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Pénale  
Internationale**



**International  
Criminal  
Court**

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29 March 2021

**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 and *EX PARTE* Annexes A to C,  
available to Prosecution and Defence only**

**Public redacted version of "Prosecution request to introduce evidence preserved  
under article 56 of the Statute", 18 December 2020, ICC-01/12-01/18-1218-Conf-Exp**

**Source: Office of the Prosecutor**

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

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**Registrar**

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Section****Other**

## I. Introduction

1. The Prosecution requests the introduction into evidence pursuant to article 69 of the Statute of the totality of the evidence provided by Mr Al Hassan during his interview with the OTP, which was preserved under article 56 (the “Article 56 Evidence”). This includes the audio recordings of the security assessments and the interviews of Mr Al Hassan and their transcripts (Annex A), as well as the related materials signed or produced by Mr Al Hassan during the interviews (Annex B) and documents commented on by Mr Al Hassan during his interviews that have not yet been submitted into evidence (Annex C). The Article 56 Evidence meets the criteria for introduction under article 69. It is *prima facie* relevant and probative and its introduction into evidence causes no prejudice to a fair trial or to the fair evaluation of the testimony of witnesses or any other evidence on the record of this case.

2. The Prosecution seeks the introduction into evidence of the Article 56 Evidence pursuant to the Trial Chamber’s order of 24 November 2020.<sup>1</sup> According to the same order, the Defence will then be entitled to file a motion based on article 69(7) in respect of the Prosecution’s request.<sup>2</sup> The Prosecution will therefore not anticipate a response to any Defence arguments under article 69(7) as part of this motion. Rather, it will respond to the upcoming Defence motion pursuant to regulation 24(1).

## II. Confidentiality

3. The Prosecution files this document confidentially pursuant to regulation 23*bis*(2) because it refers to other documents that are subject to the same classification.

## III. Procedural background

4. On 20 June 2017, the Prosecution requested the Pre-Trial Chamber to interview Mr Al Hassan pursuant to article 56.<sup>3</sup> [REDACTED]

[REDACTED]

[REDACTED]<sup>4</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

<sup>1</sup> ICC-01/12-01/18-1160, para. 10.

<sup>2</sup> ICC-01/12-01/18-1160, para. 10.

<sup>3</sup> [REDACTED]

<sup>4</sup> [REDACTED].

[REDACTED] 5 [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] 6

5. The Single Judge of Pre-Trial Chamber I granted the Prosecution’s request [REDACTED] 7 [REDACTED] 8 He therefore instructed the Registrar to appoint counsel to attend the Prosecution’s interview with Mr Al Hassan to represent the interests of the Defence of any future suspects and to “ [REDACTED] ” 9 [REDACTED] 10 [REDACTED] 11

6. On [REDACTED], the Prosecution met Mr Al Hassan for the first time [REDACTED] [REDACTED] in order to interview him. After an introduction and explanation of relevant ICC procedures, including voluntariness of the process, rights provided for under article 55(2) of the Statute and the separate nature of the Malian procedures and a security assessment, Mr Al Hassan indicated his understanding and expressed his willingness to be interviewed.

7. The interview of Mr Al Hassan started on [REDACTED] and ended on [REDACTED], conducted in the course of 19 days, in the presence of his article 55(2) counsel and the article 56 counsel appointed by the Court. Specifically, the sessions were held on [REDACTED] [REDACTED] [REDACTED]. All sessions were conducted at a [REDACTED] [REDACTED] 12

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5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]

8. On 20 March 2018, the Prosecution submitted a request for a warrant of arrest of Mr Al Hassan.<sup>13</sup> Pre-Trial Chamber I issued the warrant of arrest on 27 March 2018.<sup>14</sup> Mr Al Hassan was transferred to the seat of the Court soon thereafter. The initial appearance took place on 4 April 2018.<sup>15</sup> Charges against Mr Al Hassan were confirmed on 30 September 2019<sup>16</sup> and the trial against him commenced on 14 July 2020.

9. On 24 November 2020, the Trial Chamber ordered the Prosecution to file its request for the introduction of the Article 56 Evidence as soon as possible and no later than 31 December 2020.<sup>17</sup> According to the same order, the Defence will then be entitled to file a motion based on article 69(7) in respect of the Prosecution's request to introduce the Article 56 Evidence.<sup>18</sup>

10. On 4 December 2020, the Chamber suspended some time-limits falling between 11 December 2020 and 10 January 2021.<sup>19</sup>

#### IV. Applicable Law and Procedure

11. Article 56(4) provides that “the admissibility of evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be governed at trial by article 69, and given such weight as determined by the Trial Chamber.”<sup>20</sup> Under Article 69(2), the Court may permit the giving of the recorded testimony of a witness, as well as the introduction of transcripts, subject to the Statute and Rules.<sup>21</sup> Article 69(3) permits the parties to submit relevant evidence, while Article 69(4) provides “the Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rule of Procedure and Evidence.”<sup>22</sup>

12. In its decision on the conduct of the proceedings in this case, the Chamber adopted the so-called “submission regime” to the introduction of evidence, according to which it will generally

<sup>13</sup> [REDACTED].

<sup>14</sup> ICC-01/12-01/18-2-tENG.

<sup>15</sup> [REDACTED].

<sup>16</sup> [REDACTED]. The charges were amended on 23 April 2020 [REDACTED].

<sup>17</sup> ICC-01/12-01/18-1160, para. 10.

<sup>18</sup> ICC-01/12-01/18-1160, para. 10.

<sup>19</sup> [REDACTED].

<sup>20</sup> Evidence preserved under article 56 constitute an exception to rule 68 for the introduction of previously recorded testimonial evidence. This is also apparent from rule 68(1): “When the Pre-Trial Chamber has not taken measures under article 56, the Trial Chamber may [...] allow the introduction of previously recorded audio or video testimony of a witness [...] provided [...] that the requirement of one or more of the following sub-rules are met.” (emphasis added).

<sup>21</sup> Rule 68 of the Rules does not apply to evidence collected under Article 56 of the Statute. See rule 68(1).

<sup>22</sup> Trial Chamber IX in the *Ongwen* case previously introduced evidence preserved under article 56 pursuant to article 69 (see ICC-02/04-01/15-520, paras. 6, 9).

not issue rulings on admissibility for each item of evidence during the course of proceedings. Rather, it will recognise the submission of items of evidence without a prior ruling on relevance and/or admissibility and will consider its relevance and probative value as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused.<sup>23</sup> However, the Chamber also noted that it may be necessary to make some discrete determinations on the admissibility of specific evidence or categories of evidence.<sup>24</sup> It held that rule 63(3) mandates that rulings on admissibility shall be made by the Chamber when an application is made by a party or the Chamber by its own motion under Article 69(7) of the Statute.<sup>25</sup>

13. The Chamber set out a specific procedure to dispose of questions regarding the admissibility of the Article 56 Evidence. It ordered the Prosecution to first seek the introduction of all Article 56 Evidence, and the Defence has then an opportunity to formally submit a “motion based on article 69(7)” in respect of the Prosecution’s request.<sup>26</sup> The Prosecution has a right to respond to the Defence’s article 69(7) motion pursuant to regulation 24(1).

14. Where a challenge has been made to an item's admissibility, the burden rests on the party seeking admission of the item to demonstrate its admissibility.<sup>27</sup> In such case, the party seeking to admit evidence needs to demonstrate “on a preliminary basis” that the submitted materials (i) are relevant to the trial; (ii) have probative value; and (iii) are sufficiently relevant and probative to outweigh any prejudicial effect that could be caused to from their admission a fair trial or to a fair evaluation of the testimony of a witness.<sup>28</sup>

15. *Relevance* means that the submitted evidence is logically connected to one or more facts at issue. The item must have the capacity to make a fact at issue more or less probable and has the potential to influence the Chamber’s determination on at least one fact that needs to be determined in a case.<sup>29</sup> Consideration of the *probative value* requires a fact-specific inquiry involving factors such as indicia of authenticity, reliability, trustworthiness, accuracy or voluntariness of an item of evidence, bearing in mind also the circumstances in which the evidence arose.<sup>30</sup> Finally the inquiry of the *prejudicial effect* that admission of evidence may

<sup>23</sup> ICC-01/12-01/18-789-AnxA, para. 29.

<sup>24</sup> ICC-01/12-01/18-789-AnxA, para. 31.

<sup>25</sup> ICC-01/12-01/18-789-AnxA, para. 32; *see also* ICC-01/12-01/18-1009-Conf, para. 122.

<sup>26</sup> ICC-01/12-01/18-1160, para. 10.

<sup>27</sup> [ICC-01/05-01/08-2012](#) [REDACTED], para. 17; [ICC-01/04-01/06-1399-Corr](#), para. 25.

<sup>28</sup> Article 69(4). *See also* [ICC-01/05-01/08-2012](#) [REDACTED], para. 13; [ICC-01/04-01/06-1399-Corr](#), paras 27-32; [ICC-01/04-01/06-2595-Red-Corr](#), para. 39; ICC-01/04-01/07-2289-Corr-Red, para. 13.

<sup>29</sup> [ICC-01/05-01/08-2012](#) [REDACTED], para. 14; [ICC-01/04-01/06-1399-Corr](#), paras. 28-29; [ICC-01/04-01/06-2595-Red-Corr](#), para. 39; [ICC-01/04-01/07-2635](#), para.16; [ICC-01/05-01/08-424](#), para. 41.

<sup>30</sup> [ICC-01/05-01/08-2012](#) [REDACTED], para. 15; [ICC-01/04-01/06-1399-Corr](#), paras. 28-29; [ICC-01/04-01/06-2595-Red-Corr](#), para. 39. Authenticity has been defined as indicia showing that “the item is what it purports to be, either

cause includes an assessment of whether an item's admission would unfairly prejudice the parties presentation of their case. This will always be a fact-sensitive inquiry and the Chamber may consider such factors as whether an item's admission would encroach on the accused's rights under article 67(1) of the Statute or potentially delay proceedings because it is unnecessary or cumulative of other evidence. If potential prejudice is identified, this will not necessarily preclude the item's admission. The item will be excluded only if its relevance and probative value are insufficient to justify its admission in light of its potentially prejudicial effect.<sup>31</sup>

16. Because in this case the Defence is challenging the admission of the Article 56 Evidence,<sup>32</sup> the Prosecution must, on a preliminary basis, show that the Article 56 Evidence meets the standard evidentiary criteria for their introduction pursuant to article 69(4).

17. Article 69(7) is *lex specialis* vis-à-vis article 69(4),<sup>33</sup> and therefore “represents a clear exception to the general approach” regarding the admission of evidence.<sup>34</sup> Accordingly, if the Defence decides to make a motion based on article 69(7) in respect of the Prosecution's request to introduce the Article 56 Evidence,<sup>35</sup> it bears the burden to demonstrate that the criteria for the exclusion of evidence under article 69(7) are met. This is consistent with the findings of other Chambers. In *Mbarushimana*, Pre-Trial Chamber I held that “there is no burden on the Prosecution to prove that the impugned procedures were legal and that the evidence in question was not obtained in violation of the Statute or internationally recognised human rights.”<sup>36</sup> It is *the Defence* that should provide sufficient information that “reasonably casts doubt” as to whether the evidence should be excluded.<sup>37</sup> Similarly, in *Katanga et al*, Pre-Trial Chamber I dismissed a Defence challenge under article 69(7) “[b]ecause *it has not been shown* that this particular procedure amounted to a violation of internationally recognised human rights”.<sup>38</sup> In the *Ongwen* case, Trial Chamber IX rejected the defence's motion pursuant to article 69(7), having found that “*the Defence has not demonstrated* any statutory violation in the collection of the evidence.”<sup>39</sup> Finally, in *Bemba et al*, the Chamber VII equally rejected the defence's

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because this is evident on its face or because other admissible evidence demonstrates the item's provenance [...]” (ICC-01/05-01/08-2012-Conf, para. 15; ICC-01/04-01/06-1399-Corr, paras 28-29; ICC-01/04-01/06-2595-Red-Corr, para. 39; ICC-01/04-01/07-2635, para. 22).

<sup>31</sup> ICC-01/05-01/08-2012-Conf, para. 16; ICC-01/04-01/06-1399-Corr, paras. 31-32; ICC-01/04-01/06-2595-Red-Corr, para. 39.

<sup>32</sup> [REDACTED]

<sup>33</sup> ICC-01/04-01/06-1981, para. 34.

<sup>34</sup> ICC-01/04-01/06-1981, para. 34.

<sup>35</sup> ICC-01/12-01/18-1160, para. 10.

<sup>36</sup> ICC-01/04-01/10-465-Red, paras. 60, 62-64, 71.

<sup>37</sup> ICC-01/04-01/10-465-Red, para.59.

<sup>38</sup> ICC-01/04-01/07-717, para. 98 (emphasis added).

<sup>39</sup> ICC-02/04-01/15-520, para. 14 (emphasis added).

article 69(7) motion because “[none] of the allegations advanced by the defence teams [were] substantiated”.<sup>40</sup>

18. Accordingly, in this request, the Prosecution is not required to anticipate its response to arguments that the Defence will make in its upcoming motion based on article 69(7). Rather, it will respond to such a motion and its arguments pursuant to its right under regulation 24(1). This is also consistent with the Trial Chamber’s recent finding in the decision rejecting an application under rule 103, in which it held that “it expects to receive written submissions from the parties on the issue of exclusion of evidence allegedly tainted by torture and CIDT under Article 69(7) of the Statute in early 2021.”<sup>41</sup>

## V. Submissions

19. The Trial Chamber should admit the Article 56 Evidence. This evidence is *prima facie* relevant and probative and its introduction into evidence causes no prejudice to a fair trial or the fair evaluation of the testimony of a witness or of any other evidence on the record.

20. Although the Chamber will individually assess each item,<sup>42</sup> the below arguments collectively apply to all Article 56 Evidence, consisting of the transcripts and video recordings related to Mr Al Hassan’s security assessment and interviews with the Prosecution conducted [REDACTED] (Annex A); documents written or signed by Mr. Al Hassan during those interviews, as well as the sealed bags containing audio-recordings of the interviews, signed by Mr Al Hassan (Annex B); documents shown to and commented on by Mr Al Hassan during the interviews that have not yet been submitted into evidence (Annex C).

### *i) The Article 56 Evidence is relevant*

21. The Article 56 Evidence relates to matters to be considered by the Chamber in this case.

22. [REDACTED]

[REDACTED].<sup>43</sup> Accordingly, Mr Al Hassan’s testimony preserved under article 56 includes an account *inter alia* of the structure and operations of the Islamic tribunal, the Islamic police

<sup>40</sup> [ICC-01/05-01/13-1284](#), para.32; *see also* [ICC-01/05-01/13-1854](#), para. 62 where the Trial Chamber VII rejected the Defence’s submissions under article 69(7) for failing to provide factual support.

<sup>41</sup> ICC-01/12-01/18-1177, para. 2.

<sup>42</sup> [ICC-01/04-01/07-2635](#), para. 13.

<sup>43</sup> [REDACTED].



force and the morality brigade. It also relates to the activities of members of these groups—including Mr Al Hassan himself—who are alleged to have committed acts constituting crimes against humanity and war crimes charged in this case.



23. The documents written or signed by Mr. Al Hassan during those interviews (Annex B) are submitted for the purpose of authenticating Mr Al Hassan’s signature. This is relevant in this case, among other things to authenticate and attribute to Mr Al Hassan’s additional documents submitted into evidence.<sup>44</sup> As such they are material to the case at hand.

24. The documents commented on by Mr Al Hassan during his interview, that have not yet been submitted into evidence (Annex C), are submitted to provide context to some portions of Mr Al Hassan’s prior recorded testimony, and in particular his answer to questions on those document when they were shown to him during the interview. They are material to this case because those documents, as well as Mr Al Hassan’s answers, relate to fact charged in this case.

*ii) The article 56 evidence is probative*



25. The Article 56 Evidence is authentic, reliable and accurate. In addition, it was given voluntarily. These indicia are assessed taking into consideration also the circumstances in which the evidence arose.<sup>45</sup>

*a. Authenticity*

26. The Article 56 Evidence is genuine. It was preserved consistent with article 55(2) and rule 112 and pursuant to a procedure authorized by the Single Judge.<sup>46</sup> Two counsel for Al Hassan attended the interviews, one to assist Mr Al Hassan during the interview (“Article 55(2) Counsel”),<sup>47</sup> and the other pursuant to article 56(2)(d), to ensure that information provided by Mr Al Hassan was “ ” (“Article 56 Counsel”).<sup>48</sup>

27. The Article 56 Evidence was appropriately handled by the Prosecution. Original audio recordings were placed into bags and sealed at the end of each interview session in the presence

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<sup>45</sup> [ICC-01/05-01/08-2012](#) , para. 15; [ICC-01/04-01/06-1399-Corr](#), paras. 28-29; [ICC-01/04-01/06-2595-Red-Corr](#), para. 39. Authenticity has been defined as indicia showing that “the item is what it purports to be, either because this is evident on its face or because other admissible evidence demonstrates the item’s provenance [...]” ([ICC-01/05-01/08-2012](#) , para. 15; [ICC-01/04-01/06-1399-Corr](#), paras 28-29; [ICC-01/04-01/06-2595-Red-Corr](#), para. 39; [ICC-01/04-01/07-2635](#), para. 22).

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<sup>48</sup> 

of Mr Al Hassan, his Article 55(2) Counsel and the Article 56 Counsel. The seals were signed by Mr Al Hassan. Working copies of the audio recordings were generated in parallel for the purpose of producing transcripts and reviewing the evidence. The evidence was transported to The Hague by the Prosecution who maintained and recorded their chain of custody pursuant to Regulation 23(2) of the Regulations of the Office of the Prosecutor. The Prosecution registered the Article 56 Evidence and it is stored in the vault of the Office in electronic format pursuant to regulation 23(4) of the Regulations of the Office of the Prosecutor.<sup>49</sup> The working copies of the recordings bear digital signatures to ensure authenticity.

*b. Reliability and accuracy*

28. The *prima facie* reliability and accuracy of the Article 56 Evidence is shown both by the content of the Article 56 Evidence, as well as by the procedure that was followed prior to and during Mr Al Hassan's interviews. In addition, Mr Al Hassan's interviews with the Prosecution were based on a voluntary and informed consent (as described in more detail in the following sub-section), which further indicates that the Article 56 Evidence is reliable and accurate.

*Indicia of reliability and accuracy deriving from the content of the materials*

29. Concerning their content, Mr Al Hassan's statements are clear and internally consistent. In the course of the Prosecution's interaction with Mr Al Hassan, there was no indication that he lacked the ability required to be interviewed. Indeed, during his interview, Mr Al Hassan clearly demonstrated his ability to describe the facts of which he had knowledge and decided to talk about, as well as to understand the meaning of the duty to tell the truth.<sup>50</sup> Mr Al Hassan was interviewed in Arabic with the help of an accredited interpreter<sup>51</sup> and also exhibited during the interview that he understood French, at times correcting the interpreter<sup>52</sup> or answering questions without waiting for interpretation from French to Arabic.<sup>53</sup> In doing so, Mr Al Hassan demonstrated a high level of focus and comprehension.

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<sup>49</sup> Regulation 23(3) of the [Regulations of the Office of the Prosecutor](#): "Whenever possible, evidence shall be stored in an electronic format. Without prejudice to regulation 16 paragraph 2 of the Regulations of the Registry, originals shall be stored in the vault of the Office after digitisation. All electronic storage shall to the extent possible be compatible with the technical standards as defined by the Registry pursuant to regulation 26 of the Regulations of the Court and regulations 10, 26 and 52 of the Regulations of the Registry, and relevant decisions by the Chamber."

<sup>50</sup> [REDACTED]

<sup>51</sup> [REDACTED]

<sup>52</sup> [REDACTED]

[REDACTED]

[REDACTED]

<sup>53</sup> [REDACTED]

[REDACTED]

[REDACTED]

30. Moreover, Mr Al Hassan, besides speaking several languages,<sup>54</sup> has an advanced education. He undertook studies in veterinary science<sup>55</sup> and he is trained as a pharmacist.<sup>56</sup> He then exercised the profession of pharmacist or pharmacy manager.<sup>57</sup> Mr Al Hassan's educational and professional background shows that he was capable of understanding all of the questions that were put to him and decided of his own free will to answer them.

31. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>58</sup> [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>59</sup>

32. The investigators reminded Mr Al Hassan repeatedly that he was free not to respond to questions,<sup>60</sup> and stressed that it was his right to remain silent<sup>61</sup> or to end the interview at any time.<sup>62</sup> For example: At the first interview session on [REDACTED], the Prosecution explained to Mr Al Hassan that he was free to answer or refuse to answer the investigators' questions, that he should answer of his own free will and that he could stop at any time.<sup>63</sup>

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54. [REDACTED]  
55. [REDACTED]  
56. [REDACTED]  
57. [REDACTED]  
58. [REDACTED]  
59. [REDACTED]  
60. [REDACTED]  
61. [REDACTED]  
62. [REDACTED]  
63. [REDACTED]



region at the relevant time [REDACTED]; (ii) documentary evidence collected from relevant locations in Timbuktu, including reports of the Islamic Police authored and/or signed by the Accused and judgments of the Islamic Tribunal; (iii) videos and photographs [REDACTED]; (iv) expert evidence; and (v) reporting by international organisations, NGOs and the media.<sup>73</sup>

35. The material evidence referred to in Annex B was either signed or written by Mr Al Hassan during the interview process. This is evidenced by the transcripts included in Annex A.<sup>74</sup>

36. The material evidence referred to in Annex C are documents that were shown to Mr Al Hassan during the interviews and he commented on them as part of his prior recorded testimony, but that have not yet been submitted into evidence. This is corroborated by the transcripts included in Annex A.

*Indicia of reliability and accuracy deriving from the procedure followed for the collection of the materials*

37. The procedure followed for the interviews of Mr Al Hassan further supports their reliability and accuracy. The Article 56 Evidence was taken in accordance with article 55(2) and rule 112.<sup>75</sup> As the Chamber has previously noted, the Prosecutor made it abundantly clear to Mr Al Hassan that there were grounds to believe that he had committed crimes under the Statute and that there was no confusion in Mr Al Hassan's mind as to his status during the interview.<sup>76</sup>

38. Accordingly, the Prosecution explained to Mr Al Hassan the context of the interview, the Prosecution's obligations and Mr Al Hassan's rights under Article 55(2). Mr Al Hassan confirmed his understanding of those rights, including his right to confer with his counsel. The Chamber held that these features of the Prosecution's interaction with Mr Al Hassan "[were] critical to assessing the dynamic that existed between Mr Al Hassan and the Prosecution during the interview process."<sup>77</sup>

39. In addition, and in accordance with article 55(2) of the Statute, the Prosecution explained to Mr Al Hassan that he had the right to remain silent,<sup>78</sup> to have legal assistance and to be

<sup>73</sup> [REDACTED].

<sup>74</sup> [REDACTED].

<sup>75</sup> ICC-01/12-01/18-1009-Conf, para. 110.

<sup>76</sup> ICC-01/12-01/18-1009-Conf, para. 110.

<sup>77</sup> ICC-01/12-01/18-1009-Conf, para. 106.

<sup>78</sup> [REDACTED].

questioned in the presence of counsel.<sup>79</sup> Mr Al Hassan then discussed in private with the duty counsel assigned by the Registry and subsequently indicated his decision to be assisted by him as Article 55(2) Counsel.<sup>80</sup> The Prosecution further informed Mr Al Hassan that he had the right to change his decision at any point during the interview.<sup>81</sup> After consultation with the Article 55(2) Counsel,<sup>82</sup> Mr Al Hassan confirmed that he understood all the procedural questions and his rights as explained by the investigators and decided to proceed with the interview.<sup>83</sup> Subsequently, the investigators reminded Mr Al Hassan at the beginning of each session that he could speak to his lawyer.<sup>84</sup> They encouraged him to do so at any time.<sup>85</sup> The record of the interview shows that the Mr Al Hassan consulted the Article 55(2) Counsel on all 19 days of interview sessions, either before, or during the breaks between the interviews, and often at least twice a day.<sup>86</sup> Mr Al Hassan was also given opportunity to consult with Article 55(2) Counsel when the latter intervened during an interview.<sup>87</sup> Mr Al Hassan confirmed several times that he had the opportunity to speak to his lawyer.<sup>88</sup> Article 56 Counsel also confirmed that the procedure was being conducted in accordance with the Rome Statute, and that Mr Al Hassan had consulted with his lawyer at the beginning and during the interview.<sup>89</sup>

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79 [REDACTED]  
80 [REDACTED] 7.  
81 [REDACTED]  
82 [REDACTED]  
83 [REDACTED]  
84 [REDACTED]

85 [REDACTED]  
86 [REDACTED]

87 [REDACTED]  
88 [REDACTED]

89 ICC-01/12-01/18-1009-Conf, para. 108. [REDACTED]

40. During his interview, Mr Al Hassan was provided regular breaks, including at his request, for lunch and prayers.<sup>90</sup> He was regularly provided with food and drinks and the investigators spoke to him in a professional and respectful manner. The Prosecution also systematically reminded him, several times each day, of the possibility to take a break, have more drinks, talk to his counsel, pray or stop the interview.<sup>91</sup>

*c. Voluntariness*

41. In addition to the arguments developed *supra*, Mr Al Hassan cooperated voluntarily with the Prosecution. His interviews were based on a voluntary and informed consent. The Chamber has already accepted some of the facts from which the voluntariness of Mr Al Hassan's statements can be inferred. In its Decision on the Defence request to terminate the proceedings and related requests, the Chamber held as follows:<sup>92</sup>

98. [...] [T]he Chamber notes the indications that safeguards were put in place by the Prosecution as required by Article 55(2) of the Statute and Rule 112 of the Rules. Specifically in this regard, the record indicates that the accused [REDACTED] repeatedly informed of the voluntary nature of [REDACTED] interviews and [REDACTED] rights in this context, and notably the right of the accused to remain silent, to have legal assistance and to be questioned in the presence of counsel. In particular, the Chamber notes that Mr Al Hassan confirmed that he understood all the questions of procedure and his rights as explained by the investigators and that he decided to proceed with the interview. The record also shows that Prosecution investigators consistently reminded Mr Al Hassan of his right to consult with his lawyer and that Mr Al Hassan regularly consulted with his counsel throughout the course of the 19 days of interviews by the Prosecution. In addition, the Chamber notes that Mr Al Hassan also consistently confirmed that he answered the questions of his own free will, was given the opportunity to exercise his right to clarify or add to his statements, and stated in his last interview session that he was treated very well.

42. [REDACTED],<sup>93</sup> [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]

<sup>90</sup> [REDACTED]  
[REDACTED]

<sup>91</sup> [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

<sup>92</sup> ICC-01/12-01/18-1009-Conf, para. 98 (footnotes omitted).

<sup>93</sup> [REDACTED]

[REDACTED]<sup>94</sup> [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]<sup>95</sup>

43. The items referenced in Annex B are an integral part of Mr Al Hassan’s voluntary cooperation with the Prosecution. He provided or signed them as part of the interview process described above.

*iii) Admission of the Article 56 Evidence would not prejudice a fair trial or the fair evaluation of the testimony of a witness or any other evidence on the record*

44. The Article 56 Evidence is sufficiently relevant and probative to outweigh any prejudicial effect that could be caused from its admission to a fair trial or to a fair evaluation of the testimony of a witness or any other evidence on the record.

45. The Prosecution requested the Article 56 Evidence to be preserved pursuant to measures ordered by the Pre-Trial Chamber to ensure that information provided by Mr Al Hassan was “ [REDACTED] [REDACTED]”.<sup>96</sup> When the Single Judge of the Trial Chamber appointed counsel under article 56(2)(d) to attend the interview of Mr Al Hassan, [REDACTED] [REDACTED]”.<sup>97</sup> Because the Article 56 Evidence was obtained in accordance with article 55(2) of the Statute and rule 112 and subject to additional article 56(1)(b) measures designed to ensure the integrity of the proceedings and to protect the rights of the defence, their admission into evidence will not prejudice a fair trial or the fair evaluation of any evidence on the record.

<sup>94</sup> [REDACTED]  
 [REDACTED]  
 [REDACTED]

<sup>95</sup> [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]

<sup>96</sup> [REDACTED]

<sup>97</sup> [REDACTED]



46. As described in more detail above, Mr Al Hassan’s cooperation with the Prosecution was voluntary and based on informed consent. During his interviews, Mr Al Hassan’s rights under article 55(2) were fully respected and Mr Al Hassan has consistently shown control over what he wanted to say or not say. The interview was conducted in the presence of two lawyers, including his Article 55(2) Counsel with whom Mr Al Hassan consulted extensively, and the general conditions under which the interviews were conducted were conducive to Mr Al Hassan providing a reliable and accurate account of the events that he witnessed. In fact, there are numerous indicators in Mr Al Hassan’s statements that he provided an accurate accounts of the relevant facts of which he had knowledge, which is corroborated by various documentary evidence such as videos and reports.<sup>98</sup>

47. Admission of the Article 56 Evidence would also not unfairly prejudice the Defence’s presentation of its case. After all, Mr Al Hassan’s prior recorded testimony is his personal account of the events concerning the facts of which he now stands charged. If admitted, the Defence would have ample opportunity to challenge the Article 56 Evidence, including by requesting the introduction of its own evidence. The Defence also has an opportunity to consult Mr Al Hassan to assist in the preparation of any challenge to the Article 56 Evidence or in any other step aimed at the presentation of its case.

48. Although the Article 56 Evidence is incriminatory, its admission does not prejudice a fair trial or the fair evaluation of the testimony of a witness or any other evidence on the record in the sense of article 69(4).

49. In any event, even if—*arguendo*—potential prejudice was identified, this would not necessarily preclude the admission of the Article 56 Evidence. This is because the Article 56 Evidence would only be excluded if its relevance and probative value were insufficient to justify its admission in light of its potentially prejudicial effect.<sup>99</sup> Given that the Article 56 Evidence is a first-hand account of Mr Al Hassan—the accused in this case—, as well as the strong indicia of its reliability as summarized above, the Trial Chamber should admit the Article 56 Evidence.

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<sup>98</sup> [REDACTED]

<sup>99</sup> [ICC-01/05-01/08-2012 \[REDACTED\]](#), para. 16; [ICC-01/04-01/06-1399-Corr](#), paras. 31-32; [ICC-01/04-01/06-2595-Red-Corr](#), para. 39.

## VI. Requested Relief

50. For the reasons set out above, the Prosecution requests that the Trial Chamber admit the Article 56 Evidence pursuant to article 69.



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Fatou Bensouda  
Prosecutor

Dated this 18<sup>th</sup> day of December 2020

At The Hague, The Netherlands.