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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 A

Public redacted version of “Prosecution response to Defence
Article 69(7) Application”, 26 March 2021, ICC-01/12-01/18-1401-Conf

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

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I. Introduction

1. The Office of the Prosecutor (“OTP”) opposes¹ the Defence’s application under article 69(7) of the Statute² to exclude the evidence provided by the Accused Mr Al Hassan during his interview with the OTP (“Evidence”).³
2. The Defence has failed to establish a real risk that the Evidence was obtained by means of torture or cruel, inhuman or degrading treatment (“CIDT”). The Defence does not claim that the OTP subjected the Accused to torture/CIDT but rather that he was subject to torture/CIDT by French and Malian authorities during his detention in Mali. But many of the Defence’s allegations, especially the most serious ones, are based on unreliable evidence and/or misrepresent the facts and/or the evidence. Furthermore, the Defence has failed to show that there is a causal link between any torture/CIDT to which the Accused was allegedly subjected to and the Evidence. The record is clear that the Evidence was obtained in a voluntary interview process. In addition, the Evidence is reliable and its admission would not be antithetical to or seriously damage the integrity of the proceedings. Accordingly, the Chamber should reject the Application and allow the Evidence into evidence.

II. Applicable standards

(i) *Burden and standard of proof*

3. The OTP has already met its burden to demonstrate on a preliminary basis⁴ that the Evidence is admissible and that the Accused gave it voluntarily.⁵ As the Defence is now seeking the exclusion of the Evidence pursuant to article 69(7), it bears the initial burden of persuasion to show that the criteria for the exclusion of evidence under article 69(7) are met.⁶ The Defence must provide sufficient information that “reasonably casts doubt” on the admissibility of the Evidence.⁷ This is consistent with findings of other Chambers.⁸

¹ The OTP files this response and its annex confidentially pursuant to regulation 23bis(2) because the response refers to other documents that are subject to the same classification.

² ICC-01/12-01/18-1346- [REDACTED] (“Application”).

³ See ICC-01/12-01/18-1218- [REDACTED] (“Submission”), para.1 (audio recordings of the OTP interview of the Accused and their transcripts, as well as the related materials signed or produced by the Accused during his OTP interview and documents commented on by the Accused during his OTP interview).

⁴ See [ICC-01/05-01/08-2012-Red](#), para.13; [ICC-01/04-01/06-1399-Corr](#), para.27-32; [ICC-01/04-01/06-2595-Red-Corr](#), para.39; [ICC-01/04-01/07-2289-Corr-Red](#), para.13). *Contra* Application, para.2 (OTP must show the existence of these criteria “convincingly and beyond reasonable doubt”).

⁵ Submission, para.19-49. See also [ICC-01/05-01/08-2012-Red](#), para.17; [ICC-01/04-01/06-1399-Corr](#), para.25.

⁶ Article 69(7) “represents a clear exception to the general approach” regarding the admission of evidence. See [Lubanga Bar Table Decision](#), para.34 (referring to article 69(7) as “*lex specialis*” to article 69(4)).

⁷ [ICC-01/04-01/10-465-Red](#), para.59.

⁸ [ICC-01/04-01/10-465-Red](#), para.60, 62-64, 71; [ICC-01/04-01/07-717](#), para.98; [ICC-01/05-01/13-1284](#), para.32; [ICC-01/05-01/13-1854](#), para.62.

4. In particular, the Defence must show that there is a “real risk” that the Evidence was obtained by means of torture/CIDT.⁹ If, *arguendo*, the Defence has provided evidence showing that such a real risk exists, the OTP—seeking to rely on the Evidence—must then rebut it by showing specific circumstances negating this risk, and thereby demonstrating that the Evidence was given voluntarily.¹⁰

(ii) Interpretation and application of article 69(7)

5. Human rights law is categorical that evidence obtained “as a result of torture” shall not be admitted.¹¹ In addition, international human rights courts have held that the admission of evidence obtained as a result of CIDT, but falling short of torture, would also render the proceedings unfair.¹² Under article 69(7), “[e]vidence obtained by means of a violation of [the] Statute or internationally recognized human rights” shall be excluded if such violation casts substantial doubt on the reliability of the evidence, or its admission would be antithetical to or would seriously damage the integrity of the proceedings.¹³ The term “evidence obtained by means of”¹⁴ implies that for evidence to be excluded under article 69(7), there must be a “causal link” between a violation of human rights or the Statute and the evidence in question.¹⁵

6. The Defence does not allege that the OTP committed torture/CIDT but rather that the Accused was subject to torture/CIDT by French and Malian authorities during his detention in Mali.¹⁶ Thus, for the Evidence to be excluded pursuant to article 69(7), it must be shown that it was given “as a consequence of”¹⁷ or “result[ed] from”¹⁸ the effects of torture/CIDT by another entity,¹⁹ in that the Accused gave the Evidence involuntarily, namely under coercion,

⁹ [Othman v. United Kingdom](#), para.263, 272-280, 282, 285; [El Haski v. Belgium](#), para.86-88 and fn.14; [31 December 2015 ECCC Decision](#), para.52; [5 February 2016 ECCC Decision](#), para.33; [12 December 2016 STL Decision](#), fn.20.

¹⁰ [5 February 2016 ECCC Decision](#), para.36-38. For the evidence to be admitted, absence of a real risk must not be shown beyond reasonable doubt (*contra* Application, para.2). The standard of proof under article 66(3) is reserved for the question on the guilt of the accused and does not apply to the admissibility of evidence ([ICC-01/05-01/09-73 OA](#), para.30). In any event, in this case, the OTP has shown the voluntariness of the Accused’s Evidence to a higher threshold than required.

¹¹ [CAT](#): Article 15.

¹² [Gäfgen v. Germany](#), para.165-166; [El Haski v. Belgium](#), para.85; [Othman v. United Kingdom](#), para.264-267; [Cabrera García and Montiel Flores v. Mexico](#), para.165-166.

¹³ Article 69(7). [Bemba et al. AJ](#), para.280; [Lubanga Bar Table Decision](#), para.41; [ICC-01/04-01/10-465-Red](#), para.61.

¹⁴ The equivalent wording of [CAT](#) Article 15 is “as a result of”.

¹⁵ [Gäfgen v. Germany](#), para.171; SCOUS, [Connelly v. Colorado](#), 479 U.S. 157, p.164.

¹⁶ [ICC-01/12-01/18-885-Corr-Red3](#) (“[Termination Motion](#)”), para.38. See also Decision, para.117 (alleged torture/CIDT committed by national authorities not attributable to the OTP).

¹⁷ [Harutyunyan v. Armenia](#), para.65.

¹⁸ [Cabrera García and Montiel Flores v. Mexico](#), para.166.

¹⁹ [Othman v. United Kingdom](#), para.263, 272-280, 282, 285; [El Haski v. Belgium](#), para.86-88.

duress or threat resulting from that torture/CIDT.²⁰ If the Prosecution had obtained evidence under such circumstances, it would also violate its obligation under article 55(1)(b).

7. This requires the Chamber to make a fact-specific determination, taking into account all the relevant circumstances of this case.²¹ The practice of the Appeals Chamber in relation to article 69(7), as well as decisions of other international tribunals and domestic courts, may guide the Chamber in making this assessment.

8. In *Bemba et al.*, the Majority of the Appeals Chamber and Judge Henderson (in his Separate Opinion) confirmed that all investigative conduct should meet international human rights standards.²² Building on this need for caution, Judge Henderson held that relevant factors to take into account under article 69(7) include “(i) the gravity of the violation; (ii) whether the Prosecution was in control of the process or had the power to prevent the conduct in question; [...] and (iv) the level of care that was displayed [by OTP] to minimise the risk of any violations occurring and measures taken once the violation has occurred to reduce the impact thereof”.²³

9. In assessing the voluntariness of a statement given to international investigators by a witness who claimed to have been mistreated by domestic authorities, STL Trial Chamber I considered that the witness “had not been forced to attend the interview, nor threatened, nor offered any inducements or promises, and that its content was true to the best of his knowledge and recollection”.²⁴ The Chamber also considered “the way [the witness] had been treated by the [...] investigators before and after the interview”, and whether the witness’s statements are “internally consistent” and “comprehensive”.²⁵ In turn, ICTY Chambers have emphasised the importance of ensuring that the interviewee understood his rights,²⁶ whether counsel for the interviewee was present,²⁷ and whether the statements were induced by “coercion, force or fraud, or oppressive conduct which [...] has sapped the free will of the suspect [...]”.²⁸

²⁰ *Harutyunyan v. Armenia*, para.65; *Gäfgen v. Germany*, para.167-168; *Garcia Cruz and Sanchez Silvestre v. Mexico*, para.58; *Cabrera García and Montiel Flores v. Mexico*, para.165-167. See also [5 February 2016 ECCC Decision](#), para.59; [12 December 2016 STL Decision](#), para.44-45; *United States v. Salameh*, para.117.

²¹ Piragoff and Clarke (2016), p.1748, mn.71. See also *United States v. Murdock*, p.1305-1306; *Mohammed v. Obama*, para.25.

²² *Bemba et al. AJ*, para.291, 330. *Judge Henderson Separate Opinion*, para.3, 9.

²³ *Judge Henderson Separate Opinion*, para.34; see also para.33 (*Lubanga Bar Table Decision* and stating “The Trial Chamber in *Lubanga* suggests that the purpose of the exclusionary rule is, *inter alia*, to discipline or deter unlawful conduct by the Prosecution. Therefore, an assessment of the Prosecution’s control over the evidence gathering process or the power to prevent the improper conduct is particularly relevant”).

²⁴ [12 December 2016 STL Decision](#), para.45, see also para.42.

²⁵ [12 December 2016 STL Decision](#), para.45-46.

²⁶ [2 September 1997 Delalić Decision](#), para.62.

²⁷ [2 September 1997 Delalić Decision](#), para.51.

²⁸ [2 September 1997 Delalić Decision](#), para.66; [19 January 2006 Martić Decision](#), para.9.

10. Finally, domestic courts have assessed the admissibility of prior statements made by persons who had been subject to ill-treatment by a foreign entity, by considering the following factors, among others: whether the statement-taking authority “actively participated in the process of [ill-treatment]”;²⁹ whether a member of the entity who engaged in ill-treatment was present during the statement-taking;³⁰ the person’s age and education and whether the person was advised of their rights and the nature of the questioning,³¹ including the right to remain silent, to speak to counsel and to discontinue talking at any time;³² and whether the statement-taking took place in a friendly and co-operative environment and in the language of the person.³³ In addition, a court considered as a factor against concluding that a person was still under the influence of ill-treatment that the person freely told the investigating officers about the ill-treatment.³⁴ The Defence relies on a number of U.S. cases in support of its Application. While these cases significantly differ factually from the case at hand,³⁵ the legal propositions laid out in those cases are consistent with the international human rights standards set out above.

III. The Defence has failed to establish a real risk that the Evidence was obtained by means of torture/CIDT

i) Many of the Defence’s allegations regarding torture/CIDT are based on unreliable evidence and/or misrepresent the facts/evidence

11. Many of the Defence’s allegations regarding the Accused’s torture/CIDT are based on unreliable evidence and/or misrepresent the facts and/or evidence. This applies in particular to the most serious allegations of torture/CIDT by French Barkhane forces or the *Direction générale de la sécurité d’État* (DGSE) of Mali.³⁶

²⁹ [Canada \(Prime Minister\) v. Khadr](#), para.48; see also [United States v. Salameh](#), para.117; [R. v. Cook](#), (“There is a real and substantial connection between the investigation taking place abroad and the Charter simply by virtue of the fact that Canadian officials are involved”).

³⁰ [Karake](#), para.140.

³¹ [United States v. Murdock](#), pp.1305-1306.

³² [Colorado v. Spring](#), p. 574.

³³ [United States v. Marzook](#), p.769-772; [Bundesgerichtshof, 3 StR 573/09](#).

³⁴ [Bundesgerichtshof, 3 StR 573/09](#).

³⁵ Application, para.18-19. See e.g. [Mohammed v. Obama](#), where Binyam Mohamed was held at the behest of the U.S. in Pakistan, in Morocco where he was tortured, where the torturers acted in coordination with U.S. officials, and where the torture was designed to elicit incriminating evidence for the U.S. authorities; [Abdah v. Obama \(Uthman\)](#), where the torture occurred in a U.S detention facility at the Air Force base in Bagram (Afghanistan); [Karake](#), where the Rwandan and American governments were working “hand-in-hand” in a joint investigation—subsequent statements to American investigators were tainted, among other reasons, because Rwandan officials were present at most if not all interviews with American investigators and actively participated in the interrogation process; [Brooks v. Florida](#), where Mr Brooks was questioned by the same authorities that were responsible for his inhumane detention conditions.

³⁶ See Application, para.5-6. This includes the allegations that the Accused was waterboarded, threatened with electrocution, subjected to mock executions, beaten to such a degree of severity that he lost consciousness, threatened about his family and subject to [REDACTED], *falaka* or stress positions.

12. The Defence's allegations of torture/CIDT are almost entirely based on the Accused's own self-serving accounts to the Defence experts.³⁷ These accounts have not been tested; to accept them at face value would amount to allowing the Accused to give unsworn testimony (without cross-examination) through the Defence experts' reports. His statements to these experts should be given limited weight, if any, for that reason alone.

13. In addition, with respect to Dr Porterfield's and Dr Crosby's reports and Dr Cohen's second report, the Chamber has already held that portions that it examined were unreliable, as they were based on a partial record and/or on speculation or mischaracterisation of the record.³⁸ The following facts also indicate that many of the Defence's allegations are unsupported or exaggerated. Contrary to the Defence submissions, in the course of 19 days of interview between [REDACTED] and [REDACTED], the Accused never reported to the OTP investigators "continuous torture and CIDT."

14. Instead, on several occasions, the Accused complained to the OTP investigators about his conditions of detention,³⁹ in particular, the lack of access to his family⁴⁰ and his limited access to medication.⁴¹ He also complained on a few occasions about his toothache, fever and headaches,⁴² [REDACTED].⁴³ However, he only reported to the OTP investigators two specific incidents of physical violence, namely, an alleged beating and death threat on the day he arrived at the DGSE on 1 or 2 May 2017,⁴⁴ and an alleged beating of detainees in November 2017.⁴⁵

15. Furthermore, [REDACTED] do not support the Accused's claim that he was beaten during the alleged incident in November 2017. For example, while [REDACTED] a detainees' protest in November or December 2017,⁴⁶ neither [REDACTED] indicated the Accused's involvement, nor [REDACTED] specify the number of detainees beaten. And neither [REDACTED]⁴⁷ or D28-P-0006⁴⁸, [REDACTED]

³⁷ See Application, fn.18, 20, 23, 25, 26, 27-31, citing Dr Porterfield's report ([REDACTED]) and Dr Cohen's first report ([REDACTED]).

³⁸ ICC-01/12-01/18-1009-[REDACTED] ("Decision"), para.106-109.

³⁹ See e.g. [REDACTED]

⁴⁰ [REDACTED]

⁴¹ [REDACTED]

⁴² [REDACTED]

[REDACTED]

⁴³ [REDACTED]

⁴⁴ [REDACTED]

⁴⁵ [REDACTED]

⁴⁶ [REDACTED]

⁴⁷ [REDACTED]

⁴⁸ [REDACTED]

[REDACTED],⁴⁹ [REDACTED] any incidents of beatings or other physical violence [REDACTED] [REDACTED] by the DGSE. D28-P-0006 [REDACTED] not subject to any physical torture.⁵⁰

16. At no point in the interview did the Accused inform the OTP investigators that he was subjected to forms of torture/CIDT, such as waterboarding and being suspended, as he now alleges.⁵¹ In particular, he did not report to the OTP any of the alleged torture/CIDT by the French Barkhane forces before his transfer to the DGSE on 2 May 2017.⁵² In fact, during his first meeting with OTP investigators on [REDACTED], the Accused answered in the negative when asked if he suffered from any pain, suffering or injury.⁵³ Similarly, on [REDACTED], after informing the OTP that he had been questioned by the DGSE two or three times, he confirmed that he had not been ill-treated.⁵⁴

17. [REDACTED]
[REDACTED] observed no problem with regard to the Accused's physical appearance, his behaviour or his ability to understand and respond to questions.⁵⁵

18. Medical certificates issued by Malian and French doctors and medical records from the ICC Detention Centre do not provide any support for permanent or long-lasting injuries as alleged by the Defence.⁵⁶ For example, the medical certificates issued by the Barkhane forces on 2 May 2017⁵⁷ and by the ICC Deputy Medical Officer upon his arrival at the Detention Centre on 31 March 2018⁵⁸ record that the Accused [REDACTED]. The medical examination form completed by the Chief Doctor of *Gendarmerie Nationale* on 31 March 2018 before the Accused's departure from Mali noted that the Accused [REDACTED]
[REDACTED].⁵⁹ None of these documents mentions any lesions or scars that could be connected to allegations of torture.

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

⁵¹ See, contra, [REDACTED], according to which the Accused told Dr Porterfield that he remembered informing the OTP of "many aspects of his torture, including waterboarding, constant handcuffing, and being suspended" and "the prisoner dying near him" on the first day of his interview.

⁵² [REDACTED]

⁵³ [REDACTED].

⁵⁴ [REDACTED].

⁵⁵ [REDACTED].

⁵⁶ Application, para.10.

⁵⁷ [REDACTED]

⁵⁸ [REDACTED]

⁵⁹ [REDACTED]

19. Likewise, medical records from the ICC Detention Centre, cited by the Defence, make no mention of alleged “pain in the left side of his jaw” or “chronic dizziness and exhaustion”.⁶⁰

For example, [REDACTED]

[REDACTED]

[REDACTED].⁶¹ According to [REDACTED]

[REDACTED]

[REDACTED].⁶² [REDACTED]

[REDACTED].⁶³

20. The Defence misrepresents that the Accused’s memory problem resulted from the alleged torture/CIDT.⁶⁴ By his own accounts, this problem started when he was 30 years old or 20 years ago,⁶⁵ long before his arrest and detention in Mali.

21. Moreover, the conclusions of the Defence experts are unreliable and contradicted by the OTP experts and the Panel of Experts (“PoE”) appointed by the Chamber under rule 135.

22. Both Dr Porterfield’s report and Dr Cohen’s report show that the Accused omitted to describe to them his involvement in armed groups as part of his personal history, and only mentioned having worked as a taxi driver, a teacher, a pharmacist and a translator/typist.⁶⁶ Dr Cohen thus does not appear to have considered the possibility that any lesions and other physical injuries to the Accused’s body, almost all of which she found to be “highly consistent” with the torture described,⁶⁷ could have been caused by accidents or injuries during his activities as a member of armed groups or in his escape to the Tigharghar mountains when leaving Timbuktu in early 2013.⁶⁸ In contrast, Dr Ludes [REDACTED] concluded that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].⁶⁹

23. Dr Chisholm’s conclusion that “[t]he evidence in the POE report, medical records and Dr Porterfield’s report are consistent with PTSD in response to torture in Mali”⁷⁰ only represents

⁶⁰ Application, para.10.

⁶¹ [REDACTED].

⁶² [REDACTED]

⁶³ [REDACTED].

⁶⁴ Application, para.10.

⁶⁵ [REDACTED]

⁶⁶ [REDACTED]

⁶⁷ [REDACTED]

⁶⁸ [REDACTED]

⁶⁹ [REDACTED].

⁷⁰ [REDACTED]

his opinion and interpretation of the findings by the PoE and other experts. As he himself clarified, “[t]he clinician cannot state that torture occurred but must base their assessment on the premise that it did”.⁷¹ No weight can thus be accorded to his opinion as evidence in support of alleged torture/CIDT.

24. In contrast to the Defence experts, the PoE concluded that the Accused “does not appear from a purely categorical approach to fulfil the criteria for PTSD”.⁷² The PoE also acknowledged that “his sense of betrayal and despair could be the result of realising the consequences of an alleged involvement in criminal acts, without being trauma-related” and that “[it] had little information about the alleged torture and has seen no independent assessment of this issue.” It concluded that “[i]f AH was not subject to torture, the symptoms outlined above could either be a misinterpretation of his current mental status, or a reflection of problems he faces due to his role as an alleged perpetrator, or could be the consequence of certain experiences that are neither directly linked to his arrest and the court proceedings nor to the case itself, but manifest as a consequence of generally heightened levels of stress”.⁷³

25. Some accounts of witnesses or other sources cited by the Defence⁷⁴ are exaggerated or irrelevant to allegations of torture/CIDT at the DGSE.

26. For example, the statement of D28-P-0007, [REDACTED],⁷⁵ cited in support of the Accused’s alleged “severe mental and physical degradation” resulting from detention at the DGSE,⁷⁶ is contradicted by other evidence. [REDACTED]

[REDACTED].⁷⁷ [REDACTED]

[REDACTED].⁷⁸ The Defence’s allegation is also inconsistent with the medical certificate issued by a doctor [REDACTED]

[REDACTED].⁷⁹

⁷¹ [REDACTED]

⁷² ICC-01/12-01/18-1197-[REDACTED] (“PoE report”), para.206.

⁷³ PoE report, para.231.

⁷⁴ Application, para.12-14.

⁷⁵ [REDACTED]

⁷⁶ Application, para.13.

⁷⁷ [REDACTED]

⁷⁸ [REDACTED]

⁷⁹ [REDACTED]

27. Most of open source reports cited by the Defence,⁸⁰ including the MINUSMA report of February 2018,⁸¹ do not relate to torture/CIDT of detainees at the DGSE.⁸² They do not support the allegations of torture/CIDT of the Accused during his detention at the DGSE, or of systemic torture at the DGSE.

28. Finally, the Defence mischaracterises the Accused's detention at the DGSE as incommunicado detention.⁸³ The record shows that the Accused had access to individuals/entities outside the DGSE. By the Accused's own accounts, everyone who had been transferred by the French forces, including himself, received their visits on a monthly basis.⁸⁴ This is supported by [REDACTED],⁸⁵ [REDACTED]⁸⁶ and D28-P-0006.⁸⁷ [REDACTED] [REDACTED] that these visits were aimed at examining [REDACTED] detention conditions.⁸⁸ On [REDACTED], before the start of the introductory meeting with OTP investigators, the Accused also met with [REDACTED]

[REDACTED].⁸⁹ As discussed below, the Accused was able to raise his concerns regarding his detention conditions with [REDACTED].⁹⁰

29. Nor can the Accused's detention at the DGSE be characterised as enforced disappearance.⁹¹ At no point did Malian authorities refuse to acknowledge the Accused's detention or whereabouts.⁹² For example, after learning of his arrest through the media,⁹³ the OTP met with the DGSE [REDACTED] on [REDACTED] and inquired whether the Accused was detained there. [REDACTED] confirmed that he was detained at the DGSE in Bamako and

⁸⁰ Application, para.14, fn.82-87.

⁸¹ [REDACTED]

⁸² See, e.g. [REDACTED]

⁸³ See Application, para.7.

⁸⁴ [REDACTED]

⁸⁵ [REDACTED]

⁸⁶ [REDACTED]

⁸⁷ [REDACTED]

⁸⁸ [REDACTED]

⁸⁹ [REDACTED]

⁹⁰ See e.g. [REDACTED]

⁹¹ Contra, Application, para.7.

⁹² See e.g. the definition of enforced disappearance in article 7(2)(i) of the Statute.

⁹³ See e.g. [REDACTED]

that the OTP could meet with him if it was requested through [REDACTED].⁹⁴ [REDACTED] agreed to facilitate the OTP's access to the Accused for the purpose of its interview.⁹⁵

ii) *There is no causal link between the alleged torture/CIDT and the Evidence*

30. Most critically, the Defence fails to establish that there is a real risk that the Evidence was given as a consequence of, or resulted from, the effects of torture/CIDT. The Accused did not give the Evidence under coercion, duress or threat resulting from any alleged torture/CIDT. The totality of the circumstances of the Accused's interview⁹⁶ demonstrates that the Evidence was voluntary. Any contrary risk is negated by the facts described below.

(a) *The Accused's OTP interview was separate from national proceedings*

31. The Accused's interview with the OTP investigators was separate from any proceedings conducted against him by national authorities, in particular, by those alleged to have inflicted torture/CIDT on him.⁹⁷ At all times, the Accused was detained by the national authorities, and his detention conditions were within their competence.⁹⁸ While the OTP was in control of its own interview process, it had no power or control over the Accused's detention conditions. Even if the article 69(7) exclusionary rule is designed, *inter alia*, to discipline or deter unlawful conduct, in this instance it would not apply to the OTP.⁹⁹

32. The Defence submits that the Accused was subjected to torture/CIDT while in French custody after his arrest on 21 April 2017, before his transfer to the DGSE on 2 May 2017, allegedly causing "long-term psychological consequences".¹⁰⁰ However, the Defence fails to show a causal link between those alleged violations and the OTP interview, which began on [REDACTED].

33. The identity of those present at the Accused's OTP interview, and the interview's location, also show the separate nature of the proceedings. In the course of 19 sessions between [REDACTED] and [REDACTED], the Accused's interview was conducted by two OTP investigators, [REDACTED], assisted by an Arabic speaking interpreter, in the presence of an article 55(2) counsel and an article 56 counsel.¹⁰¹ The Accused's OTP interview did not take place at the DGSE where the Accused was detained, but [REDACTED]

⁹⁴ [REDACTED]

⁹⁵ [REDACTED]

⁹⁶ *Contra* Application, para.18, 22.

⁹⁷ Decision, para.93, and citations therein.

⁹⁸ Decision, para.93, and citations therein. *See further* Decision, para.94 (OTP contact with Malian authorities or RFAs [REDACTED] does not suggest OTP involvement in Accused's continued detention).

⁹⁹ *See Judge Henderson Separate Opinion*, para.33, referring to [Lubanga Bar Table Decision](#). *See also* para.34.

¹⁰⁰ Application, para.5. The OTP contests this claim. *See* para.18-24 above.

¹⁰¹ [REDACTED]

██████████.¹⁰² The Defence claims that two occasions when the interview was briefly interrupted by persons entering the room had a coercive effect on the Evidence.¹⁰³ This claim is speculative. Once, a person removed and then returned a chair and another time, a guard brought the article 56 counsels' glasses into ██████████ room. Following these brief interruptions, the interview continued as before on the same topic with no perceptible change.¹⁰⁴ While the start and end times of interview sessions depended on the Accused's transport to and from his detention location, this does not show that "DGSE's requirements dictated the parameters of each Prosecution interview".¹⁰⁵

34. More generally, the Accused was clearly informed of the separate nature of the ICC proceedings from national proceedings,¹⁰⁶ and was told that the information provided to the OTP would not be shared with third parties or the public.¹⁰⁷

35. The Defence's reliance on *Karake* is misplaced.¹⁰⁸ In that case, Rwandan and American officials were working "hand-in-hand" in a joint investigation. Statements to American investigators were tainted, among other reasons, because Rwandan officials were present at most if not all interviews with American investigators and actively participated in the interrogation process.¹⁰⁹

(b) The Accused was afforded and made use of his rights under article 55(2) and rule 112

36. The OTP interview of the Accused was conducted in full conformity with the Statute and internationally recognised human rights, which the Accused effectively made use of when giving the Evidence. The fact that OTP investigators explained the context of the interview and the Accused's article 55(2) rights, confirmed his understanding of these rights and his opportunity to confer with counsel, and asked him about his detention conditions, is reflected

¹⁰² ██████████.

¹⁰³ *Contra* Application, para.29.

¹⁰⁴ See ██████████
██████████
██████████
██████████

¹⁰⁵ *Contra* Application, para.22. See ██████████

¹⁰⁶ Decision, para.96, and citations therein.

¹⁰⁷ ██████████
██████████

¹⁰⁸ Application, para.18.

¹⁰⁹ [Karake](#), para.122, 127, 128, 138. See also para.137-138 (defendants' statements at interrogation location reported to detention location; some of defendants' abuse at detention location directly attributable to content of statements), para.140 (defendants' detention conditions and beatings linked specifically to accepting responsibility for Bwindi crimes).

in specific extracts of the interview which the Chamber found were “critical to assessing the dynamic” between the Accused and OTP during the interview process.¹¹⁰

37. As noted by the Chamber, the OTP put safeguards in place as required by article 55(2) and rule 112. Specifically, OTP investigators repeatedly informed the Accused about the voluntary nature of the interview and of his rights in this context, including the right to remain silent, to have legal assistance and to be questioned in counsel’s presence.¹¹¹

38. At the first meeting with OTP investigators on [REDACTED], the Accused confirmed that he understood all the questions of procedure and his rights as explained by the investigators and that he had decided to proceed with the interview.¹¹² Contrary to the Defence’s argument,¹¹³ the Accused fully understood his status, as the OTP had informed him that there were grounds to believe that he had committed crimes under the Statute. This was mentioned by the OTP consistently throughout subsequent interview sessions.¹¹⁴

39. After the OTP investigators explained that he had the right to legal assistance and to be questioned in counsel’s presence, the Accused had a private discussion with the Registry-assigned article 55(2) duty counsel, and then indicated his decision to be assisted by him.¹¹⁵ The OTP investigators informed the Accused that he had the right to change his decision at any point during the interview.¹¹⁶ They frequently reminded the Accused of his right to consult with his lawyer, and the Accused regularly did so throughout the 19 days of OTP interview.¹¹⁷

40. The OTP did not dictate the Accused’s ability to consult with his counsel.¹¹⁸ The article 55(2) counsel’s assignment for the purpose of his OTP interview shows that the Accused received effective legal representation during that interview. The Defence’s observation that he appeared unaware of article 55(1) and human rights’ protections is simply unsupported.¹¹⁹ In addition, an article 56 counsel was appointed by the Single Judge of PTCI and assigned by the

¹¹⁰ Decision, para.106, and citations therein.

¹¹¹ Decision, para.98, and citations therein.

¹¹² Decision, para.98, citing [REDACTED].

¹¹³ Application, para.22.

¹¹⁴ See Decision, para.110, and citations therein.

¹¹⁵ [REDACTED].

¹¹⁶ [REDACTED].

¹¹⁷ Decision, para.98, and citations therein.

¹¹⁸ *Contra* Application, para.22. OSCE Manual cited by the Defence (fn.124) is irrelevant as OTP did not “authorize and/or dictate” level/ frequency of lawyer contact. Reference to Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt, para.209 is inapposite.

¹¹⁹ *Contra* Application, para.22, citing [REDACTED] [REDACTED].
[REDACTED]. See also Decision para.108, citing *inter alia* [REDACTED]
[REDACTED] (finding article 56 counsel commented that procedure was conducted in accordance with Statute, and that Accused consulted with his lawyer).

Registry to represent future defendants' interests.¹²⁰ Her appointment afforded an additional guarantee for the conduct of the Accused's interview and to preserve his rights.

41. The Accused "also consistently confirmed that he answered the questions of his own free will".¹²¹ On [REDACTED], the Accused explained that his motivation in speaking to the OTP was so that the truth would be clear as to what happened.¹²²

42. Overall, throughout the OTP interview, the Accused was in control of what he wanted to say. On some occasions, he made use of the right to remain silent and refused to answer OTP's questions. For example, on [REDACTED], the Accused decided not to answer questions regarding his reaction to the destruction of mausoleums and other sites,¹²³ or what the mausoleums represented for him.¹²⁴ On [REDACTED], [REDACTED]

[REDACTED].¹²⁵ On [REDACTED], he chose not to give the names of the people who he thought were behind his arrest.¹²⁶ The OTP also informed the Accused of his "right to clarify or add to his statements", ¹²⁷ which he repeatedly exercised.¹²⁸

43. The Defence's contention that the Accused was unable to effectively exercise his right to silence on [REDACTED] relies on a piecemeal reading of the relevant transcript.¹²⁹ The Accused expressly clarified that his unwillingness to go into detail about what happened after 2012 stemmed from not wanting to incriminate himself, with the OTP investigator reminding him that it was his right not to do so.¹³⁰

44. Further, the Defence's argument that "[t]he Prosecution's language clearly implied that they had access to the DGSE interviews",¹³¹ overlooks that on [REDACTED],¹³² [REDACTED]
[REDACTED]
[REDACTED]. He did so in the context of a free recall [REDACTED]

¹²⁰ See Decision, para.94.

¹²¹ Decision, para.98, and citations therein.

¹²² [REDACTED].

¹²³ [REDACTED]

[REDACTED]

¹²⁴ [REDACTED]

¹²⁵ [REDACTED].

¹²⁶ [REDACTED].

¹²⁷ Decision, para.98, and citations therein.

¹²⁸ See e.g., [REDACTED]

[REDACTED]

[REDACTED].

¹²⁹ Application, para.25, citing [REDACTED]

¹³⁰ [REDACTED]. See also Decision, para.107, citing [REDACTED]

[REDACTED]

¹³¹ Application, para.25, citing [REDACTED].

¹³² [REDACTED]

██████████.¹³³ The OTP did not receive the notes of his questioning by the Malian authorities until after the Accused's transfer to the ICC.¹³⁴ The Defence argues that the purported "overlap between the DGSE and Prosecution questions,"¹³⁵ tainted the Evidence. However, the topics discussed during the Accused's OTP interview related in large part to the 2012-2013 events in Timbuktu, while the topics covered in the questioning by Malian authorities appear to have largely focused on ██████████

██████████.¹³⁶ The Defence relies on Dr Porterfield's report to argue that the Accused was compelled to adhere to a script as a result of torture/CIDT.¹³⁷ However the Chamber has already found that it would afford little weight to this report.¹³⁸ The Defence also relies on passages of the PoE Report but these relate to the Accused's own views.¹³⁹ The Defence maintains that the Accused was interrogated by French, American and Malian authorities *concurrently* with the OTP interview,¹⁴⁰ but the Accused only mentioned being questioned two or three times--by the DGSE--during that period.¹⁴¹

(c) Other safeguards taken by OTP ensured the voluntariness of the Evidence

45. The Chamber has already held that the OTP took a number of other safeguards "within its competence" in the Accused's interview.¹⁴² These safeguards, and the Accused's effective use of them, further demonstrate that the Evidence was provided voluntarily and not as a result of coercion, duress or threat resulting from the alleged torture/CIDT.

46. As explained above in paragraph 14, the Accused described to the OTP two specific incidents of alleged physical violence, and also complained about some of his conditions of detention (although his descriptions fall short of what the Defence is alleging now). That the Accused reported these allegations and made these complaints shows that in his OTP interview he was not labouring under the effects of any alleged torture/CIDT.¹⁴³

¹³³ See ██████████

¹³⁴ Notes of interview with the Accused ██████████ and ██████████ received from Malian authorities on 27 November 2018. Copy of his file of transfer from French to Malian authorities dated 2 May 2017 (██████████ received from Malian authorities, and from French authorities ██████████ and better quality version ██████████), and copy of Barkhane Force medical certificate (██████████) were only received after Accused transferred to ICC.

¹³⁵ Application, para.7.

¹³⁶ ██████████

¹³⁷ Application, para.28, citing *inter alia* ██████████.

¹³⁸ See Decision, para.106-109.

¹³⁹ Application, para.28, citing *inter alia* PoE Report, para.43-46.

¹⁴⁰ Application, para.28, citing ██████████

¹⁴¹ ██████████

¹⁴² Decision, para.96.

¹⁴³ [Bundesgerichtshof, 3 StR 573/09.](#)

47. The OTP investigators systematically asked the Accused whether he had anything to raise regarding his detention.¹⁴⁴ They also asked detailed questions about his health, security and conditions of detention in his initial security assessment, and subsequently. The OTP consistently enquired with the Accused about his health and willingness to proceed with the interview, and encouraged him to raise issues.¹⁴⁵ The OTP told the Accused that it would inform [REDACTED] of his complaints, and passed the complaints on.¹⁴⁶ The OTP investigators also informed the Accused that he could raise his concerns in person with [REDACTED],¹⁴⁷ and in fact, the Accused did so.¹⁴⁸

48. As noted by the Chamber, the OTP also explained to the Accused that if he had any injury because of ill-treatment or if he was sick, the OTP would not proceed with an interview session and would seek to ensure that he could receive treatment, and explained that if anything abnormal had happened and the OTP were made aware of it, they would intervene and speak to the authorities.¹⁴⁹

49. At the same time, the OTP made clear to the Accused the extent of the OTP's competence in this regard.¹⁵⁰ Thus the Accused was clearly informed at the start of his interview and consistently throughout, of the separate nature of the ICC proceedings and national proceedings.¹⁵¹ The OTP systematically explained to him that his "conditions and place of detention were the responsibility of the national Malian authorities, and explained what was the capacity of the OTP in this context, which was to inform relevant authorities of any complaints they might have and to request that any necessary and possible measures be taken to address them."¹⁵² At no point in the Accused's interview did the OTP investigators make any promise or inducements to obtain or sustain his cooperation with the OTP.¹⁵³

¹⁴⁴ Decision, para.96, and citations therein.

¹⁴⁵ Decision, para.96, and citations therein.

¹⁴⁶ Decision, para.97, and citations therein.

¹⁴⁷ See e.g. [REDACTED].

¹⁴⁸ [REDACTED]. See also Decision, para.97, and citations therein.

¹⁴⁹ Decision, para.96, citing [REDACTED]. Contra Application, para.21, citing

¹⁵⁰ [Halilovic AD](#), para.38 ("Prosecutorial offers that serve as inducements to the accused's cooperation may, if the inducement is sufficiently powerful, render statements made pursuant to that cooperation involuntary. In other cases, however, the inducement is simply an incentive; the fact that the accused may have taken this incentive into account when deciding whether to cooperate does not mean that the defendant was not acting voluntarily.")

¹⁵¹ Decision, para.96, and citations therein.

¹⁵² Decision, para.96, and citations therein.

¹⁵³ See e.g. [Sesay TD](#), para.45-52, finding statements involuntary because of promises/inducements (family protection/ financial assistance and reduced sentence).

50. The Defence argues, relying on Dr Porterfield's and Dr Crosby's reports, that the contrast in conditions between the interview setting as compared to his general detention operated as an inducement.¹⁵⁴ This argument is unfounded and speculative. These were normal interview conditions. The Chamber has already found that it would give these reports little weight in light of their unreliability.¹⁵⁵

51. An absence of duress, coercion or threat during the OTP interview can also be inferred from the Accused having taken the initiative to request reduced interview hours due to psychological exhaustion which had led to a headache, fever and a toothache.¹⁵⁶ The Defence argues that in this instance the Accused continued with the interview only when the OTP investigator told the Accused that he would raise these issues with [REDACTED] after they finished.¹⁵⁷ However, the OTP investigator also indicated that the Accused could request to stop the interview at any moment he wished.¹⁵⁸

(d) Other circumstances and evidence show the Evidence was voluntary and free from coercion, duress or threat resulting from alleged torture/CIDT

52. Contrary to the Defence's claim that the Accused's cognitive capacities were undermined by torture/CIDT,¹⁵⁹ the Accused showed focus and comprehension, for example when correcting the interpreter or answering questions without waiting for interpretation from French to Arabic,¹⁶⁰ and also when correcting counsel to reflect what the Accused had said.¹⁶¹ The Accused's age and education¹⁶² also show that he was capable of understanding the questions and to decide to give the Evidence.¹⁶³

53. Dr Lamothe ([REDACTED]), based on the transcripts of the Accused's OTP interview and some of the audio-recordings, concluded that [REDACTED]
[REDACTED]
[REDACTED].¹⁶⁴ He also found that [REDACTED]

¹⁵⁴ Application, para.23, citing [REDACTED]
[REDACTED]

¹⁵⁵ See Decision, para.106-109.

¹⁵⁶ [REDACTED]

¹⁵⁷ Application, para.25, citing [REDACTED]

¹⁵⁸ [REDACTED]

¹⁵⁹ Application, para.19.

¹⁶⁰ Submission, para.29, and citations therein.

¹⁶¹ See e.g. [REDACTED]

¹⁶² See Application, para.18 and *inter alia* [REDACTED].

¹⁶³ See Submission, para.30.

¹⁶⁴ [REDACTED].

[REDACTED]

[REDACTED]¹⁶⁵ [REDACTED]

[REDACTED]

[REDACTED]¹⁶⁶ [REDACTED]

[REDACTED]¹⁶⁷

54. There is no reliable evidence establishing the existence of a dynamic of “learned helplessness” between the Accused and the OTP at the time of his interview in 2017-2018.¹⁶⁸ The Chamber has already found that Dr Porterfield’s analysis in this regard is based on a partial record of the Accused’s OTP interview and speculation and/or mischaracterisation.¹⁶⁹ Dr Lamothe also criticised Dr Porterfield’s methodology and approach.¹⁷⁰ The PoE Report only refers to “learned helplessness” in relation to the Accused’s passivity in asserting his right to confidentiality when two PoE members met with him in November 2020.¹⁷¹

55. [REDACTED], during the OTP interview, the Accused’s attitude and behaviour appeared normal under the circumstances. The Accused was quite affable, at ease, at times smiling and laughing.¹⁷² The interview recordings reflect such moments, which further attest to the voluntary, cordial and respectful manner in which the interview was conducted.¹⁷³

56. [REDACTED] [REDACTED], the Accused expressed grievances and requests regarding his conditions of detention, and complained of tiredness, headaches and a toothache. However, none of this affected his general demeanour, his ability to follow and decide on the answers he wanted to give or to remember what he had said on certain subjects, or his decision to continue the interview and answer certain questions as he wanted. The Accused appeared generally comfortable during the interview and in control of what he wanted to say and what he refused

¹⁶⁵ [REDACTED].

¹⁶⁶ [REDACTED]

¹⁶⁷ [REDACTED]

¹⁶⁸ *Contra* Application, para.30, citing *inter alia* [REDACTED]

¹⁶⁹ Decision, para.106-107.

¹⁷⁰ [REDACTED]

¹⁷¹ PoE Report, para.40 cited in Application, para.30. *See also* PoE Report, para.125, 128-129 (Accused able to assert himself appropriately, not appearing excessively compliant/suggestible).

¹⁷² [REDACTED].

¹⁷³ *See e.g.*, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

bringing its request before the Chamber. The OTP is in the process of addressing this new disclosure request. With respect to the Defence's request [REDACTED] the OTP has informed the Defence that it considers it necessary to wait for the Chamber's decision [REDACTED]

[REDACTED] ¹⁸⁵ If allowed, [REDACTED] can give evidence and if necessary be available for cross-examination. Given that these processes are ongoing, the Defence has suffered no prejudice.

IV. The Evidence is reliable

60. In any event, alleged violations of the Statute or internationally recognised human rights do not cast substantial doubt on the reliability of the Evidence.¹⁸⁶ The Evidence is internally consistent and comprehensive. As discussed above, in the course of the OTP interview in 2017-2018, there was no indication that the Accused lacked the cognitive functions necessary to be interviewed and to provide reliable evidence. The Defence arguments as to the possibility that the Accused was in a “continuing state of extreme stress”¹⁸⁷ or created false memories¹⁸⁸ misrepresent the facts and evidence¹⁸⁹ and amount to speculation.

61. As discussed in the Submission, the reliability and accuracy of the Evidence can be inferred from its content, the procedure used for its collection, and its voluntariness.¹⁹⁰ In particular, the Evidence is, for the most part, corroborated by multiple different, stand-alone, evidence – including contemporaneous documentary evidence, videos, reports, and testimony from insider, crime-base, and overview witnesses (including eye-witnesses).¹⁹¹ [REDACTED] [REDACTED]. For example, [REDACTED] that the Accused was *commissaire* or one of the leaders of the Islamic Police.¹⁹² The Accused's participation in, or presence at floggings is supported by photos¹⁹³ and videos¹⁹⁴ as well as

¹⁸⁵ [REDACTED].

¹⁸⁶ [Lubanga Bar Table Decision](#), para.40, indicating that a violation does not affect the reliability of the evidence if, absent the violation, the content of the evidence would have been the same.

¹⁸⁷ IACHR case, [Djamel Ameiziane v United States Of America](#), para. 169, cited in Application, fn.181 does not refer to these techniques causing “continuing state of extreme stress”.

¹⁸⁸ When read in context, UN Special rapporteur on torture's report, [A/71/298](#), para. 18, cited in Dr Cohen's second report ([MLI-D28-0003-0031](#), p.0034) and in Application, fn.182, refers specifically to “repeated suffocation, extended sleep deprivation and caloric restriction”.

¹⁸⁹ See above para.42 regarding the Accused's refusal to discuss events because he did not want to incriminate himself. *Contra*, Application, para.32.

¹⁹⁰ Submission, para.28-43.

¹⁹¹ Submission, para.34 and accompanying footnotes 68-73.

¹⁹² [REDACTED].

¹⁹³ See e.g., [REDACTED].

¹⁹⁴ See e.g., [REDACTED].

evidence from witnesses [REDACTED] [REDACTED].¹⁹⁵ The Accused's role in drafting and signing reports of the Islamic Police is supported by the documents collected by [REDACTED]¹⁹⁶ and the findings of expert [REDACTED].¹⁹⁷ Several witnesses, [REDACTED] [REDACTED] provided detailed accounts of acts of violence and persecution committed by members of Ansar Dine/AQIM, which they personally suffered or witnessed.

V. Admitting the Evidence would not be antithetical to or seriously damage the integrity of the proceedings

62. Because there is no causal link between any alleged torture/CIDT and the Evidence, its admission would not be antithetical to or seriously damage the integrity of the proceedings.

63. The PoE's findings relied upon by the Defence¹⁹⁸ relate to the potential impact on the Accused of any future cross-examination by the OTP, *if* he decides to testify. In any event, any such impact, if it were to materialise, could be addressed through other measures, such as those recommended by the PoE,¹⁹⁹ rather than excluding the Evidence that is reliable and relevant to the determination of the truth in this case.

VI. Conclusion

64. For the reasons set out above, the OTP requests that the Chamber reject the Application and admit the Evidence.

65. The Defence's requests to admit the reports of Dr Porterfield and Dr Cohen into evidence and for an evidentiary hearing should also be dismissed because the Chamber has already found these reports unreliable, and the Chamber can decide the matter without a separate evidentiary hearing.



Fatou Bensouda, Prosecutor

Dated this 26th day of March 2021

At The Hague, The Netherlands.

¹⁹⁵ See e.g. [REDACTED].

¹⁹⁶ See e.g. [REDACTED].

¹⁹⁷ [REDACTED].

¹⁹⁸ PoE report, para.282, 283, 292, 293, 303, cited in fn.188 of the Application.

¹⁹⁹ PoE report, para.296-320. See also ICC-01/12-01/18-1317-[REDACTED], para.52-64.