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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

**Public redacted version of ‘*Corrigendum to “Defence request for leave to appeal
‘Decision on requests related to the submission into evidence of Mr Al Hassan’s
statements”*’**

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

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Introduction

1. The Defence for Mr Al Hassan hereby seeks leave to appeal the Trial Chamber's 'Decision on requests related to the submission into evidence of Mr Al Hassan's statements' ('the Decision').¹ The admissibility of material emanating from ICC interviews conducted within the context of arbitrary detention and torture/CIDT strikes at the heart of the Chamber's ability to try Mr Al Hassan fairly and impartially, as well as the integrity of the ICC. Allegations of torture must always be independently investigated and fairly heard. Convenience and considerations of *realpolitik* have no place in such an investigation or adjudication. A trial that is tainted by torture can never be fair and a judicial institution that accepts evidence obtained by or through torture cannot render credible or effective justice.
2. The Defence has identified three groups of issues arising from the Decision: the first concerns the approach adopted by the Chamber towards the submission and evaluation of evidence; the second relates to the manner in which the Chamber interpreted and applied the constituent elements of Article 69(7); and the third pertains to the Chamber's partial application of the admissibility criteria set out in Article 69(4).² The manner in which the Chamber decided these issues led to its ultimate determination that the ICC may admit into evidence material emanating from interviews of an arbitrarily detained individual being additionally subjected to physical and psychological torture. This starkly contravenes the spirit, letter and goals of the international human rights norms that bind and govern the Chamber's adjudication of Article 69(7) applications. To continue the trial without seeking immediate appellate intervention as concerns the correctness of the legal, procedural and evidential bases for the Decision risks occasioning a grave miscarriage of justice.

Submissions

1.1 The issue arises as to whether the Chamber erred in law in finding that the burden for demonstrating that the Article 69(7) criteria are fulfilled falls on the Defence

¹ ICC-01/12-01/18-1475-Conf ('[Decision](#)'). Pursuant to Regulation 23bis(2) of the Regulations of Court, this request is filed confidentially in accordance with the classification of the Decision.

² The 6 issues are: **(1.1)** whether the Chamber erred in law in finding that the burden for demonstrating that the Article 69(7) criteria are fulfilled falls on the Defence; **(1.2)** whether the Chamber abused its discretion by deciding not to convene a *voir dire* hearing; **(2.1)** whether the Chamber erred in law and abused its discretion by relying on irrelevant considerations and failing to rely on relevant considerations as concerns the causal nexus between violations and the means used to collect evidence; **(2.2)** whether the Chamber's conclusion that the causal nexus was not satisfied was legally incorrect and manifestly unreasonable; **(2.3)** whether the Chamber erred in law and misappreciated the facts set out in the evidential record through its conclusion that the Prosecution took sufficient steps to ensure the reliability of the evidence collected while Mr Al Hassan was detained at the DGSE; and **(3.1)** whether the Chamber erred in law by failing to issue a reasoned assessment concerning the prejudicial impact of the admission of such statements as part of its Article 69(4) assessment.

3. There are two interrelated errors arising from this issue: first, the general burden that applies to Article 69(7) applications and, second, the manner in which the Chamber construed the legal and evidential requirements of the ‘real risk of torture’ test.
4. As concerns the first aspect, the Chamber found the burden of demonstrating that the criteria for the admission of evidence through Article 69(4) falls on the tendering party.³ If the non-tendering party raises issues as concerns these criteria, the burden still rests with the tendering party to demonstrate that such issues do not undermine the standard for admission.⁴ Nonetheless, while the Chamber acknowledged that Article 69(7) is the *lex specialis* of Article 69(4),⁵ the Chamber found that it was consistent with both previous ICC case law and the object and intent of Article 69(7) to impose the burden in this case on the Defence.⁶ The Chamber’s determination on this point is lifted straight from the Prosecution response: the Chamber did not engage with Defence analysis and arguments as concerns these decisions or contrary precedents from both the ICC and other international criminal courts.⁷ The Chamber also did not explain why it is logical to impose the burden of demonstrating reliability on the Prosecution for the purposes of Article 69(4), but on the Defence for the purposes of Article 69(7). Nor did the Chamber address the specific strand of international criminal jurisprudence concerning the burden of proof and evidentiary standard that applies in relation to confessions and detainees.⁸ The admission of confessions directly impacts the presumption of innocence⁹ and thus brings into play

³ [Decision](#), para. 36.

⁴ [Decision](#), para. 36.

⁵ [Decision](#), para. 30.

⁶ [Decision](#), para. 37.

⁷ ICC-01/12-01/18-1346-Conf (‘[Application](#)’), para. 2.

⁸ Notably, whereas Rule 92 of the ICTY/ICTR/SCSL RPR suggests that the burden would fall on the defendant to prove that a confession was not obtained in a voluntary manner, the case law has consistently held that the burden falls on the Prosecution to demonstrate that the waiver of the right to silence was informed and unequivocal, to the standard of beyond reasonable doubt. See [Delalic](#), para. 42: “The burden of proof of voluntariness or absence of oppressive conduct in obtaining a statement is on the Prosecution. Since these are essential elements of proof fundamental to the admissibility of a statement, the Trial Chamber is of the opinion that the nature of the issue demands for admissibility the most exacting standard consistent with the allegation. Thus, the Prosecution claiming voluntariness on the part of the Accused/suspect, or absence of oppressive conduct, is required to prove it convincingly and beyond reasonable doubt. We agree with the Defence that this is the required standard”; [Bagosora](#), paras 17-18; [Sesay](#), para. 15.

⁹ See decision of the Constitutional Court of South Africa in [Zuma v. State](#), CCT/5/94, 23 February 1995, where, after considering different approaches under criminal and constitutional law in a range of different countries (including Canada), Kentridge AJ (on behalf of the Court) concluded at para. 33: “The conclusion which I reach, as a result of this survey, is that the common law rule in regard to the burden of proving that a confession was voluntary has been not a fortuitous but an integral and essential part of the right to remain silent after arrest, the right not to be compelled to make a confession, and the right not to be a compellable witness against oneself. These rights, in turn, are the necessary reinforcement of Viscount Sankey’s “golden thread” - that it is for the

Article 67(1)(i): Mr Al Hassan’s right “[n]ot to have imposed on him (...) any reversal of the burden of proof or any onus of rebuttal”.¹⁰ These are critical issues that warranted full and reasoned consideration by the Chamber.

5. Regarding the second aspect, the Defence argued that the real risk test specifies that once it has been established that there is a real risk that an individual is a victim of torture or CIDT, the burden then shifts to the Prosecution (respondent) to first, conduct an independent and effective investigation into the circumstances of torture/CIDT and second, refrain from relying on evidence from the individual unless the Prosecution can demonstrate, after an independent and effective investigation, that the evidence was not obtained through means involving torture/CIDT.¹¹ As a matter of evidence, this first element can be established through medical reports or credible NGO reports concerning the existence of torture/CIDT in facilities where the applicant was held. Given the particularities of torture occurring in State controlled facilities, imposing a further or higher standard of proof would extinguish the right to an effective remedy.¹²
6. The Chamber’s resolution of this matter was once again lifted straight from the Prosecution Response, without consideration of the issues or actual text of the case law relied upon.¹³ The Decision thus echoed the Prosecution’s claim that as a matter of law, the Defence must establish the entirety of the *chapeau* requirement (“a real risk that the evidence in question was obtained by means of torture or CIDT”) in addition to the subsequent elements.¹⁴ This raises the issue as to whether the Chamber erred in law by adding two elements to the burden on the Defence, while at the same time ignoring the obligation to ensure that an effective and independent investigation be conducted and the inferences of fact that should be drawn in the absence of such an investigation.

prosecution to prove the guilt of the accused beyond reasonable doubt (Woolmington’s case, *supra*). Reverse the burden of proof and all these rights are seriously compromised and undermined.”

¹⁰ See also [ICC-01/04-02/06-2666-Red](#), para. 12: “The burden of proof is on the Prosecutor and any suggestion that the accused would have to present more convincing evidence than the Prosecutor, or indeed any evidence at all, to prove their innocence would represent an impermissible reversal of that burden”;

¹¹ [Application](#), paras 3-4; ICC-01/12-01/18-1411-Conf-Exp (‘[Reply](#)’), para.3.

¹² The Special Rapporteur on Torture has further cautioned that in the particular case of allegations of torture or CIDT, a narrow definition of the nexus requirement would extinguish the effectiveness of the rule; it is, therefore “necessary to have due regard for the special difficulties in proving allegations of torture, which is often practised in secret by experienced interrogators who are skilled at ensuring that no visible signs are left on the victim. In addition, all too frequently those who are charged with ensuring that torture or other ill-treatment does not occur are complicit in its concealment”: [A/HRC/25/60](#), para. 31.

¹³ [Decision](#), para. 38.

¹⁴ [Decision](#), para. 38.

7. While endorsing the ‘real risk’ evidential threshold, the Chamber provided no guidance as to what this threshold entails as a matter of evidentiary proof. In contrast to the free and relaxed standard that has governed the submission of evidence at trial, the Chamber applied an extremely exacting standard to Defence evidence: disregarding all UN and NGO reports concerning the legality and conditions of detention at the DGSE;¹⁵ ignoring evidence from [REDACTED] Defence witnesses that corroborated the inferences drawn by the Defence from the record of transcripts and the existence of human rights violation occurring in direct temporal proximity to ICC Prosecution interviews;¹⁶ derisively labelling Defence medical experts as ‘consultants’ (even though they were on the ICC list of experts and there had been no *voir dire* hearing to determine challenges to their expertise);¹⁷ giving no weight to expert findings (which were corroborated by the Panel of Experts (‘PoE’) appointed by the Chamber) concerning forensic indicia of torture and Mr Al Hassan’s physical and psychological capacity to be interviewed while held at the DGSE;¹⁸ and designating information provided from Mr Al Hassan to independent experts appointed by the Chamber as inadmissible and categorically refusing to rely on the PoE’s assessment of such information.¹⁹ The Chamber’s conclusion that it cannot rely on expert evidence to establish or draw inferences as concerns Mr Al Hassan’s subjective state of mind – for the purpose of resolving an evidentiary application – is completely out of step with ICC case law regarding the standard of proof for a conviction.²⁰ The PoE appointed by the Chamber found first, that Mr Al Hassan’s accounts of torture and his related state of mind were credible and consistent, and second, that it would be extremely deleterious to Mr Al Hassan’s mental well-being to subject Mr Al Hassan to cross-examination by the very entity he considers to be complicit in his torture.²¹ In light of these findings, the Chamber’s suggestion that it was necessary for Mr Al Hassan to waive his Statutory right to silence

¹⁵ [Application](#), para. 14.

¹⁶ [Application](#), para. 12 (including as concerns conditions of detention, prolonged shackling, blindfolding/hooding, physical beatings and threats); Reply, para. 6.

¹⁷ The Defence notes with concern the facial discrimination of the language used to refer to Dr. Juliet Cohen, Dr. Kate Porterfield, and Dr. Sondra Crosby (‘Consultants’) as compared to that used for their Prosecution counterparts (“Prosecution witnesses Dr [REDACTED] and Dr [REDACTED]”): [Decision](#), para. 15.

¹⁸ [Decision](#), para. 48.

¹⁹ [Decision](#), para. 70.

²⁰ In *Ongwen*, the Trial Chamber accepted psychological and psychiatric evidence in support of its assessment of the defence of duress (a defence that necessarily concerns the defendant’s state of mind) even though several experts did not interview Mr Ongwen and Mr Ongwen did not testify: [Trial Judgment](#), paras 2454, 2456, 2469.

²¹ ICC-01/12-01/18-1197-Conf-Anx, fn. 2 and paras 281-283, 292 and 311.

and undergo cross-examination in order to obtain an effective protection as concerns his right to silence²² is illogical, legally unsound and manifestly unreasonable.

8. Finally, the Chamber failed to address or provide a reasoned opinion as concerns the implications for the burden and standard of proof arising from the absence of a timely, independent and effective investigation into the allegations of torture, which Mr Al Hassan brought to the Prosecution's attention on the very first day of interviews. The Defence does not have contemporaneous evidence as concerns Mr Al Hassan's state of mind and physical condition at the time of the interviews because he was held incommunicado with no access to medical care and the Prosecution failed to arrange a contemporaneous examination. Internationally recognised human rights law stipulates in such circumstances that the Prosecuting authorities cannot assert that the defendant was free from the effects of torture if they failed to conduct such an investigation or obtain independent medical evidence to this effect.²³
9. The Chamber's legal approach to the burden of proof affected the manner in which it resolved the Application and the ultimate outcome. For example, the Chamber resolved certain points on the basis that it was not "convinced" by the Defence interpretation of the evidence,²⁴ or characterised inferential arguments concerning the intrusion of DGSE guards (who were involved in torturing Mr Al Hassan) as "highly speculative".²⁵ In contrast, the Chamber accepted *en masse* the Prosecution's interpretation and account of events, even though [REDACTED] refused to be interviewed or examined by the Defence,²⁶ the Prosecution refused to disclose the underlying evidence and correspondence concerning its interactions with,²⁷ and the Prosecution's account was incoherent and inconsistent with the record of the transcripts of interviews with Mr Al Hassan [REDACTED].

1.2 The issue arises as to whether the Chamber abused its discretion by deciding not to convene a voir dire hearing

10. The Chamber recognised that it fell within its discretion to convene a *voir dire* hearing but declined to do so on the grounds that it had sufficient written evidence before it to

²² [Decision](#), para. 9.

²³ [Rasim Bairamov v Kazakhstan](#), paras 8.2-8.3; [Oleg Evloev v Kazakhstan](#), No 441/2010, para. 9.5.

²⁴ [Decision](#), para. 63,

²⁵ [Decision](#), para. 51.

²⁶ [Reply](#), para. 7.

²⁷ [Application](#), para. 20.

resolve the application.²⁸ Discretionary decisions must be exercised in a manner that is consistent with the Chamber's obligation to ensure the overall fairness of the trial. This includes the Defence's right to have an effective opportunity to challenge the submission of evidence, which is of critical importance in the context of challenges concerning the exclusion of evidence purportedly derived from torture or CIDT. In line with internationally recognised human rights law, the Chamber was obliged to exercise its discretion in a manner that was consistent with Mr Al Hassan's right to an independent and effective investigation into his claims.²⁹ This includes the Defence's right to examine [REDACTED] as concerns the circumstances of the interview and to put forward witnesses of law and fact as the conditions of detention at the DGSE at the time of the interview and the impact on the physical and psychological health of the detainees. Indeed, there is a logical dissonance between the Chamber's suggestion that the Defence could and should have placed Mr Al Hassan on the stand to testify to such matters, while refusing to afford the Defence the option to adduce other witnesses [REDACTED].³⁰ The prejudice accruing from the absence of a *voir dire* hearing was heightened by the contrast between the Chamber's preliminary emphasis on the lower standard of proof that applies to evidentiary applications,³¹ as compared to the actual standard of proof applied to the Defence. In short, there is an appearance that the Chamber effectively lifted the bar as concerns the standard of proof and, at the same time, deprived the Defence of an effective opportunity to clear this bar.

2.1 The issue arises as to whether the Chamber erred in law and abused its discretion by relying on irrelevant considerations and failing to rely on relevant considerations as concerns the causal nexus between the violations of the defendant's rights and the means used to collect evidence

11. The Chamber concluded that its analysis of nexus between alleged violations and the means used by the Prosecution to collect evidence could:³²

include consideration of the general context in which the evidence was gathered and interaction with, or influence of other authorities, but only insofar as those factors are relevant to the gathering of the specific evidence in this case by the ICC Prosecution. This construction of Article 69(7) is consistent with its plain language and with the practical realities which

²⁸ [Decision](#), para. 18.

²⁹ [Bokhonko v. Georgia](#), paras 92-93, 98.

³⁰ [REDACTED]

³¹ ICC-01/12-01/18-1304-Conf, para. 29: "the material which is the subject of the Related Evidentiary Requests constitutes supporting material in relation to a procedural motion, which does not need to meet the same admissibility criteria as evidence upon which the Chamber may base its trial judgment".

³² [Decision](#), para. 42.

surround evidence gathering with respect to alleged atrocity crime in the different situations within the jurisdiction of the Court. ICC investigators are dependent on the cooperation of States to conduct investigative activities and their control with respect to the overall conditions and circumstances in which those activities are carried out will be limited.

12. This factor was central to the Chamber’s ultimate conclusion that “that the exclusionary rule, especially to the extent that it is intended to discipline or deter irregular or unlawful conduct by authorities, must be construed narrowly with focus on the circumstances pertaining to gathering of the specific evidence.”³³
13. This factor was an extraneous and arbitrary consideration, with far-reaching consequences as concerns the effective and impartial implementation of fair trial rights at the ICC. Judicial reliance on the “practical realities” *in situ* means that the protections concerning certain rights can be heightened or diminished depending on the conditions that exist in particular States. This is not consistent with the text of Article 55(1)(b) and (d) and Article 54(1)(c), which impose clear and mandatory obligations on the Prosecution to fully respect the rights of suspects, irrespective of such “practical realities”. Nor is it consistent with Articles 67(1) and 21(3) of the Statute, which prevent the Chamber from applying a different or discriminatory level of protection to different suspects interviewed by the Prosecution. Importing an additional layer of consideration over the existing text would frustrate the careful compromise that led to the current text and the clear understanding that the protection of core due process rights should take precedence over such considerations.
14. This approach also fell afoul of the obligation to construe Article 69(7) in a manner consistent with the text of the Statute as a whole and the overarching objectives of the Court. The Chamber’s focus on State cooperation and the need to collect evidence from persons detained in States that potentially engage in egregious practices is simply a more elaborate construction of the notion that “the ends justifies the means”. This flies in the face of the cardinal principle underpinning CAT (as reflected in internationally recognised human rights law) that the ends never justify the means when considering reliance on information tainted by torture. It is also contrary to Trial Chamber I’s finding that:³⁴

the public interest in their prosecution and punishment cannot influence a decision on admissibility under this statutory provision. Indeed, there is no basis within the Rome Statute framework general for an approach that would allow the seriousness of the alleged crimes to inform decisions as to the admissibility of evidence.

³³ [Decision](#), para. 43.

³⁴ [ICC-01/04-01/06-1981](#), para. 44.

15. The Chamber's finding that the exclusionary rule "must be construed narrowly" also failed to provide any room for variance depending on the specific nature or gravity of the violation. Although any violation of the Statute or human rights law can trigger the *chapeau* threshold of Article 69(7), both internationally recognised human rights law and commentary on the Rome Statute suggest that a more attenuated or indirect link will suffice for violations arising from torture or CIDT.³⁵ The Chamber had itself affirmed earlier in the decision that the degree of substantiation required "this will depend on the nature of the violation or breach alleged in each particular instance".³⁶ Nonetheless, while this finding implies that the nature of the violation should also affect the threshold for establishing a causal nexus between the violation and the collection of evidence, there is no indication that the Chamber adjusted its "narrow" nexus accordingly. Accordingly, to the extent that the Decision fails to calibrate the nexus to the specific type of violations that have been alleged, the issue arises as to whether the Chamber's legal test as concerns the causal nexus failed to take into consideration relevant factors pertaining to the nature of the violation/s alleged.

2.2 The issue arises to whether the Chamber's conclusion that the causal nexus was not satisfied was legally incorrect and manifestly unreasonable

16. It is not enough for the Chamber to correctly state the law; the Chamber must also correctly apply this legal standard to its assessment of evidence. Failure to do so constitutes a legal error,³⁷ particularly if the Decision is deficient as concerns the reasoning underpinning the manner in which the Chamber applied the law to the factual arguments before it.³⁸

17. In the preliminary part of the Decision, the Chamber found that "the first determination for the Chamber is whether it has been shown that the evidence in question was gathered, or its gathering was facilitated by, such a breach or violation".³⁹ This test imposed a clear requirement for the Chamber to consider whether the Prosecution's ability to obtain

³⁵ [Application](#), para. 3; Piragoff, 'Article 69', in Otto Triffterer (ed) [Commentary on the Rome Statute of the International Criminal Court](#) (2nd ed), p.1331: "This degree could vary depending on the right or procedure violated (e.g. the collection of evidence in the context of a violation of the right to counsel could require less of a causal link than collection in the context of an illegal search and seizure)".

³⁶ [Decision](#), para. 37.

³⁷ *Prosecutor v. Boškoski and Tarčulovski*, [Appeals Judgement](#), para. 11, referring to inter alia *Prosecutor v. Milošević*, [Appeals Judgement](#), para. 14; *Prosecutor v. Mrkšić and Šljivančanin*, [Appeals Judgement](#), para. 12.

³⁸ [Zhang v Ukraine](#), para. 61; [ICC-01/05-01/08-3636-Red](#), paras 172-175.

³⁹ [Decision](#), para. 41.

evidence was facilitated by violations of Mr Al Hassan's rights. The Chamber nonetheless failed to do so.

18. It is not contested that the Prosecution requested the Malian authorities (the DGSE) to secure Mr Al Hassan's presence for the interviews.⁴⁰ The Prosecution also did not contest Defence submissions that Mr Al Hassan was the victim of prolonged arbitrary detention.⁴¹ The means used to secure Mr Al Hassan's presence during the interviews thus violated his protection against an arbitrary and illegal deprivation of his liberty; conversely, his arbitrary and illegal deprivation of liberty facilitated the Prosecution's ability to collect the statements. The fact that the interviews occurred in a different physical location is irrelevant as concerns the ongoing existence of this violation since the constituent elements of arbitrary detention do not depend on the detainee's location,⁴² but whether the detainee has either been brought before a judge or released. The Decision is nonetheless completely silent as concerns this "facilitation" or the arbitrary nature of Mr Al Hassan's detention.
19. It would appear that the Chamber ignored or gave no weight to the role of arbitrary DGSE detention in facilitating the interview process because of its stance that it was necessary to focus its inquiry on the investigative activities of the Prosecution, thus excluding factors and violations that did not overtly manifest themselves during the four corners of the actual interview process.⁴³
20. This approach to the gathering or facilitation of the gathering of evidence is incongruous with existing ICC case law concerning the *chapeau* requirement of Article 69(7). For example, the interaction between the actions of the Prosecution and the violations committed by national authorities in this case is directly analogous to the circumstances in

⁴⁰ ICC-01/12-01/18-328-Conf-Red4, paras 5, 6, 25.

⁴¹ The Prosecution only contested that he was held incommunicado or that it could be characterised as an enforced disappearance. Although the Chamber claimed that "the Defence does not submit in this case that the Prosecution was the perpetrator of the alleged acts of torture or CIDT" ([Decision](#), para. 40), this claim cites to Prosecution rather than Defence submissions.

⁴² [Guzzardi v. Italy](#), paras 90-95. See also UK reports: Intelligence and Security Committee of Parliament 'Detainee Mistreatment and Rendition: 2001–2010', p. 117 (interviewing in separate location not an acceptable solution); The fact that the Prosecution did not conduct the interviews in the DGSE and did not access it during the interview process also meant that they had no means to independently investigate, monitor and ensure his conditions of detention and protection from retaliation: see [United States v. Karake](#), 443 F. Supp. 2d 8 (D.D.C. 2006) paras 119-120, 140, where the Court emphasised that conducting interviews off-site heightens the risk and vulnerability of the interviewee, as the interviews have no means to inspect detention conditions overnight or between interviews periods: attenuation required a more complete removal from the coercive detention environment.

⁴³ [Decision](#), para. 42.

the Bemba *et al.* case, where there was a split between the identity of the entity collecting the evidence and the entity responsible for the violation. In that case, the Appeals Chamber found that the causal nexus requirement was met because the Prosecution requested the national authorities to provide it access to evidence and the means used by the national authorities to fulfil this request entailed an alleged violation of the right to privacy.⁴⁴ The Appeals Chamber further found that the Trial Chamber had erred by failing to take into account Austria's violation of domestic law, insofar as this violation was relevant to the question as to whether the evidence was obtained through means involving a violation of human rights.⁴⁵ Notably, the Appeals Chamber did not base its determination as to nexus on the sufficiency of the steps or safeguards taken by the Prosecution. The Prosecution's belief that the collection of evidence was lawful under Austrian law was also irrelevant since the question before the Chamber was whether there had been an objective violation of human rights law – not whether the Austrian authorities or the Prosecution had acted in conformity with Austrian law.

21. Similarly, in the *Lubanga* case, Trial Chamber I found that the causal nexus was fulfilled in circumstances in which the Congolese authorities provided the Prosecution with access to evidence collected during an illegal search and seizure.⁴⁶ This is also directly analogous to the current case in that the Malian authorities provided the Prosecution with access to evidence that had been obtained through an illegal apprehension and detention – that is, the Malian authorities provided the Prosecution with the 'unique opportunity' to interview and obtain evidence from Mr Al Hassan by virtue of his detention at the DGSE.⁴⁷
22. If the Trial Chamber had correctly applied the approach set out in these cases, it would have found that the methods used to facilitate the gathering of Mr Al Hassan's statements violated several core human rights protections concerning Mr Al Hassan's right not to be held in such an environment.

⁴⁴ [ICC-01/05-01/13-2275-Red](#), paras 332-333. Trial Chamber VII had also found that the nexus was met because "the Prosecution was involved in the process that lead to the illegally obtained material, inasmuch as it triggered, via requests for assistance to the Austrian authorities, the process of requesting the judicial orders": [ICC-01/05-01/13-1948](#), para. 36.

⁴⁵ [ICC-01/05-01/13-2275-Red](#), para. 332.

⁴⁶ ICC-01/04-01/06-1981, para. 38 (finding that the evidence was collected through means which violated the individual's right to privacy). The fact that the Prosecution was present, but did not have the means to control the means by which the search was conducted (para. 46) did not affect this *chapeau* element.

⁴⁷ ICC-01/12-45-Conf-Exp-Red2, paras 6, 17, and 18: 'P-0398's detention in Bamako presents a unique investigative opportunity, as the Prosecution was not in a position to [REDACTED] before and it is likely that it will lose the opportunity to contact him once again if he was released'.

23. The fact that certain critical elements of the process are outside the control of the interviewing party does not lessen this obligation. ICL jurisprudence underscores that the separation in responsibility between national and international authorities cannot operate to the detriment of a defendant's right to an effective remedy.⁴⁸ Human rights law also prohibits Faustian bargains whereby the interviewing party turns a blind eye to abuse or arbitrary detention in exchange for unique access to evidence.⁴⁹ This is because in the case of torture, a blind eye from a prosecuting authority is no different than a wink or nod of encouragement. For this reason, even if the interviewing party cannot stop or prevent acts of torture/CIDT, they have an obligation to investigate and/or condemn such practices.⁵⁰
24. For this reason, the Prosecution's ongoing reliance on the DGSE to secure Mr Al Hassan's presence at interviews constituted a separate violation of Mr Al Hassan's rights under UNCAT, particularly since the Prosecution knew that he was brought to the interview while hooded (a form of torture/CIDT),⁵¹ and that each night, he was refouled to "deplorable" conditions.⁵² This violation has and continues to have profound implications as concerns the integrity of the proceedings before this Court.
25. Even on the basis of a more blinkered approach (that is, focusing exclusively on the interviews themselves), the *chapeau* element was fulfilled on the basis of the uncontested facts. The Chamber acknowledged that it should take into account extrinsic violations "relevant to the gathering of the specific evidence in this case by the ICC Prosecution".⁵³ Throughout the Decision, the Chamber referenced various transcript segments that demonstrated that these extrinsic violations produced an impact on the evidence gathering sessions conducted by the Prosecution: Mr Al Hassan referred to depression, mental incapacity, fear of retaliation and death, physical pain, tremors and fever.⁵⁴ Even if the Chamber disagreed that the impact was sufficient to invalidate the voluntary and reliable nature of the interviews, it was still obliged in law to find that the *chapeau* element had been satisfied, since there had been violations of Mr Al Hassan's rights in the process of

⁴⁸ *Prosecutor v. Kajelijeli*, [Appeals Judgment](#), para. 220; In the Matter of El Sayed, STL, '[Order on Conditions of Detention](#)', para. 10; '[Order Relating to the Jurisdiction of the Tribunal to Rule on the Application by Mr El Sayed Dated 17 March 2010 and Whether Mr. El Sayed Has Standing Before the Tribunal](#)', 17 September 2010, CH/PT/2010/005, 17 September 2010, para. 31.

⁴⁹ [A/61/259](#), para. 47.

⁵⁰ *Cwik v Poland*, para. 64; [Application](#), para. 4, fn. 53, [Reply](#), para. 4, fn. 42.

⁵¹ [Application](#), para. 24.

⁵² [REDACTED].

⁵³ [Decision](#), para. 42.

⁵⁴ [Decision](#), fns 170-172.

bringing him to and from the Prosecution, and these violations had produced effects during the interview process. The question as to whether these effects vitiated Mr Al Hassan's capacity to provide informed consent was also separate to the question as to whether Mr Al Hassan had an independent and inviolable right not to be interviewed by the ICC Prosecution while he was held in an arbitrary and incommunicado detention environment involving physical and psychological torture.⁵⁵ Since he *was* interviewed, any such right would have been violated, triggering the *chapeau* of Article 69(7).

26. The Chamber was then obliged to consider whether the use of evidence obtained in such a manner was antithetical to the integrity of proceedings before this Court. In this regard, the question as to whether Mr Al Hassan had the capacity to provide informed consent to be interviewed does not answer the separate issue as concerns the lawfulness of his arrest and detention – which triggered and enabled the Article 56 proceedings. Put simply, the Chamber put the cart before the horse by assessing the impact of the violations and the steps taken by the Prosecution to try to cure the harm caused by the violations, rather than first identifying the violations and their nexus to the evidence collection process.

27. Given that the nature of the violation impacts the degree of substantiation required (according to the Decision) and the causal nexus (see *infra*), the Chamber's omission to make a threshold determination as to whether there had been a breach of the Statute or internationally recognised human rights affected the reliability of analysis as concerns whether the Defence had satisfied the necessary evidential and legal threshold. This error therefore affected the outcome of the Decision and, given the ramifications of the submission of Mr Al Hassan's statements, the case. The Chamber's approach (focusing on the steps taken by the Prosecution to ensure consent and reliability) also sidelined the alternative basis for exclusion set out in Article 67(9) - that is, that the admission of evidence would be contrary to the integrity of proceedings.⁵⁶ This was a critical omission, as it can be argued that the admission of "evidence obtained as a result of any amount of torture that is proscribed by the Convention would (...) be antithetical to, or damage, the integrity of the Court's proceedings" (emphasis added).⁵⁷

⁵⁵ [Application](#) paras 4, 7, 16; [Reply](#), paras 8, 10.

⁵⁶ Piragoff, 'Article 69', p. 1330 concerning the deliberate decision to include disjunctive bases for exclusion.

⁵⁷ Piragoff, 'Article 69', p. 1331

2.3 The issue arises as to whether the Chamber erred in law and misappreciated the facts set out in the evidential record through its conclusion that the Prosecution took sufficient steps to ensure the reliability of the evidence collected while Mr Al Hassan was detained at the DGSE

28. The Chamber's analysis and interpretation of the interactions between Mr Al Hassan and the Prosecution turned on the following legal and evidential approaches:

- The Chamber placed significant weight on the Prosecution's repeated demarcation between the ICC and national proceedings,⁵⁸ but at the same time, found that the Prosecution's avowals (from day 15, that is, at the end of the interview process) that it would try to intercede with national authorities to improve Mr Al Hassan's detention conditions fulfilled its obligations towards Mr Al Hassan under the Statute and internationally recognised human rights law;⁵⁹
- The Chamber interpreted the interactions from the perspective of the Prosecution rather than the subjective understanding of Mr Al Hassan and made no findings as concerns the subjective psychological capacity of an individual in Mr Al Hassan's position and circumstances to understand and appreciate his rights, or to appreciate the exchanges in the manner proposed by the Prosecution; and
- When faced with competing interpretations of the inferences to be drawn from exchanges, the Chamber provided no explanation or justification as to how it reached its conclusion by reference to the burden of proof and evidentiary standard that applies to evidentiary applications falling under Article 69(7).

The Chamber's reliance on the Prosecution's avowals that it would intercede with national authorities

29. As a matter of law, the exclusionary rule imposes an obligation of result and not of effort.

No derogations from the rule are permissible.⁶⁰ The interviewing party must either take all necessary steps to insulate the interview process from the effects of torture/CIDT. It is not

⁵⁸ [Decision](#), para. 69: "the Chamber considers that, in light of the other elements of the interviews as a whole, the abovementioned steps were reasonable in the circumstances, also bearing in mind the limited powers of the ICC Prosecution in its cooperation with public authorities at the national level".

⁵⁹ [Decision](#), paras 65-69.

⁶⁰ "As the prohibition against torture and other ill-treatment is absolute and non-derogable under any circumstances, it follows that the exclusionary rule must also be non-derogable under any circumstances, including in respect of national security": A/HRC/25/60, para. 22. See also [Cwik v Poland](#), para. 68: "The Court reiterates that Article 3 of the Convention enshrines an absolute right. Being absolute, there can be no weighing of other interests against it, such as the seriousness of the offence under investigation or the public interest in effective criminal prosecution, for to do so would undermine its absolute nature. Neither the protection of human life nor the securing of a criminal conviction may be obtained at the cost of compromising the protection of the absolute right not to be subjected to ill-treatment proscribed by Article 3, as this would sacrifice those values and discredit the administration of justice".

sufficient to initiate attempts that do not address or cure the effects of torture/CIDT. Apart from, first, the absence of reliable documentation as to the steps actually taken by the Prosecution and, second, the fact that the Prosecution took no such steps until March 2018⁶¹ (that is 8 months after interviews commenced, and 11 months into Mr Al Hassan's illegal, arbitrary and incommunicado detention), the issue arises as to whether the Chamber should have placed any weight on such efforts in the absence of proof that such efforts fully remedied the violations of Mr Al Hassan's rights and the negative effects produced by such violations.

The Chamber's reliance on the perspective of the Prosecution rather than that of a vulnerable detained individual in the specific circumstances of Mr Al Hassan

30. The focus of inquiry concerning volition and informed consent must be on the interviewee and not the interviewer: how the interview process was perceived by the interviewee as opposed to how it was intended.⁶² Bad intentions might be an aggravating factor but good intentions do not cure the harm caused to a suspect labouring under a misapprehension as to their rights and expectations. This analysis must also be tailored to the personal circumstances of the defendant: that is, the physical and cognitive capacity of an individual who had been physically and psychological tortured, while held in prolonged arbitrary and incommunicado detention. The Chamber nonetheless analysed interactions from the perspective of what the Prosecution knew to be true rather than what a detainee in the circumstances of Mr Al Hassan would have understood.⁶³ This can be seen from the following non-exhaustive examples:

- The Chamber relied on the Prosecution's avowals that it did not have copies of DGSE interview records,⁶⁴ and did not consider or provide a reasoned opinion as concerns Defence submissions regarding the manner in which the Prosecution's reference to 'other evidence' would have been understood by Mr Al Hassan, particularly in light of the direct relationship between the OTP and the DGSE;

⁶¹ [Reply](#), para. 9 cf [Decision](#), fn. 165 referring to the OTP informing the Malian authorities of Mr. Al Hassan's complaints on Day 15 although the cited extract does not indicate that these matters were raised then, and [REDACTED] conceded that no matters were raised until 1 and 7 March 2018: [REDACTED].

⁶² In [Halilovic](#), while the Trial Chamber accepted that the Prosecution had offered no inducements, the Appeals Chamber found the Chamber erred by failing to consider that the accused 'was labouring under the misapprehension that his cooperation could lead to the withdrawal of the indictment against him' (para. 45). See also *R v Thomas* [2006] [VSCA 165](#), para. 72, concerning focus of inquiry on subjective perception of the interviewee.

⁶³ [Decision](#), para. 63.

⁶⁴ [Decision](#), para. 63.

- The Chamber found that the Prosecution's repeated claims that it possessed no influence over the national authorities was intended to assuage concerns that the content of the interviews could be shared with national authorities.⁶⁵ There was no objective evidence before the Chamber to support the conclusion that is what the Prosecution intended to convey by its claims and no evidence to suggest that the Chamber's retrospective interpretation reflects the manner in which these exchanges were understood by Mr Al Hassan. The Chamber was, in any case, obliged to consider all alternative inferences that can be draw from this exchange, and to do so from the perspective of Mr Al Hassan. A key indication should have been Mr Al Hassan's complaint concerning the illegality of interviewing him while he was held in a lawless and threatening environment reflects the contrary – that is, he believed that the illegal nature of his detention coupled with the fact that he could be tortured at any time undermined his psychological capacity and choice to be interviewed.⁶⁶ However, rather than addressing the import and inferences that should be drawn from this critical intervention, the Chamber gave no weight to it because the Prosecution told him that the proceedings were separate and they could do nothing about it.⁶⁷ The Chamber effectively worked backwards in a manner suggestive of a pre-determined result: rather than examining the inferences that could reasonably be drawn from the Prosecution's references to 'separate proceedings' in light of the record as a whole (including explicit concerns raised by Mr Al Hassan), the Chamber placed a positive inflection on these interventions, then used this positive inflection to justify its decision to provide no weight to exchanges reflecting Mr Al Hassan's subjective perception concerning his inability to provide informed consent to the interview process;
- The Chamber acknowledged that the Prosecution had referred to Mr Al Hassan as a witness at various points of the interviews, but in considering whether the Prosecution's invocation of Article 55(2) was sufficient to cure this ambiguity,⁶⁸ failed to reference the points where Mr Al Hassan describes himself as a witness.⁶⁹ The Chamber also acknowledged that the Prosecution averred that the Judges would exclude his statements if they agreed that it was a violation of his rights to conduct interviews while he was

⁶⁵ [Decision](#), paras 49-50.

⁶⁶ [REDACTED].

⁶⁷ [Decision](#), para. 53.

⁶⁸ [Decision](#), para. 55.

⁶⁹ [REDACTED].

held in illegal detention.⁷⁰ The Chamber nonetheless gave no weight or consideration to the impact of this promise on Mr Al Hassan's subjective perception of the terms and conditions of the interview process and his subsequent participation; and

- The Chamber dismissed *en masse* Defence submissions concerning the impact of torture and prolonged incommunicado detention on Mr Al Hassan's physical and mental capacity by reference to specific sections of the transcripts which, in the Chamber's view, reflected his ability to provide clear and detailed answers.⁷¹ This approach presupposes that the Chamber has the ability to ascertain the difference between evidence that is truthful and evidence that is provided as a result of the continuing effects of torture. International human rights law is categorical that when faced with clear indicia of the continuing effects of torture (including expressions of physical and mental fatigue) Judges cannot dismiss these indicia by attempting to assess the internal reliability of the evidence or otherwise relying on the responsiveness of the interviewee.⁷² This is because tainted evidence can appear equally as reliable and probative as untainted evidence. The very fact that this Chamber believes that it *can* differentiate between information that Mr Al Hassan gives because he is under an ongoing fear of death and retaliation as compared to truthful information given freely, raises an issue as to whether the Chamber's reliance on the substance of these interviews throughout these trial proceedings has tainted the lens through which it viewed the Application.

The Chamber's approach to inferences

31. In accordance with appellate case law concerning inferential reasoning, when faced with competing interpretations of a text, the Chamber is obliged to provide a reasoned explanation as to its consideration of the different interpretations, by reference to the applicable evidential standard.⁷³ As noted above, the Chamber did not articulate the standard of proof that would equate to the 'real risk standard' or otherwise explain the standard that should have been met by the Defence in meeting the burden imposed by the Chamber. As part of its analysis of the evidence, the Chamber also repeatedly drew

⁷⁰ [Decision](#), para.53.

⁷¹ [Decision](#), paras 58-59.

⁷² [Application](#), paras 31-32, referring in particular to the UN Special Rapporteur on Torture, [A/71/298](#), para. 18, [Anam](#), 696 F. Supp. 2d 1 at 9 (court unpersuaded by government's argument that statements' internal consistency indicated reliability), [Ibrahim & ors v. United Kingdom](#), para. 254 (probative value irrelevant)' ICC-01/04-01/06-1981, para. 43 (probative value irrelevant).

⁷³ [ICC-02/05-01/09-73](#), para. 39; [ICC-01/05-01/13-2275-Red](#), paras 869-870.

inferences in favour of the Prosecution's interpretation, notwithstanding the absence of any objective foundation for such interpretation, while at the same time, the Chamber either gave no weight to Defence submissions, or rejected them as 'speculative', even though the evidential record provided objective corroboration.⁷⁴

32. For example, when analysing the October 2017 interaction concerning Mr Al Hassan's complaint concerning the illegality of his detention and unlawfulness of conducting interviews while he was subject to an ongoing risk of torture and death, the Chamber gave credence to the Prosecution's promise that they would stop the interviews if faced with evidence of physical mistreatment.⁷⁵ Since Mr Al Hassan was referring to psychological not physical torture, the Chamber was obliged to consider whether the Prosecution's response was a hollow non-response, which failed to satisfy the Article 55(1)(b) and (d) prohibition on collecting evidence from a person who has been subjected to arbitrary detention and psychological torture. It was also anomalous for the Chamber to give plaudits for the Prosecution's assurance that it would stop the interviews if faced with signs of physical mistreatment, given that when such signs manifested themselves, the Prosecution told Mr Al Hassan's Counsel that such abuse was irrelevant to their process.⁷⁶ The Chamber thus had a duty to consider other inferences that could and should be drawn from the transcripts, in particular whether the references to the 'separation of proceedings' would have deterred Mr Al Hassan or his Counsel from exercising key rights, including the right to stop the process at this point. Conversely, when the Chamber once again gave plaudits to the Prosecution for telling Mr Al Hassan in December 2017 that they would stop the interview if he had nothing else to tell them,⁷⁷ the Chamber failed to appreciate the impact of this statement on an individual who had just been subjected to physical torture and starvation in the lead up to the interview – that is, an individual who knows that since the Prosecution had told him that he "had no right to wish" to be detained in a different (i.e. lawful) detention facility, his only hope of maintaining access to the outside world and obtaining access to pain relief was to participate in such interviews. Indeed, the December

⁷⁴ For example, the Chamber characterised as speculative submissions that the Article 55 Counsel and Mr Al Hassan appeared to be unaware of Article 55(1) protections ([Decision](#), para. 55), even though: the Prosecution never referred to or read out Article 55(1) during the interviews; Mr Al Hassan explicitly asked for guidance as to whether it was lawful to interview him while held in a situation of arbitrary detention involving torture ([REDACTED]); and the Article 55(2) Counsel expressed his view that issues of torture/CIDT didn't have an impact for the Prosecution's process ([REDACTED]).

⁷⁵ [Decision](#), para 53.

⁷⁶ [REDACTED]

⁷⁷ [Decision](#), para. 62.

exchange should have been critical to the Chamber's appreciation of the January exchanges, where Mr Al Hassan agreed to continue after the Prosecution provided explicit promises that they would report his physical and psychological incapacities to the [REDACTED].⁷⁸ Instead, the Chamber reviewed the latter interventions in isolation, and ignored the causal relationship between the Prosecution's promises of intervention and Mr Al Hassan's ongoing participation.

33. The Chamber's approach to the inferences to be drawn from the transcripts is further impacted by its counter-factual description of the evidence and procedural history. For example, the Chamber emphasised steps taken by the Prosecution to intervene on Mr Al Hassan's behalf, while omitting the crucial detail that these steps only occurred at the very end of the interview process when the Prosecution was about to seek Mr Al Hassan's transfer to the ICC.⁷⁹ Similarly, the Chamber claims that the Prosecution reacted to Mr Al Hassan's revelation that he had been tortured and threatened with death unless he told the "truth" by asking follow up questions and asking whether anyone else threatened him.⁸⁰ The Decision leaves out the crucial point that after telling the Prosecution that he had been tortured and threatened with death by the DGSE, the Prosecution did not ask Mr Al Hassan which DGSE officials threatened him with death and tortured him nor did they ask for clarification as to what he had been forced to say: their follow up questions were limited to whether he was at risk from other detainees. This was the point at which the Prosecution could and should have stepped in to investigate and ascertain the effects of torture on the interview process. The Chamber was thus required to consider whether their failure to do so tainted the process as a whole, and Mr Al Hassan's subjective understanding of the process as a whole. Put simply, this exchange should have formed the reference point for the Chamber's analysis of all subsequent exchanges and Mr Al Hassan's subjective perception as concerns whether he had a "free and informed choice" to participate, in light of the real or threatened consequences of non-participation.

3.1 The issue arises to whether the Chamber erred in law by failing to issue a reasoned assessment concerning the prejudicial impact of the admission of such statements as part of its Article 69(4) assessment

⁷⁸ [Decision](#), fns 170-171.

⁷⁹ [Decision](#), para. 67.

⁸⁰ [Decision](#), para. 66.

34. The Statute allows the Chamber to determine if and when to make an admissibility ruling. Having exercised its discretion to make an evidential determination under Article 69(4), the Chamber was obliged to consider and issue a reasoned assessment of all the factors set out in this provision including “any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness”.⁸¹ The Chamber cannot bifurcate the constituent elements of the ruling - deciding elements of probative value and reliability upfront and prejudice in the judgment.⁸² Prejudice is also distinct from weight: although the prejudicial impact of admission might affect the weight to be attributed to an item of evidence, it is also an independent basis for exclusion. The passing reference to prejudice in the Decision does not engage with or adjudicate the specific Defence arguments concerning the prejudice to a fair trial that would arise through the introduction of these statements into the record.⁸³ The PoE made clear findings as concerns the negative implications for a fair trial stemming from the use of these statements in the proceedings.⁸⁴ These findings concerned Mr Al Hassan’s current state of mind and not his subjective state of mind at the time of the interview. The Chamber’s preliminary determination that it could not rely on either Defence Experts or the PoE to establish issues concerning his subjective mind while detained did not govern the question as to whether the Chamber should have considered these findings when determining whether the prejudicial impact of using these statements in the proceedings outweighed the probative value. The Chamber was in any case obliged to provide a reasoned opinion on Defence submissions on this point. In the absence of any deliberations on this point,⁸⁵ the issue arises as to whether the Chamber erred in law by failing to issue a reasoned assessment concerning the prejudicial impact of the admission of such statements as part of its Article 69(4) assessment, and therefore improperly admitted the impugned statements and records.

4. The above issues affect the fair and expeditious conduct of the proceedings and the outcome of the trial and an immediate decision by the Appeals Chamber is required to materially advance the proceedings

35. A trial that is tainted by torture evidence can never be fair.⁸⁶ If the Chamber has erred in the manner in which it resolved the above issues, then the record of this case will have

⁸¹ [ICC-01/05-01/08-1386](#), paras 2-3, 37, 55,60.

⁸² [ICC-01/05-01/08-1386](#), paras 60, 70.

⁸³ [Application](#), para. 33.

⁸⁴ ICC-01/12-01/18-1197-Conf-Anx, paras 48, 259, 275-284, 303.

⁸⁵ [Decision](#), para. 75.

⁸⁶ *Gäfgen v. Germany*, [22978/05](#), paras 173 and 175. See more generally paras 170-188.

been irrevocably stained and any judgment flawed. Given the length and extent of the transcripts, their use will ineluctably contaminate the Chamber's perception of Mr Al Hassan, his presumption of innocence, and any lines of Defence argument and examination that deviate from these transcripts. Their admission will directly affect the fairness and modalities of almost all future testimonial evidence in this case.⁸⁷ The Chamber has also presaged that it will apply the legal and evidential approach set out in the Decision to its resolution of all pending and future applications for exclusion under Article 69(7). If the Chamber has improperly placed the burden on the Defence, this will undermine the ability of the Defence to obtain an effective remedy as concerns future submissions pertaining to evidence collected through violations of the Statute or human rights law. The burden and evidential standard is also tied directly to the time and resources available to the Defence to investigate and substantiate such applications, and the volume of time required to litigate them. An overly onerous approach will retard the ability of the parties to raise such issues in an expeditious and efficacious manner. Aside from the issue of contamination, the issues raised by the PoE concerning the implications of using Mr Al Hassan's statements have profound implications as concerns Mr Al Hassan's mental well-being, his effective participation and the principle of equality of arms. Mr Al Hassan cannot review evidential or legal submissions based on evidence emanating from the DGSE without reliving his trauma. The introduction of this matter into the record forces the Defence to litigate blind, with an incapacitated client. These issues cannot be effectively resolved on final appeal. Witnesses will have been questioned on the basis of these transcripts. Interim release applications will have been rejected in the interceding years. Future Article 69(7) requests will have been adjudicated. The bell cannot be un-rung.



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Dated this 24th Day of May 2021
At The Hague, The Netherlands

⁸⁷ Cf [ICC-01/04-01/06-2404](#), para. 30, finding for similar reasons that the criterion for appeal concerning the impact on the outcome of the trial was fulfilled.