [REDACTED].¹²¹ The Prosecution was aware, from at least 2016, [REDACTED] severe human rights violations and forms of torture. The Prosecution nonetheless continued to rely on the assistance of the DGSE to execute this agreement, and, by failing to investigate or condemn acts of torture perpetrated by the DGSE, facilitated their ability to maintain an illegal system of detention and interrogations.

20. The same conclusion results if the situation is evaluated through the lens of organizational responsibility. Article 14 of the Draft Articles of Responsibility for International Organizations ('DARIOs') provides:¹²²

An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if: (a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that organization.

21. The commentary to the DARIOs further set out a fact scenario, as an example where responsibility could arise under Article 14, of a UN entity, working with a domestic authority, after it receives information concerning the authority's involvement in human rights abuses.¹²³ Notions of aid and assistance within the context of Article 14 are also

¹¹⁸ [ICC-01/04-01/06-3121-Red](#), para. 451.

¹¹⁹ [ICC-01/04-01/10-465-Red](#), paras. 286-287.

¹²⁰ [ICC-01/12-01/18-461-Corr-Red](#), paras. 932, 948.

¹²¹ Response, para. 10.

¹²² [ILC Draft Articles on the responsibility of international organizations](#), 2011.

¹²³ [Commentary to the ILC Draft Articles on the responsibility of international organizations](#), p. 66.

impacted by peremptory rules of international law concerning the positive duty to prevent, prohibit, and remedy the continuing effects of torture. Commentary to the DARIOs reflects that the responsibility of an international organization, for a breach of an *erga omnes* obligation, arises in similar circumstances to those applying to States.¹²⁴ The commentary as concerns State obligations explains that within the context of *erga omnes* obligations, responsibility arises from “conduct “after the fact”, which assists the responsible State in maintaining a situation in violation of international law’.¹²⁵ If the threshold for an *erga omnes* violation has been reached, it is not necessary to demonstrate that the State knew that its conduct would aid or assist the internationally wrongful acts.¹²⁶ This reflects, also, the position of CAT.¹²⁷ In line with the ICC Appeals Chamber’s findings concerning the specific linkage between *erga omnes* obligations, and the content of legal obligations arising from the Rome Statute,¹²⁸ since Article 55(1) gives effect to a broad *erga omnes* obligation to ensure that suspects are not subjected to acts of torture/CIDT/arbitrary detention during the interview processes, a failure on the part of either the Prosecution or Mali, as a State Party, to ensure that this condition has been met, violates the Statute, and engenders a related right, to obtain a full and effective remedy.

22. The contours of these obligations are further fleshed out by the positive obligation not to engage in activity which exposes a person to a risk of torture or CIDT. Although the *Soering* principle has been articulated in the specific context of expulsion or *refoulement* cases, the Court’s findings reflect an acceptance that article 3 not only prohibits States from causing inhuman or degrading treatment or punishment but also embodies an associated obligation not to put a person in a position where he will or may suffer such treatment or punishment at the hands of others:¹²⁹ the liability of the ‘extraditing Contracting State’ is incurred ‘by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment’.¹³⁰ The principle

¹²⁴ [Commentary to the ILC Draft Articles on the responsibility of international organizations](#), p. 90

¹²⁵ [Draft articles on Responsibility of States for Internationally Wrongful Acts](#), p. 115 (‘ASR’).

¹²⁶ [ASR](#), p. 115: “the concept of aid or assistance in article 16 presupposes that the State has “knowledge of the circumstances of the internationally wrongful act”. (...) it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State”.

¹²⁷ [CAT/C/GC/2](#), paras. 18-19: “Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, **the State’s indifference or inaction provides a form of encouragement and/or de facto permission.**”

¹²⁸ [ICC-02/05-01/09-397-Corr](#), para. 123.

¹²⁹ [Soering v. United Kingdom](#), paras. 82, 91 (‘Soering’).

¹³⁰ [Soering](#), para. 91.

has been applied in ECHR and ICCPR cases dealing with States' complicity with the CIA's High Value Detainee program, even if where States do not take part in the torture or CIDT and are not aware of the exact details.¹³¹ The notion of 'jurisdiction' for such purposes has also been considered to extend to the control exercised by an interviewer, over an interviewee, during custodial interrogations occurring in foreign territories.¹³² Responsibility, in such a context, is engaged by eliciting information from persons held in secret detention, since it amounts to knowingly benefitting from the situation of secret detention.¹³³ It should also be recalled that the ICC Prosecutor's obligation under Article 54(1)(c) of the Statute is to 'fully' respect the rights of the accused. The rights listed in Article 55(1) (including the right not to be subject to arbitrary arrest) suggest that this is broader than a negative obligation not to violate. The Statute makes clear that States conduct arrests, not the Prosecutor; the Prosecutor's obligation to 'fully respect' that right can only be an obligation to ensure that States with which it works respect the right. Whenever an individual becomes entitled to the rights provided for in the Statute, the Prosecutor has an obligation, within its own competence, to fully respect those rights and not to take action which will expose the individual to violations of those rights.

23. Within the framework of inter-State mutual legal assistance, complicity, and a duty to remedy, has been found to arise in circumstances where State A has knowingly relied on the assistance of State B, to conduct interviews with a person, illegally detained and/or abused by authorities from State B.¹³⁴ The case law cited by the Prosecution (*Marzook*) has been cited out of context,¹³⁵ and does not undermine this premise. The Prosecution also failed to refer to other, more analogous precedents which reached contrary conclusions based in particular on the pervasive psychological effects of secret and incommunicado detention. In particular, the SCOTUS underlined in *Bin Laden* that

¹³¹ ECHR: *Abu Zubaydah v. Lithuania*, para. 642; *El-Masri v. Macedonia*; *Al Nashiri v. Poland*; *Husayn v. Poland*; HRC: *Alzery v. Sweden*, para. 116.

¹³² *A/70/303*, para. 34; *CAT/C/GC/2*, para. 16.

¹³³ *A/HRC/13/42 (2010)*, para. 159.

¹³⁴ *A/70/303*, para 20: "complicity itself can be extraterritorial, as in cases where the individual suffering a violation is located in a territory outside the complicit State's control and under the control of the principal. Examples include the alleged collusion, connivance, presence or participation of Canadian and British intelligence services in the interrogation and mistreatment abroad..."

¹³⁵ *United States v. Marzook*, 435 F. Supp. 2d 708, 8 June 2006 ('*Marzook*') (cited in Response, fn. 185), predates *Karake (infra)*, and turns not only on the interactions during the interviews, but findings (based on sworn testimony, and evidence) concerning the absence of any established mistreatment in the detention facility.

further care must be taken when investigating extraterritorially.¹³⁶ Applying these principles, in *Karake*,¹³⁷ although the defendants had been physically arrested and detained by Rwanda, and the US authorities had not been involved in violations perpetrated by Rwandan officials against the detainees, the Court excluded confessions collected abroad (which led to the dismissal of charges) because: although the US interviewing officers were aware that the detainees were held incommunicado, and that Rwandan officials had interrogated the detainees, they made only cursory inquiries as concerns their conditions of confinement, did not inspect these conditions, did not conduct proper physical examinations, and were not in contact with the defendants between interviews; the US interviewing officers relied upon Rwandan officials to transport the detainees to and from the interviews, and some of the Rwandan officials were present during some of the interviews; and although the conditions of detention improved in the lead up to the interviews, there was “no corresponding change in defendants' circumstances that would cure the coercive nature of their confinement”.¹³⁸ This decision reflected a well-established line of precedent that: incommunicado detention constitutes an inherently coercive circumstance;¹³⁹ and the coercive effect of custody increases over time, and will give rise to a presumption of coercion, if the suspect is unable to establish any form of control or normalcy over his or her circumstances.¹⁴⁰

¹³⁶ *United States v. Laden*, 132 F. Supp. 2d 168 (S.D.N.Y. 2001): “a custodial interrogation held [extraterritorially] will present greater threats of compulsion (...) the laws of the host nation might permit lengthy incommunicado detention subsequent to arrest, thereby leaving the accused isolated and without assistance for a duration not seen today in America. Substandard detention conditions could further contribute to the toll. Worst yet, local authorities may privately engage in aggressive practices (...) As such, by the time U.S. agents are finally on hand to ask questions of their own, strong countervailing forces will already have run head first into the free will of the accused.”

¹³⁷ *United States v. Karake*, 443 F. Supp. 2d 8 (D.D.C. 2006)

¹³⁸ *Karake*, para. 140: “The critical question with respect to attenuation is not the length of time between a previously coerced confession and the present confession, it is the length of time between the removal of the coercive circumstances and the present confession. (...) Where, as here, the coercion was a product of both discrete beatings, as well as the general conditions of confinement, it is impossible for the Court to conclude that there was any meaningful relief from those conditions prior to the interrogations by American investigators.”

¹³⁹ Psychological torture, as well as conditions of confinement have consistently been considered by courts in their assessment of the voluntariness of the statements: *Brooks v. Florida*, 389 U.S. 413, 414-15 (1967); *Stidham v. Swanson*, 506 F.2d 478 (8th Cir. 1974); *Arnett v. Lewis*, 870 F. Supp. 1514, 1523-25, 1540 (D. Ariz. 1994); *Townsend v. Henderson*, 405 F.2d 324, 326 (6th Cir. 1968); *Wainwright v. LaSalle*, 414 F.2d 1235, 1237-39 (5th Cir. 1969). See *Miranda*, 384 U.S. at 476.

¹⁴⁰ See *Maryland v. Shatzer*, 559 U.S. 98, 105 (2010) referring to the “mounting coercive pressures” of continued police custody and *Michigan v. Moseley*, 423 U.S. 96, 104 (1975).

24. In *R v. Thomas*,¹⁴¹ when overturning a conviction obtained through use and admissions of statements taken while the defendant was held in incommunicado detention in Pakistan, the Victorian Court of Appeal placed particular weight on the fact that the suspect been brought to the interviews hooded and shackled (with these restraints removed during the interviews themselves); and the absence of any persuasive explanation as to why the Government had not taken steps to conduct such interviews after the suspect had been transferred to a facility where the Government could assure itself that the suspect's rights would be fully respected. And, whereas the Response focuses on the satisfaction, expressed [REDACTED], as concerns the conditions within the ICC interviews,¹⁴² both *Karake* and *Thomas* confirm that good conditions within the interviews are not sufficient to eliminate or cure the ongoing effects of coercion (and psychological effects of incommunicado detention). The disparity in treatment afforded during the interview compared to the general circumstances of detention can, in itself, overbear the interviewee's free will, particularly if they view the interviewer as a potential means to improve or escape their conditions of detention.¹⁴³
25. The Canadian Supreme Court affirmed in *R v. Cooke* that due process rights could have extra-territorial effect *vis-à-vis* interrogations conducted abroad, where there was a real and substantial link between the acts in question, and Canada,¹⁴⁴ which would be satisfied "simply by virtue of the fact that Canadian officials are involved." In *R v. Khadr*, the Court further noted that "[t]he right to challenge the legality of detention by habeas corpus is a fundamental right", and as such, "participation in the Guantanamo Bay process which violates these international instruments would be contrary to Canada's binding international obligation".¹⁴⁵ The same considerations apply to the Prosecution's participation in a detention situation contrary to fundamental rights of *habeas corpus* and protection against torture. The Prosecution had the power and the duty to firstly, request Mr. Al Hassan's transfer to a detention facility, that would allow full compliance with his Statutory rights; and secondly, refrain from conducting the interviews until such cooperation was implemented. Its failure to do so, gave rise to shocking violations of Mr. Al Hassan's rights, and warrants the termination of the case.

¹⁴¹ [R v Thomas](#) [2006] VSCA 165.

¹⁴² Response, paras. 76-93.

¹⁴³ [R v Thomas](#), [2006] VSCA 165, at paras. 73-78.

¹⁴⁴ [R. v. Cook](#), [1998] 2 S.C.R. 597.

¹⁴⁵ [R v. Khadr](#), [2008] 2 S.C.R. para. 25.



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At The Hague, The Netherlands