

## **Fair Trials Briefing: Inclusion of evidence allegedly tainted by torture in Al Hassan case at International Criminal Court**

The International Criminal Court's (ICC) Trial Chamber X is expected to hand down an important decision on exclusion of evidence allegedly tainted by torture, when the trial of Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud resumes on March 4. It is the first time the Court has been asked to rule on the standards of dealing with claims of torture in ICC investigations and the admissibility of evidence obtained as a result. Fair Trials' work shows that resort to evidence tainted by torture in criminal proceedings is still an issue undermining the fairness and integrity of criminal proceedings across the globe.<sup>1</sup> Therefore, we expect this decision to have significant ramifications not only for the future jurisprudence of the ICC, but also for investigative practices globally.

### **Background**

On 30 September 2019 Al Hassan was charged with crimes against humanity and war crimes, including torture, rape, and persecution under the Statute of the International Criminal Court.<sup>2</sup> He is currently in custody at the ICC. The crimes were allegedly committed in the context of a widespread and systematic attack by armed groups Ansar Eddine/Al Qaeda in the Islamic Maghreb against the civilian population of Timbuktu.<sup>3</sup> The trial opened on 14-15 July 2020 before Trial Chamber X.

During the proceedings, the defence argued that the prosecution evidence relies heavily on statements Mr. Al Hassan made while being held at an undisclosed location and at the *Direction générale de la sécurité d'État* (DGSE) in Mali, a facility infamous for human rights abuses.<sup>4</sup> As a result, Al Hassan's defence petitioned the ICC to stay proceedings claiming that their client had been tortured while under DGSE's custody, and that the ICC's prosecutors had been informed but ignored the claims. The defence argued that Mr. Al Hassan was subjected to different forms of torture, including waterboarding, beatings, threats, mock executions, and other sensory forms of torture.<sup>5</sup> The defence also showed independent medical expert reports and testimonies that corroborated that Mr. Al Hassan sustained physical and psychological injuries consistent with his allegations of torture.

On October 29, 2020 the Trial Chamber dismissed the defence request to terminate proceedings,<sup>6</sup> and later on directed the parties to submit evidence and arguments pertaining to (i) the treatment of Mr Al Hassan while detained in Mali, prior to his transfer to the ICC, and its connection to the ICC proceedings and (ii) the admissibility of material tainted by connection to such treatment.<sup>7</sup>

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<sup>1</sup> Fair Trials 'Tainted by Torture', Report, 2018, available: [https://www.fairtrials.org/sites/default/files/publication\\_pdf/Tainted-by-Torture-Examining-the-Use-of-Evidence-Obtained-by-Torture.pdf](https://www.fairtrials.org/sites/default/files/publication_pdf/Tainted-by-Torture-Examining-the-Use-of-Evidence-Obtained-by-Torture.pdf)

<sup>2</sup> Redacted version of the decision on confirmation of charges <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/12-01/18-461-Corr-Red>

<sup>3</sup> <https://www.icc-cpi.int/mali/al-hassan>

<sup>4</sup> Amnesty International Agenda for Human Rights in Mali <https://www.amnesty.org/download/Documents/12000/afr370062013en.pdf>

<sup>5</sup> [https://www.icc-cpi.int/CourtRecords/CR2020\\_04689.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_04689.PDF) para 15.

<sup>6</sup> Trial Chambers Decision on Defence request to terminate proceedings [https://www.icc-cpi.int/CourtRecords/CR2020\\_05897.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_05897.PDF)

<sup>7</sup> [https://www.icc-cpi.int/CourtRecords/CR2020\\_06054.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_06054.PDF)

In view of our expertise and interest in the law and procedures relating to the use of material believed to be tainted by connection to torture or cruel, inhuman or degrading treatment (CIDT),<sup>8</sup> Fair Trials requested a leave to submit an amicus curiae brief,<sup>9</sup> which was denied by the Chamber on December 2, 2020.<sup>10</sup>

### **Importance of the ICC's decision**

Whether or not the alleged acts of torture have taken place is a question that will have to be determined by Trial Chamber X. However, regardless of the Court's decision on the facts of particular claims, the ICC as a global criminal court must enforce international standards on proper investigation of allegations of torture and on admissibility of evidence tainted by torture.

The prohibition of torture is an internationally recognized human right in both conventional and customary international law.<sup>11</sup> It is absolute and permits no derogations. All states are obliged to prohibit it without exception; the right to be free from torture cannot be suspended or limited and its violation can never be justified, even by emergency situations or by the importance of the crimes under investigation. No direct or indirect benefits can be allowed to be gained from torture in criminal proceedings, and for this reason, evidence obtained through torture must be, in all cases, inadmissible. This is the case regardless of who commits the alleged acts of torture. Thus, the attributability of acts of torture, *i.e.*, whether torture is inflicted by national authorities, or members of the Office of the Prosecutor of the ICC, should play no role in the decision on exclusion if it is established that the evidence is indeed tainted by torture.

The exclusionary rule plays a key role in the legal architecture underpinning the prohibition of torture. In domestic systems the exclusion of tainted evidence is justified under different rationales: i) to avoid the lack or doubt of reliability of the respective evidence; ii) to serve the purpose of deterrence and prevention; iii) to vindicate individual rights, including the right to a fair trial; and particularly important for the ICC iii) to safeguard the integrity of the proceedings and the rule of law.

The Rome Statute protects the right not to be tortured during an investigation in Article 55(1).<sup>12</sup> It further establishes in Article 69(7) a distinct exclusionary rule, which is not mandatory or automatic. On the contrary, it grants the Judges of the ICC the discretion to decide whether to admit evidence allegedly obtained in violation of a person's rights, if and when the evidence is unreliable, and if and when its admission would cause prejudice to the integrity of the proceedings.<sup>13</sup> Accordingly, the development of the exclusionary regime of the ICC, lies in the hands of its Judges.<sup>14</sup>

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<sup>8</sup> <https://www.fairtrials.org/publication/tainted-torture>

<sup>9</sup> [https://www.icc-cpi.int/CourtRecords/CR2020\\_06525.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_06525.PDF); see also, <http://www.iclmediareview.com/30-november-2020-ongwen-judgment-postponed-to-february-and-amicus-application-made-on-al-hassan-art-697-challenge>

<sup>10</sup> [https://www.icc-cpi.int/CourtRecords/CR2020\\_06781.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_06781.PDF)

<sup>11</sup> Article 2 UNCAT; Article 5 UDHR; Article 7 ICCPR; Article 5(2) ACHR; Article 3 ECHR.

<sup>12</sup> In respect of an investigation under this Statute, a person: [...] (b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment[.]

<sup>13</sup> Article 69(7): Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: (a) The violation casts substantial doubt on the reliability of the evidence; or (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

<sup>14</sup> Prosecutor v. Lubanga (Decision on the confirmation of charges), ICC (Pre-Trial Chamber), decision of 29 January 2007, para 84. The Pre-Trial Chamber in the Lubanga case clarified the principle governing the exclusionary rule at the ICC affirming that “[...] article 69(7) of the ICC Statute rejects the notion that evidence

Therefore, it is essential that the standards set by the upcoming decision in the *Al Hassan* case, meticulously disallow the use of evidence obtained by torture in order to safeguard the integrity of its proceedings. The Court's mandate is to prosecute the most heinous international crimes. Integrity and fairness of the proceedings in the ICC are therefore fundamental, and the Court must be seen as a legitimate institution possessing moral authority and acting with integrity, including with respect to evidence that it relies upon in its proceedings.<sup>15</sup>

Article 69(7) of the Rome Statute, has been confirmed as *lex specialis* by the Court, and has been consistently applied when dealing with illicitly obtained evidence.<sup>16</sup> The article provides for a two-part exclusionary regime. This means that there must first of all be a violation in the obtaining of evidence; and second, that violation must affect its admission to the trial, whether because the evidence is unreliable, or because its admission “*would be antithetical to and would seriously damage the integrity of the proceedings.*”<sup>17</sup> In this sense, the Court must determine whether there were violations in the evidence gathering process that may trigger the exclusionary rule. It must then exercise its discretionary power to decide whether the violation warrants the exclusion of evidence from trial.

Fair Trials firmly believes that Trial Chamber X is placed in a unique and privileged position to decide upon the jurisprudential development of the international evidentiary regime, and this is a role that must not be taken lightly.

### **International practice on the exclusion of torture evidence**

Fair Trials has carried out comprehensive research<sup>18</sup> on the exclusionary rule under international law and its application in jurisdictions around the world. International law prohibits reliance on ‘torture evidence’ because *i)* it is involuntary, inherently unreliable and violates right to a fair trial; *ii)* to rely on such evidence undermines the rights of the torture victim; *iii)* it indirectly legitimizes torture and in so doing taints the justice system and *iv)* prohibiting reliance on the fruits of torture acts as a form of deterrence and prevention. This prohibition in principle extends to cruel, inhuman and degrading treatment and should cover derivative evidence. Almost all jurisdictions have some form of exclusionary rule applicable to ‘torture evidence’ although its scope and modalities of application differ.

For example, in Mexico, there is specific anti-torture legislation which includes an exclusionary regime. Challenges to the admissibility of evidence are allowed in advance of the trial, and once a defendant has alleged torture, a hearing must be held to analyse the allegation and to assess whether any evidence should be excluded. The Mexican Supreme Court has further held that the accreditation of a torture claim demands a lower standard of proof, and then the burden of proof for establishing whether the evidence was obtained as a result of

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procured in violation of internationally recognised human rights should be automatically excluded. Consequently, the judges have the discretion to seek an appropriate balance between the Statute's fundamental values in each concrete case.”

<sup>15</sup> Christoph Safferling, *Towards an international criminal procedure*. Oxford University Press.

<sup>16</sup> Prosecutor v. Lubanga (Decision on the admission of material from the “bar table”), ICC (Trial Chamber), decision of 24 June 2009, paras 34 and 43.

<sup>17</sup> Sluiter G (2002) *International criminal adjudication and the collection of evidence: obligations of states: obligations of states*. Intersentia, Antwerpen, p. 224.

<sup>18</sup> Tainted by torture. Examining the use of Torture evidence, a report by Fair Trials and Redress, May 2018.

torture, switches and falls on the prosecution, not the defendant. The former must prove that a confession or statement was legally and voluntarily given.<sup>19</sup>

According to the UN Human Rights Committee,<sup>20</sup> the defendant must first make a prima facie case by advancing a plausible reason or producing a credible complaint or evidence of ill-treatment in order to trigger the procedure. The burden should then shift to the prosecution to prove that a confession was voluntary. The requirement for the state to bear the burden of proof in establishing that evidence was not obtained by torture recognises the fact that the state has responsibility for the treatment of individuals in its custody.<sup>21</sup>

The latter relates to the specific case of Mr. Al Hassan. The Office of the Prosecutor of the ICC (OTP) bears responsibility for the evidence it accepts and presents at trial to prove its case, whether it is gathered directly by the OTP or through cooperation with national authorities. It is also the duty of the OTP to verify that the circumstances in which evidence is gathered are compatible with international standards. Thus, the OTP is responsible for the legality of evidence it presents, especially when it has knowledge of possible acts of torture committed by national authorities in the process of obtaining evidence that will be presented to support the prosecution's case.

In Europe, the European Court of Human Rights (ECtHR) has set clear standards on the exclusion of evidence obtained by torture. The ECtHR's leading line of case law on torture evidence states that all evidence – whether in the form of a statement or physical evidence – obtained as a direct result of torture, must be excluded from the criminal trial otherwise the trial will not be fair.<sup>22</sup> The applicant has to prove that there is a 'real risk' the evidence has been obtained by torture shifting the further burden to prove its legality on the state (prosecution).<sup>23</sup> This applies irrespective of its probative value or other safeguards of fairness. In case of use of any evidence obtained as a result of torture, the Court will not proceed to examine other aspects of the trial at all. Failure to exclude such evidence, in the Court's view, would "serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe".<sup>24</sup> These standards were recently extended to the evidence obtained by torture inflicted by private parties.<sup>25</sup>

Hence, respect for the right to a fair trial and the prohibition against torture requires the exclusion, not only of statements elicited by torture, but also of other forms of evidence obtained as a result of torture. This view was taken by the Inter-American Court of Human Rights, which indicated that the "absolute nature of the exclusionary rule is reflected in the prohibition on granting probative value not only to evidence obtained directly by coercion, but also to evidence derived from such action. Consequently, the Court considers that excluding

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<sup>19</sup> SCJN, Primera Sala, Amparo Directo en Revisión 4530/2014, sesión del 30 de septiembre de 2015, p. 65; Amparo Directo en Revisión 913/2015, sesión del 28 de octubre de 2015, p. 66.

<sup>20</sup> *Deolall v Guyana*, CCPR/C/82/D/912/2000, 5 November 2004; *Singarasa v Sri Lanka*, CCPR/C/81/D/1033/2001, 23 August 2004.

<sup>21</sup> [https://www.fairtrials.org/sites/default/files/publication\\_pdf/Tainted-by-Torture-Examining-the-Use-of-Evidence-Obtained-by-Torture.pdf](https://www.fairtrials.org/sites/default/files/publication_pdf/Tainted-by-Torture-Examining-the-Use-of-Evidence-Obtained-by-Torture.pdf) pp. 31-32

<sup>22</sup> *Gäfgen v. Germany*, application no. 22978/05, Grand Chamber Judgment of 1 June 2010.

<sup>23</sup> *El Haski v. Belgium*, application no. 649/08, Second Section Judgment of 25 September 2012, para. 85.

<sup>24</sup> *Jalloh v. Germany*, application no. 54810/00, Grand Chamber Judgment of 11 July 2006, para. 105.

<sup>25</sup> *Cwik v. Poland*, application no. 31454, Judgment of 5 November 2011.

evidence gathered or derived from information obtained by coercion adequately guarantees the exclusionary rule'.<sup>26</sup>

### **Conclusion**

The gathering of evidence in cases dealing with international crimes has its challenges and the cooperation of States Parties is key in that process. However, technical exceptions based on attributability or vague legal standards potentially allowing the admission of evidence tainted by torture would undermine the legitimacy and authority of the ICC. It would also encourage questionable prosecutorial and investigative practices in States Parties and in the Office of the Prosecutor.

The ICC, and particularly Trial Chamber X, are presented with a remarkable opportunity to strengthen the law of evidence of the Court and set clear standards to protect the integrity and fairness of its proceedings. It is an opportunity to affirm clearly the absolute nature of the prohibition of torture and to state that due process guarantees cannot yield before acts of torture for the sake of prosecuting an individual even for the most serious crimes.

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<sup>26</sup> Cabrera-García and Montiel Flores v Mexico (Preliminary Objection, Merits, Reparations and Costs) Series C No. 220, 26 November 2010, para 167.