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TRIAL CHAMBER X

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

SITUATION IN THE REPUBLIC OF MALI

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

PUBLIC

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

Public redacted version of “Defence Article 69(7) Reply”

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

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

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Submissions

The Chamber should dismiss in limine arguments based on improper cross-referencing

1. The OTP's reliance on Termination Decision findings¹ as a mechanism to incorporate prior OTP arguments by reference is an impermissible attempt to circumvent the page limit and the Chamber's rulings that those findings would not pre-determine future Article 69(7) litigation,² and Article 69(7) submissions should be self-contained.³

The OTP has misconstrued the causality requirement in Article 69(7)

2. The OTP's position that Article 69(7) requires the non-tendering party to demonstrate that the contested evidence 'was "given as a consequence of" or "result[ed] from" the effects of torture/CIDT from another entity, in that the Accused gave the Evidence involuntarily, namely under coercion, duress or threat resulting from the torture/CIDT',⁴ is erroneous. It is not necessary to demonstrate that the evidence resulted from the violation nor does the *chapeau* violation need to occur at the same time of collection, provided it triggers 'detrimental effects' satisfying either Article 69(7)(a) or (b).⁵ This formulation is consistent with leading precedents concerning the 'continuing effects' of torture or prior mistreatment.⁶ Given the alternative bases for exclusion, is also not necessary to demonstrate a lack of volition if there are other elements undermining reliability or the integrity of the proceedings.

3. In relying on the *prima facie* standard that applies to the satisfaction of general admission criteria,⁷ the OTP fails to acknowledge the distinction between demonstrating general admissibility criteria to a *prima facie* standard, and the OTP's independent obligation to demonstrate the voluntary nature of suspect waivers to the standard of beyond reasonable doubt.⁸ Moreover, the OTP's own authorities controvert its argument that the Defence bears the initial burden of persuasion in relation to Article 69(7),⁹ and must establish that there is a 'real risk' that the evidence was obtained by torture/CIDT.¹⁰ *First*, the 31 December 2015 ECCC decision, the 5 February 2016 ECCC decision, *Othman*, and *El Haski* all support the principle that reports of widespread torture or patterns of similar abuses and complaints would

¹ ICC-01/12-01/18-1401-Conf, fns 97, 98, 106, 111, 114, 120, 121, 127, 144, 145, 146, 151, 152, 183.

² ICC-01/12-01/18-1009, para. 122.

³ ICC-01/12-01/18-1150, para. 11.

⁴ Response, para. 6.

⁵ [ICC-01/05-01/13-2170-Corr2-Red](#), para. 18: 'facts must demonstrate both a violation and (...) detrimental effect'.

⁶ [Gäffen](#), paras 128-129; [Cabrerá](#), paras 167, 173; [Abu Zubaydah v. Lithuania](#), para. 634: 'The Court considers that the applicant's experience in CIA custody prior to his detention in Lithuania is an important factor to be taken into account in its assessment of the severity of the treatment to which he was subsequently subjected'.

⁷ Response, para. 3 and fn. 3.

⁸ [Kabiligi](#), para. 18: 'waiver must be shown "convincingly and beyond reasonable doubt"'; [Sesay](#), paras 5, 15.

⁹ Response, para. 3.

¹⁰ Response, fn. 9.

trigger the exclusionary rule, and if unrebutted by the state, would satisfy the threshold for exclusion.¹¹ *Second*, the 31 December 2015 ECCC decision and *Cabrera* state that once the defence establishes that a confession might have been obtained through means that render it unreliable, the prosecution must prove beyond reasonable doubt that it was obtained voluntarily.¹² Linked STL jurisprudence similarly supports the burden of argumentation and proof for Article 69(7) resting with the tendering party.¹³ *Harutyunyan v. Armenia*¹⁴ specifically notes that the burden on the state will not be discharged by arguing that the applicant confirmed the contents of earlier statements in the subsequent confession or that the subsequent confession was made ‘to an authority other than the one responsible for the ill-treatment’. *Othman* similarly states that it would be ‘wholly inappropriate’ to require a high standard of proof from the suspect to the effect that the ‘evidence had been obtained from torture’ and that the absence of an independent and effective examination of the torture allegations impacted on the burden imposed on the suspect.¹⁵ *Third*, the *Lubanga* bar table decision and *El Haski*¹⁶ affirm the ICC’s obligation to investigate the real risk and satisfy itself that no real risk exists, failing which evidence must be excluded.

The Response claims that the real risk threshold has not been met are predicated on erroneous interpretations of evidence and law

4. The OTP’s attempt to contest the real risk threshold, based on the claim that allegations of torture/CIDT are based primarily on information provided to Defence experts,¹⁷ misapplies the evidential threshold for establishing a *prima facie* case, misrepresents the evidential record, and misapplies the legal definitions of torture and CIDT. The claim that Mr Al Hassan’s allegations to both Defence and PoE experts are insufficiently probative fails to take account of the Chamber’s evidential guidelines concerning Article 69(7) applications¹⁸ and the legal precedents concerning the real risk standard, including *Cabrera*, which affirmed that the real risk threshold could be fulfilled by expert opinions prepared in accordance with the Istanbul Protocol.¹⁹ Lapse of time between the torture and the preparation of the reports does

¹¹ [31 December 2015 ECCC decision](#), paras 48, 50, 52, 55 and 57; [5 February 2016 ECCC decision](#), para.34; *Othman*, paras 103-105, 270; *El Haski*, para.98.

¹² [31 December 2015 ECCC decision](#), para.53; *Cabrera*, para. 136.

¹³ [20 December 2016 STL Prosecution Request](#), para. 7; [20 October 2017 STL Decision](#), para.5.

¹⁴ *Harutyunyan v. Armenia*, para. 65.

¹⁵ *Othman*, paras 276, 280.

¹⁶ *Lubanga* bar table decision, para.41; *El Haski*, para.89.

¹⁷ Response, para. 12.

¹⁸ ICC-01/12-01/18-1304-Conf, para. 29.

¹⁹ *Cabrera*, para.122. The reports of Drs Cohen and Porterfield comply fully with the Istanbul Protocol. In contrast to the Response, para. 22, Dr Cohen considered other possible causes for the injuries she assessed: [MLI-D28-0002-0500](#) at 0514-0521, paras 69-70, 73, 79-80, 87-88, 92; [MLI-D28-0003-2059](#) at 2059-2063. Drs Ludes,

not undermine their validity because '[a] medical examination should be undertaken regardless of the length of time since the torture'.²⁰ The OTP also cites Dr Chisolm out of context: the relevant passage was not referring to Mr Al Hassan, but was an implicit criticism of the limitation imposed on the POE not to examine torture, despite its relevance to a PTSD diagnosis.²¹ In adopting a purely adversarial stance to its assessment of the PoE report, the OTP ignores the clear indication that the PoE considered that the information and evidence they evaluated satisfied the 'real risk threshold', again triggering the obligation to conduct an independent, effective and objective investigation into allegations of torture.²²

5. The real risk of torture/CIDT threshold is also fully substantiated by Mr Al Hassan's statements to the OTP. By seeking to rely on the contents of these statements to establish criminal responsibility, while failing to give due weight to the multiple indicia of torture/CIDT contained therein, the OTP has inverted its obligations under Article 15 of UNCAT. Notwithstanding the Prosecutor's duty of candour as concerns both evidential and legal matters,²³ the Response bypasses these indicia by misrepresenting the evidential record,²⁴ or misapplying the law. A glaring example is the OTP's claim that 'in the course of

[REDACTED] and [REDACTED] failed to comply with the torture assessment requirements of the Protocol: [MLI-D28-0003-2059](#) at 2063-2064, paras 19-22. Dr Lamothe initially drafted his report on the assumption that Mr Al Hassan was interrogated while detained at the ICC. While the OTP notified him of his error ([MLI-OTP-0078-7843](#)) and a second report was issued, a comparison of his two reports demonstrates that he did not give any consideration of the impact of Mr Al Hassan's conditions of detention in the DGSE on his psychological and physical welfare: ICC-01/12-01/18-991-Conf-AnxB.

²⁰ [Espinoza Gonzáles](#), paras 152, 255; [Cabrera](#), para. 122.

²¹ Response, para. 23 and fn. 71. See [MLI-D28-0003-2272](#) at 2276-2278, paras 10-11, 15: 'The evidence in the POE report, medical records and Dr Porterfield's report are consistent with PTSD in response to torture in Mali.' See also Annex B, pp. 9-13 regarding the long-term impacts of torture and CIDT contained in medical records.

²² ICC-01/12-01/18-1197- [REDACTED] ('PoE report'), paras 172-173: '[E]very effort must be made to obtain all other sources of collateral information in assessing the allegation of torture . . . An independent investigation of this accusation would help to clarify the relevant issue of trauma exposure, trauma-related health consequences and their impact on AH's ability to stand trial and exercise his fair trial rights.'

²³ *Prosecutor v. Niyetegeka*, [Appeals Judgment](#), para. 20, referring to the 'duty to demonstrate candour' and 'not knowingly to make incorrect statements of material facts to the Tribunal'; See also [ICC-01/04-01/07-322](#), p. 12.

²⁴ Annex B, citing Response para. 14, cf [MLI-OTP-1728](#), 1747; Response para. 15, cf [REDACTED], [REDACTED], [MLI-OTP-0062-4856](#), 4870-4871, [REDACTED]; Response, para. 16, cf [REDACTED], [MLI-OTP-0078-4322](#), 4329-4331, [REDACTED]; Response, para. 18, cf [MLI-D28-0003-2186](#), 2186-2187; Response, para. 19, cf [MLI-D28-0003-2194](#), 2204-2205, [MLI-D28-0003-2186](#), 2187, [MLI-D28-0003-2194](#), 2220-2221, [MLI-D28-0003-2244](#), 2248-2249, [MLI-D28-0003-2186](#), 2186-2187, [MLI-D28-0003-2194](#), 2220-2221, [MLI-D28-0003-2244](#), 2248-2249; Response, para. 22, cf [REDACTED]; Response, para. 23, cf [MLI-D28-0003-2272](#), 2276; Response, para. 24, cf ICC-01/12-01/18-1197-Conf-Anx, para. 51; Response, para. 26, cf [MLI-OTP-0078-4236](#), 4236, 4237-8; Response, para. 27, cf [REDACTED], [MLI-D28-0003-0571](#), 0573, [MLI-D28-0003-0260](#), 0269, [MLI-OTP-0046-8902](#), 8916; Response, para. 28, cf [REDACTED], [REDACTED], [REDACTED], [MLI-OTP-0069-3451](#), 3470-3472, [MLI-OTP-0068-2957](#), 2964; Response, para. 29, cf [REDACTED]; Response, para. 31, cf [MLI-OTP-0073-1218](#), 1219, [MLI-OTP-0068-3083](#), 3104-5, [MLI-OTP-0069-0874](#), 0894-9, [MLI-OTP-0069-7492-5](#), [MLI-OTP-0078-0838](#), 0839-40; Response para. 34, [MLI-OTP-0051-1213](#), 1224-5; Response, para. 37, cf [MLI-OTP-0060-1791](#), 1804-6; Response para. 38, cf [REDACTED], [REDACTED], [REDACTED]; Response para. 44, cf [REDACTED]; Response, para. 48, cf [REDACTED]; Response, para. 56, cf [REDACTED], [MLI-OTP-0060-1791](#), 1804-7.

19 days of interview between July 2017 and March 2018, the Accused never reported to the OTP investigators “continuous torture and CIDT”.²⁵ Since the Response specifically references numerous occasions where Mr Al Hassan referred to treatment falling squarely within the definition of ‘continuous torture and CIDT’,²⁶ it would appear this misconceived denial stems from the erroneous definitions of torture and CIDT employed in the Response. *First*, the OTP has incorrectly claimed that Mr Al Hassan was not detained incommunicado because he met with [REDACTED] and Barkhane.²⁷ A situation of incommunicado detention exists when a person is ‘held with no contact with anyone apart from other detainees and officials in the place where he is detained’.²⁸ The determinative and aggravating factor is ‘absence of any realistic possibility of being brought before a court to test the legality of the detention’, leaving the detainee ‘completely at the mercy of those holding him.’²⁹ Mr Al Hassan’s interactions with French officials did not change his incommunicado status or cure its effects, since he remained cut-off from the outside world and outside the protection of the law for the duration of DGSE detention.³⁰ If anything, these contacts, which included blind-folded interrogations without the assistance of Counsel, exacerbated the environment of coercion and his vulnerability.³¹ The definition of ‘officials’ in defining incommunicado detention includes [REDACTED] ([REDACTED]).³² *Second*, the OTP’s claim that this did not amount to enforced disappearance is flawed.³³ An enforced disappearance occurs when a person is deprived of their liberty and there is a refusal either to acknowledge their arrest/detention or ‘to give information on the fate or whereabouts of such person or persons’,³⁴ which will be fulfilled in circumstances where the person is held in a secret or unofficial location.³⁵ Although the OTP was informed by the DGSE that Mr Al Hassan was detained by them, there is no indication that the OTP was informed of his location nor were

²⁵ Response, para. 13.

²⁶ Response, para. 14. See Annex B, pp. 1-3, 6-8.

²⁷ Response, para. 14.

²⁸ N. Rodley, *The Treatment of Prisoners under International Law* (Oxford University Press 2009) p. 461.

²⁹ [100/1995/606/694](#), para. 83.

³⁰ Annex B, pp. 16-20

³¹ See for example [REDACTED], [REDACTED].

³² [MLI-OTP-0064-0797](#), [REDACTED]; [MLI-OTP-0035-0364-R01](#) at 0385 [REDACTED].

³³ Response, para. 29.

³⁴ [Elements of Crimes](#), p. 11. See also Article 17(1) of [the Declaration on Enforced Disappearance](#).

³⁵ See [CED/C/IRQ/OAI/1](#), paras 16-17, condemning secret detention facilities; Article 17(2)(c) of the [Convention on Enforced Disappearance](#): ‘Guarantee that any person deprived of liberty shall be held solely in officially recognized and supervised places of deprivation of liberty’; [HRW Report 2017](#), « Le gouvernement malien devrait mettre fin à la pratique consistant à détenir des suspects dans des lieux de détention non autorisés, notamment à la DGSE »; [MLI-D28-0003-1203](#) at 1236; [CED/C/MLI/1](#), [REDACTED] (p. 8).

the OTP (or UN or ICRC monitors) afforded access.³⁶ The Minister of Justice had no knowledge of his arrest, and has subsequently confirmed that the Ministry has no access to his DGSE files.³⁷ The OTP did not provide any updates concerning Mr Al Hassan's status to his family, or otherwise verify that this had been done by the Malian authorities. Article 15 and Article 69(7) are triggered by evidence of human rights violations, not criminal responsibility which is more strictly construed.³⁸ The specific label attached to these facts does not negate the psychological pain that Mr Al Hassan endured throughout DGSE detention due to his inability to communicate with his family.³⁹ Cutting off or unreasonably restricting contacts with family constitutes ongoing CIDT,⁴⁰ and [REDACTED] acknowledged the "deplorable"⁴¹ DGSE detention conditions. These uncontested matters, alone, satisfy the real risk threshold.

6. It is improper for the OTP to rely on [REDACTED]. The legal precedents relied upon by the OTP underscore the difficulty faced by torture survivors in recounting their experience in full, particularly while [REDACTED] facing ongoing risk of retaliation.⁴² The OTP also cannot rely on [REDACTED] never questioned on,⁴³ or afforded a fair and unconstrained opportunity to address, the issue.⁴⁴ Since the OTP positively relied on D28-P-0006's omissions,⁴⁵ notwithstanding D28-P-0005's opinion that P-0006 was still constrained [REDACTED],⁴⁶ the Defence provides a more recent statement from P-0006.⁴⁷ This statement fully corroborates Mr Al Hassan's account of continuous forms of torture and CIDT at the DGSE,⁴⁸ and highlights the difficulty [REDACTED] in providing a full account of torture, while still facing potential retaliation.⁴⁹

³⁶ ICC-01/12-01/18-1346-Conf, para. 14; Annex B, pp. 15-16.

³⁷ [MLI-D28-0004-7442](#) at 7443.

³⁸ [Rome Statute](#), Article 22(2).

³⁹ [Suárez-Rosero](#), para. 90: "isolation from the outside world produces moral and psychological suffering(...), places him in a particularly vulnerable position,...)increases the risk of aggression and arbitrary acts in prisons".

⁴⁰ [Espinoza de Polay](#), para. 8.6; [Mugesera](#), paras 89-91, where CIDT threshold met by 'limited' contacts with lawyer and family combined with verbal threats and poor conditions, and right to life also violated (para. 104).

⁴¹ [MLI-OTP-0066-0709-R02](#) at 0712 at 0714-0716.

⁴² [12 December 2016 STL Decision](#), para. 42; [Cabrerá](#), para. 135; [J v. Peru](#), paras 325-326, noting, since applicant held incommunicado, 'it is reasonable that Ms. J. did not recount all the presumed ill-treatment on that occasion. (...) after describing the alleged ill-treatment, the interrogators continued taking her statement without asking any question as a result of what she had asserted'; [Kaverzin v. Ukraine](#), para.113, where failure to conduct an independent investigation found because, *inter alia*, 'it relied on the applicant's initial statement denying any ill-treatment, in spite of the applicant's more recent, at the time, submissions to the contrary'.

⁴³ [REDACTED].

⁴⁴ Annex B, pp. 3-9.

⁴⁵ Response, para. 15.

⁴⁶ [MLI-D28-0003-1203-R01](#) at 1243-1244.

⁴⁷ [MLI-D28-0003-2343-R01](#) (English); [MLI-D28-0003-2340-R01](#) (Arabic).

⁴⁸ [MLI-D28-0003-2343-R01](#) at 2344-2345. See also earlier corroboration regarding handcuffing: Annex B, p. 6.

⁴⁹ D28-P-6 was not willing to provide the statement earlier due to these fears: [MLI-D28-0003-2343-R01](#) at 2345.

*OTP correspondence confirms that Mr Al Hassan's torture allegations were not objectively investigated & evaluated: as a result, his account acquires "a highly presumptive value"*⁵⁰

7. Recently disclosed evidence demonstrates, first, the OTP's failure to take steps to ensure that serious allegations of torture/CIDT were independently and promptly investigated,⁵¹ and, second, that no weight can be attached to [REDACTED], prepared retrospectively and exclusively for litigation purposes,⁵² and drafted with the guidance of the OTP.⁵³ The Defence has sought to interview [REDACTED]. [REDACTED], in response to an OTP proposal [REDACTED], the Defence expressed its concern that communications between OTP [REDACTED] could undermine the integrity of [REDACTED] evidence.⁵⁴ The communications between [REDACTED],⁵⁵ show that the OTP disregarded these concerns.⁵⁶ The correspondence controverts the good faith nature of the OTP's avowal that it was unnecessary [REDACTED].⁵⁷ Of particular concern, [REDACTED].⁵⁸ The OTP has refused to disclose [REDACTED],⁵⁹ but [REDACTED]⁶⁰ raises serious grounds for concern in light of first, [REDACTED],⁶¹ second, [REDACTED],⁶² and third, the OTP's ongoing refusal to [REDACTED].⁶³

The OTP's claims concerning the allegedly voluntary nature of the interview fail to address systemic coercion arising from continuous forms of torture/CIDT

8. The Response attempts to rely on Mr Al Hassan's formal consent as an antidote to the inherently coercive nature of the interview process. In so doing, the Response relies on indicia of volition irrelevant to a person held in a climate of fear entailing both actual and threatened torture. A voluntary waiver of rights must be informed: 'it is not sufficient to establish that the witness gave evidence voluntarily, without duress. The witness would have to know of the existence of the right, and the consequences deriving from waiving it'.⁶⁴ The OTP failed to fulfil this requirement. The Response shows that as a result of its insistence that

⁵⁰ [Suárez-Rosero v. Ecuador](#), para. 53.

⁵¹ [REDACTED].

⁵² See [Cabrera](#), para. 131, re the fact that the duty to independently and objectively investigate allegations of torture is not satisfied by merely responding to such allegations, within the context of criminal proceedings.

⁵³ [REDACTED].

⁵⁴ Annex D.

⁵⁵ [REDACTED].

⁵⁶ [REDACTED].

⁵⁷ [REDACTED].

⁵⁸ [REDACTED].

⁵⁹ Annex E.

⁶⁰ [REDACTED].

⁶¹ [REDACTED].

⁶² [REDACTED].

⁶³ Annex A.

⁶⁴ [Prlic](#), para. 15.

its interviews were ‘separate’ from national proceedings,⁶⁵ the OTP failed to either stop the interviews when it first received indicia of torture, or to advise Mr Al Hassan of his right not to be interviewed while held in arbitrary or incommunicado detention, which risked his life and physical and psychological integrity. The OTP averred in its Article 56 application that Mr Al Hassan’s DGSE detention created a ‘unique opportunity’ for the OTP to collect his evidence.⁶⁶ Nonetheless, although the Article 56 interview process was directly predicated on DGSE detention, the Response does not consider the *impact* of the OTP’s claims to Mr Al Hassan that his detention conditions were not their concern and that their competence was limited to raising these issues with national authorities,⁶⁷ on Mr Al Hassan’s ability to provide an informed waiver. These claims failed to respect Rule 111(2), which specifies that ‘[w]hen the Prosecutor or national authorities question a person, due regard shall be given to article 55’. As the OTP conceded, it had an obligation not to collect evidence in circumstances involving breaches of Article 55(1).⁶⁸ Consistent with internationally recognised human rights,⁶⁹ this includes circumstances involving detention violations amounting to torture/CIDT. The OTP relies on its interventions with the Malian authorities in order to claim that it discharged its duty of care towards Mr Al Hassan [REDACTED],⁷⁰ but these interventions were too late - occurring either at the end of the OTP’s interviews with Mr Al Hassan, or after his transfer to the ICC.⁷¹ While too late to assist Mr Al Hassan, these efforts concerning [REDACTED] confirm the *prima facie* credibility of Mr Al Hassan’s complaints concerning DGSE conditions, and reinforce the point that the OTP could and should have done more to discharge its duty towards Mr Al Hassan.⁷² [REDACTED],⁷³ but when Mr Al Hassan raised [REDACTED] complaints, querying whether it was lawful to conduct the interviews while held there, the OTP insisted that it was and that he had no right to demand otherwise.⁷⁴ Mr Al Hassan’s consent was vitiated because the OTP not only failed to advise him of his rights under Article 55(1), it provided inaccurate advice and information (i.e. that

⁶⁵ Response, para. 31.

⁶⁶ [REDACTED].

⁶⁷ Response, para. 49.

⁶⁸ Response, para. 6.

⁶⁹ Principle 27, [UN Body of Principles for the Protection of Persons in Detention](#), specifies that non-compliance with a range of detention related rights (such as right to communicate with family), ‘shall be taken into account in determining the admissibility of such evidence against a detained or imprisoned person.’

⁷⁰ Response, para. 47.

⁷¹ [REDACTED].

⁷² [REDACTED] ([REDACTED]).

⁷³ [REDACTED]. Cf Response para. 45, which asserts taking of ‘safeguards “within its competence” in the Accused’s interview’.

⁷⁴ [REDACTED].

the Judges knew of his detention conditions and had approved the interviews notwithstanding).⁷⁵ In line with *Ruto*, the OTP's insistence that he had no right to condition participation on change in detention status gave rise to the 'added danger that the suspect (who is not familiar with the relevant law) might be left to worry that asserting the right [in question] (...) might be viewed by the investigators as evidence of consciousness of guilt.'⁷⁶

9. The OTP's claim that Mr Al Hassan's communication of *some* information concerning his mistreatment shows that he was 'not labouring under the effects of any alleged torture/CIDT'⁷⁷ is an oxymoron. Crucially, the Response does not address the OTP's *reactions* to the reported incidents.⁷⁸ When Mr Al Hassan told the OTP in the first BSQ session that he had been threatened with death and his life was in the hands of the DGSE,⁷⁹ the OTP did not refer to Article 55(1)(b) or ask follow-up questions to investigate the impact of these threats and the coercive environment on the Article 56 interview process.⁸⁰ On 2 October 2017, the OTP promised that if Mr Al Hassan was subjected to physical mistreatment or had medical ailments, they would not do the interview and would try to get him care.⁸¹ Yet, when Mr Al Hassan reported in December 2017 that he had been subjected to physical mistreatment (and denied food for three days),⁸² the OTP continued the interviews, even though they agreed that his conditions were tantamount to those at Guantanamo Bay.⁸³ The OTP conducted a further 6 days of interviews⁸⁴ before it communicated Mr Al Hassan's concerns [REDACTED], for the first time, on 1 March 2018 (that is, three months later),⁸⁵ by which time the 'cat was out of the bag'.⁸⁶

10. The OTP's failure to comply with the promised procedural safeguards (that it would stop the interviews and immediately report the maltreatment) invalidates any possible consent to

⁷⁵ [REDACTED].

⁷⁶ [ICC-01/09-01/11-1753](#), para. 37. See also Annex B, pp. 20-22.

⁷⁷ Response, para. 46.

⁷⁸ Response, para. 14.

⁷⁹ [REDACTED].

⁸⁰ [Cabrera](#), paras 167, 173: 'the fact that this person ratifies his confession before a different authority (...) should not automatically lead to the conclusion that such confession is valid. This is so because a subsequent confession may be the consequence of the mistreatment suffered by the person and, more specifically, because of the fear that remains after this type of experience'. See also Annex B, pp. 2-6 regarding the OTP not asking follow-up questions regarding the alleged beating of the detainees in November or December 2017.

⁸¹ [REDACTED].

⁸² Response, para. 14.

⁸³ [MLI-OTP-0069-1795](#) at 1797, lns 48-55. See also Annex B, pp. 25-28.

⁸⁴ [REDACTED].

⁸⁵ [REDACTED].

⁸⁶ '[A]fter an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. (...) In such a sense, a later confession always may be looked upon as fruit of the first'. [Bayer](#), 331 U.S. 532 (1947) pp. 540-541.

continue following Mr Al Hassan's expressed concern that it was unlawful to interview him while held at the DGSE.⁸⁷ Even if the OTP was not responsible for Mr Al Hassan's arbitrary detention, the OTP was responsible for ensuring, first, that the manner in which it advised him of his rights, was tailored to his personal circumstances (a torture survivor, held incommunicado),⁸⁸ and second, that it did not benefit, or collect evidence in circumstances entailing human rights violations.⁸⁹ The OTP also had an obligation to stop the interviews, as soon as they received information concerning maltreatment.⁹⁰ Vulnerable individuals in an inherently coercive detention environment entailing systemic mistreatment lack capacity to provide informed consent;⁹¹ no individual can or should choose between the right to silence and the right to access someone outside an environment involving torture and CIDT.⁹²

11. The OTP's invocation of discrete interactions to demonstrate volition is misplaced: these exchanges do not demonstrate that the OTP took the necessary steps to ensure that Mr Al Hassan was placed to provide an informed and unequivocal waiver of his right to silence,⁹³ in light of his detention environment. Specifically, throughout the interview process, the OTP did not verify that steps were taken to put Mr Al Hassan in contact with the outside world (his family in particular), to protect Mr Al Hassan from the actual or perceived risk of retaliation from DGSE guards, to provide Mr Al Hassan with information concerning the legal and factual basis for his detention and its expected duration and an effective mechanism

⁸⁷ [Kabiligi](#), paras 14-19.

⁸⁸ [Kabiligi](#), para. 16: 'this right is rooted in the concern that an individual, when detained by officials for interrogation, is often fearful, ignorant and vulnerable; that fear and ignorance can lead to false confessions by the innocent; and that vulnerability can lead to abuse (...), particularly when (...) held incommunicado.'

⁸⁹ [Harney](#), 407 F.2d 586 (1969), two confessions excluded, first without compliance with *Miranda* warning and second with warning, because 'the effects of the earlier invalid interrogations and statements had not been sufficiently dissipated, and the FBI agent was the direct beneficiary of the illegal conduct of the local police.'

⁹⁰ [MLI-D28-0003-0031](#) at 0032-0035, especially at 0035, para. 27.

⁹¹ [31 December 2015 ECCC decision](#), paras 42 and 57, finding the threshold satisfied by evidence that detainees 'subjected to systematic interrogation' and 'lived in permanent climate of fear', and referring to 'intrinsic unreliability' of evidence produced; IACHR, [Resolution No. 29/89](#): 'statements(...)were obtained during the period in which he was detained incommunicado(...)and are therefore invalid'; [A/HRC/10/3/Add.2](#), para. 43, referring to 'problematic conditions(...)at Guantánamo Bay', and welcoming 'the decision(...)to close the case declaring all evidence originating from Guantánamo Bay null and void'; [Ali Ahmed](#), at 56, where testimony had 'been cast into significant question, due to the fact that it was elicited (...) amidst actual torture or fear of it.'

⁹² [Hicks](#), para. 4.9, where Australia could not rely on Hicks' 'consent' to conditions of return given 'that the detention conditions and ill-treatment to which he was subjected left him little choice.' Cf [MLI-OTP-0060-1791](#) at 1806-1807 where OTP linked their presence to Mr. Al Hassan's willingness to provide evidence.

⁹³ Response para. 55. Cf [MLI-OTP-0062-1268](#), p.1278, l.320-336. The conversation is led by the investigator and it is the investigator who makes the joke; Mr Al Hassan only provided short answers ('c'est vrai, c'est vrai'). [REDACTED], not Mr Al Hassan, refers to 'smiles', after a sardonic exchange, and there is no independent record: [MLI-OTP-0060-1780](#) at 1789, l.301-304, [MLI-OTP-0060-1752](#) at 1756, l.103, 114. The interactions occurred on the same day that Mr Al Hassan referred to his deteriorated medical situation, in response to which[REDACTED]: [REDACTED]. Cf [Marzook](#), containing more than twenty examples of jokes being exchanged throughout the interview.

to challenge it, or to provide him an independent medical examination or appropriate medication to address both physical and psychological ailments he referred to during the course of the interventions. The Response also does not address the OTP's failure to correct Mr Al Hassan's misapprehension that he was being interviewed as a witness,⁹⁴ even though it was an error fanned by the Prosecution's own language to this effect.⁹⁵

12. The OTP's reliance on the 'separate' nature of the proceedings does not reflect the extent to which it blurred the boundaries between the two by questioning Mr Al Hassan on matters relating to his apprehension by Barkhane and the DGSE,⁹⁶ nor does it address the implications as concerns Mr Al Hassan's right to know the reasons as to why he was considered to be a suspect, and to consequently provide an informed waiver of his privilege against self-incrimination.⁹⁷ During the first session, the OTP explained to Mr Al Hassan his rights under Article 55(2) in the context of seeking his versions of events from 2012, particularly concerning what happened in Timbuktu.⁹⁸ Nonetheless, after Mr Al Hassan told the OTP that he had been tortured and threatened by the DGSE, the OTP questioned Mr Al Hassan in relation to matters occurring after 2012 and outside Timbuktu. These issues were not raised spontaneously by Mr Al Hassan,⁹⁹ but were elicited through deliberate questioning.¹⁰⁰ Whereas the Response claims that Mr Al Hassan was advised of his privilege against self-incrimination,¹⁰¹ the transcript reflects the vague and equivocal manner in which this was expressed.¹⁰² Mr Al Hassan was not cautioned that the OTP was investigating such matters or that they could be relied upon in ICC proceedings until January 2018 (by which time he had been held incommunicado for 9 months).¹⁰³ Mr Al Hassan's ability to obtain legal advice on such matters was compromised by the fact that neither he nor his Counsel had access to his domestic case file and therefore could not assess the implications of adhering or deviating from the DGSE dossier vis-à-vis his rights in Mali or before the ICC.¹⁰⁴ Unlike the Article 56 Counsel (who had no privileged relationship with Mr Al Hassan), the Article 55 Counsel was

⁹⁴[REDACTED]; [REDACTED],lns.36-38.Cf [ICC-01/09-01/11-1753](#), para.32.

⁹⁵[REDACTED].

⁹⁶ See e.g. the matters discussed at [MLI-OTP-0051-1067](#) at 1075-1077. Cf Response, para. 44.

⁹⁷ [Kabiligi](#), paras 17, 19; [Karemera](#), paras 12-13 (waiver involuntary because defendant not provided with information concerning reasons for arrest, or why he was considered to be a suspect).

⁹⁸ [MLI-OTP-0051-1233](#) at 1243-1244.

⁹⁹ Cf Response, para. 44.

¹⁰⁰ [MLI-OTP-0051-1067](#) at 1074-1078.

¹⁰¹ Response, fn. 133, citing [MLI-OTP-0051-1067](#) at 1078, lns 341-348.

¹⁰² [MLI-OTP-0051-1067](#) at 1078. lns 345-353.

¹⁰³ [MLI-OTP-0060-1752](#) at 1769 (specific allegation of attacks on peacekeepers first included in caution).

¹⁰⁴ [ICC-01/04-01/07-2635](#), para. 63.

not provided access to the materials supporting the Article 56 Application.¹⁰⁵ The Response also does not reconcile its reliance on Article 55(2) cautions to demonstrate volition, with the OTP's failure to provide such cautions in BSQ sessions, during which the OTP elicited physical evidence under the guise of ensuring his protection.¹⁰⁶

13. Finally, it would be inimical to the protective purposes of Article 15 and Article 69(7) to carve out an exception based on formal consent or procedural formalities that do not remedy the effects of the torture/CIDT in question.¹⁰⁷ The ICC cannot 'contribute to the prevention' of torture and arbitrary detention, if it makes use of evidence obtained from a tortured individual, held in arbitrary detention, since 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).¹⁰⁸



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Dated this 12th Day of April 2021
At The Hague, The Netherlands

¹⁰⁵ ICC-01/12-01/18-328-Conf-Red4, para. 28.

¹⁰⁶ See [MLI-OTP-0069-1806](#) at 1807-1808, which produced [MLI-OTP-0056-0421](#), which has been used by the OTP for an incriminatory purpose and relied upon by their expert P-0620.

¹⁰⁷ The ECCC found that the exclusionary rule could be rebutted by evidence that torture was not used; the notion that the victims consented was not a relevant factor: [5 February 2016 ECCC decision](#), para. 37.

¹⁰⁸ Piragoff, 'Article 69', in Triffterer (ed) [Commentary on the Rome Statute](#) (2nd ed), p.1335; [Cabreria](#), para.166.