

Annex 19

**PUBLIC
REDACTED**

From: Trial Chamber X Communications
Sent: 14 October 2020 14:53
To: [REDACTED] Trial Chamber X Communications; Al Hassan Prosecution Team; D28 Al Hassan Defence Team; V43 Victims Al Hassan Team; Associate Legal Officer-Court Officer; Chamber Decisions Communication
Subject: RE: List of material for Witness MLI-OTP-P-0655

Dear counsel,
 Dear colleagues,

The Chamber notes that the Defence objects to the use and admissibility of certain items on the Prosecution's list of material for P-0655 (namely the report of P-0655 and the recording he used to draft his report).

The Chamber recalls that it has previously authorised P-0655 to testify as an expert witness and also to the use of the report he drafted. The Chamber however noted, this 'is without prejudice to the Chamber's eventual determination on the admissibility of the evidence analysed by the expert, including pursuant to Article 69(7) of the Statute. In this regard the Chamber stresses that the Prosecution will introduce this related audio-video material through other witnesses.' (ICC-01/12-01/18-989-Conf, para. 66).

For these reasons, the Chamber confirms that the material in question may be used with P-0655. However, this is without prejudice to any eventual determination on admissibility pursuant to Article 69(7) of the Statute, which will be made at the appropriate time and in due course.

Kind regards,

[REDACTED]
 (on behalf of Trial Chamber X)

From: [REDACTED]
Sent: 13 October 2020 15:35
To: Trial Chamber X Communications; Al Hassan Prosecution Team; D28 Al Hassan Defence Team; V43 Victims Al Hassan Team; Associate Legal Officer-Court Officer
Subject: FW: List of material for Witness MLI-OTP-P-0655

Dear Trial Chamber X,
 Dear Colleagues,

Pursuant to paragraph 60 of ICC-01/12-01/18-789-AnxA, the Defence provides notice of its objection to the use of the following material with Witness P-0655:

Tab	Document ID	Title	Type	Main Date	To Be Tendered as Evidence	To Be Submitted under Rule 68(3) through P-0655
13	[REDACTED]	MLI-OTP-P-0398 / Interview Recordings Day 1/3	ICC Statement - A/V recording	13-Jul-2017	Yes	No
16		MLI-OTP-P-0398 / Interview Recordings Day 2/3	ICC Statement - A/V recording	14-Jul-2017	Yes	No

20		MLI-OTP-P-0398 / Interview Recordings Day 3/3	ICC Statement - A/V recording	17-Jul-2017	Yes	No
28			ICC Statement - A/V recording	6-Sep-2017	Yes	No
32			ICC Statement - A/V recording	8-Sep-2017	Yes	No
38			ICC Statement - A/V recording	11-Sep-2017	Yes	No
58		RAPPORT D'EXPERTISE PCATT/2020/14/AV01	Forensic Records or Reports	28-Feb-2020	Yes	Yes
59		Confirmation of Charges Hearing / Al Hassan ICC-01/12-01/18 / Session 1	Court document - ICC	8-Jul-2019	Yes	No
60		Confirmation of Charges Hearing / Al Hassan ICC-01/12-01/18 / Session 2	Court document - ICC	8-Jul-2019	Yes	No
61		Confirmation of Charges Hearing / Al Hassan ICC-01/12-01/18 / Session 1	Court document - ICC	9-Jul-2019	Yes	No
62		Confirmation of Charges Hearing / Al Hassan ICC-01/12-01/18 / Session 2	Court document - ICC	9-Jul-2019	Yes	No
63		Confirmation of Charges Hearing / Al Hassan ICC-01/12-01/18 / Session 3	Court document - ICC	9-Jul-2019	Yes	No
64		Confirmation of Charges Hearing / Al Hassan ICC-01/12-01/18 / Session 1	Court document - ICC	10-Jul-2019	Yes	No
65		Confirmation of Charges Hearing / Al Hassan ICC-01/12-01/18 / Session 2	Court document - ICC	10-Jul-2019	Yes	No
66		Confirmation of Charges Hearing / Al Hassan ICC-01/12-01/18 / Session 3	Court document - ICC	10-Jul-2019	Yes	No
67		Confirmation of Charges Hearing / Al Hassan ICC-01/12-01/18 / Session 1 / Delayed Copy	Court document - ICC	10-Jul-2019	Yes	No
68		Confirmation of Charges Hearing / Al Hassan ICC-01/12-01/18 / Session 2 / Delayed Copy	Court document - ICC	10-Jul-2019	Yes	No
69		Confirmation of Charges Hearing / Al Hassan ICC-01/12-01/18 / Session 3 / Delayed Copy	Court document - ICC	10-Jul-2019	Yes	No
70		Confirmation of Charges Hearing / Al Hassan ICC-01/12-01/18 / Session 1	Court document - ICC	11-Jul-2019	Yes	No
71		Confirmation of Charges Hearing / Al Hassan ICC-01/12-01/18 / Session 2	Court document - ICC	11-Jul-2019	Yes	No

72		Confirmation of Charges Hearing / Al Hassan ICC-01/12-01/18 / Session 1 / Delayed Copy	Court document - ICC	11-Jul-2019	Yes	No
73		Confirmation of Charges Hearing / Al Hassan ICC-01/12-01/18 / Session 2 / Delayed Copy	Court document - ICC	11-Jul-2019	Yes	No
74		ICC-01/12-01/18 / Al Hassan / Confirmation of Charges	Court document - ICC	17-Jul-2019	Yes	No
75		CONTACT NOTE	ICC Investigation notes / report / correspondence	3-Dec-2019	Yes	No
76		ICC-01/12-01/18 / Al Hassan / First Appearance	Court document - ICC	4-Apr-2019	Yes	No
78		CONTACT NOTE / Réponse à un courriel envoyé par MLI-OTP-P-0655	ICC Investigation notes / report / correspondence	25-Feb-2020	Yes	No

Relief sought

Article 69(7) of the Statute states that '[e]vidence 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.'

There are four classes of documents in respect of which the Defence provides objections:

1. Items 13, 16, 20, 28, 32 and 38 are the audio recordings of the interviews conducted by the Prosecution with Mr. Al Hassan while he was detained at the Sécurité d'État ('**Sécurité d'État Recordings**').
2. Items 59-74 and 76 are video recordings of public court hearings conducted in the present trial against Mr. Al Hassan at the ICC ('**Court Recordings**').
3. Item 58 is the report of P-0655, which relies on the Sécurité d'État Recordings and Court Recordings ('**Report**').
4. Items 75 and 78 are contact notes prepared by the Prosecution ('**Contact Notes**').

The Sécurité d'État Recordings are objected to on the basis that as detailed below, this evidence was obtained in breach of Articles 55(1)(a), 55(1)(b), 55(1)(d) and (in some cases) 55(2) of the Statute and internationally recognised human rights law reflecting *jus cogens* norms against arbitrary detention and torture (ECCC [Case No. 002](#), para. 25 and fns. 74-75). Furthermore, as set out in ECCC [Case No. 002](#) at para. 21, Article 15 of the United Nations Convention against Torture prohibits not only the admission of torture evidence as evidence, but also the use of the evidence (including as a basis of questioning). This means that it cannot be used for the purpose intended by the Prosecution. Each of the subsections of Article 69(7) are satisfied as not only would admission of the evidence be 'manifestly contrary to the most basic international standards of a fair trial' but is also improper to rely on as torture tainted evidence is intrinsically unreliable (ECCC [Case No. 002](#), paras. 44-45). These findings are independent of any complicity of the Prosecution in any such violations as Article 55(1) creates a form of protection for any forms of investigation under the Statute (and therefore includes any acts that occur while a person is subjected to arbitrary detention (amounting to a form of torture and/or cruel, inhuman and degrading treatment), and/or subjection to any form of coercion, duress or threat) and exclusion under Article 69(7) can apply, if there has been a violation, even if there has been no finding of responsibility by the Prosecution. The ICC and international criminal courts and tribunals have applied these exclusionary rules in respect of violations committed by third parties

(including national authorities) so any finding of lack of complicity in, or responsibility of, the Prosecution for the arbitrary detention, torture and/or CIDT does not resolve the issue (see [ICC-01/04-01/07-2635](#), paras. 63-65; *Co-Prosecutors v. "Duch"*, [Decision on the Admissibility of Evidence in the Case File as Evidence](#), para. 19 (noting in context of statement taken by the UN without a Counsel present, that "exclusion is the usual remedy" as concerns breaches of right to silence/privilege against self-incrimination)).

The Court Recordings are objected to on the basis that as detailed below, this evidence was obtained in breach of internationally recognised human rights law. Using these videos for an incriminating purpose in the report is in violation of Mr. Al Hassan's right to privacy and privilege against self-incrimination. Use of the videos is in breach of internationally recognized human rights and their admission would be antithetical to and would seriously damage the integrity of the proceedings. While the right to privacy is not absolute, the admission of these items as evidence to incriminate Mr. Al Hassan is contrary to the integrity of the proceedings because it creates a 'chilling effect' for the defendant as it disincentivises his attendance at court (and therefore, his exercise of his Statutory right under Article 67(1)(d) 'to be present at the trial'). This is particularly so as the use of these images to instruct a Prosecution expert was done without Mr. Al Hassan's knowledge or consent, and in the absence of any legal order authorising such use, and because the resulting use of those images, which depict Mr. Al Hassan as a defendant involved in court proceedings, to produce incriminating expert evidence raise concerns about the methodology adopted by P-0655, as these images prejudice the mind of the examiner, and therefore the position of the Defence.

As the Trial Chamber in [Prosecutor v. Lubanga](#) held, when deciding whether there has been serious damage to the "integrity of proceedings" as provided for in Article 69(7)(b), it has been stressed that "the respect for the integrity of proceedings is necessarily made up of respect for the core values which run through the Rome Statute" and that applying this provision involves balancing a number of concerns and values found in the Statute, including respect for the rights of the person (para. 42). This includes, for each of the Sécurité d'État Recordings and the Court Recordings, interferences not only with Mr. Al Hassan's rights as a defendant, but also the rights of the interpreters whose voices have also been used. In [Prosecutor v. Lubanga](#), the Trial Chamber, upholding the findings of the Pre-Trial Chamber, found that there had been 'an unjustified violation of the individual's right to privacy', in the indiscriminate seizure of hundreds of documents unrelated to the purpose of the proceedings (para. 38). On that basis, the breach of a third party's right to privacy raises additional issues necessitating their exclusion.

The Report, as it relies on such tainted evidence, is also objected to.

The Contact Notes are also objected to on a separate basis, being the basis of their testimonial nature.

Exclusion of the Sécurité d'État Recordings

Right to privacy

The European Court of Human Rights has found interferences with the right to privacy on the basis of recording of individuals' personal and telephone conversations ([Hambarzumyan v. Armenia](#), para. 58; [Khan v. United Kingdom](#), paras. 9, 10 and 25; [Vetter c. France](#), paras. 10 and 20; [Dragojević v. Croatia](#), para. 78) and the use of listening devices ([P.G. and J.H. v. United Kingdom](#), paras. 59-60). Specifically, in [P.G. and J.H. v. United Kingdom](#), the ECHR held that:

the Court is not persuaded that recordings taken for use as voice samples can be regarded as falling outside the scope of the protection afforded by Article 8. A permanent record has nonetheless been made of the person's voice and it is subject to a process of analysis directly relevant to identifying that person in the context of other personal data. Though it is true that when being charged the applicants answered formal questions in a place where police officers were listening to them, the recording and analysis of their voices on this occasion must still be regarded as concerning the processing of personal data about the applicants.

Furthermore, as the Appeals Chamber in [Prosecutor v. Bemba et al](#) identified, 'detained persons also benefit from the internationally recognised human right to privacy', albeit with certain limitations 'necessarily result[ing]' from the fact of incarceration (para. 372 and fn. 807).

The use of Mr. Al Hassan and the interpreter's voices thus represented interferences with their rights to privacy.

Human rights courts have adopted a two-part test to interferences with privacy.

Article 8(2) of the ECHR provides (emphasis added):

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

On the basis of this rule, human rights courts have held that measures must have ‘some basis in domestic law’ and must be ‘compatible with the rule of law’, which means that they should comply with the twin requirements of ‘accessibility’ and ‘foreseeability’ (*Sunday Times v. United Kingdom*, paras. 49-50; *Silver and Others v. United Kingdom*, paras. 86-88; and *Malone v. United Kingdom*, paras. 66-67). ECHR jurisprudence was referred to, and analysed by reference to the provisions of the Rome Statute, by the Appeals Chamber in *Prosecutor v. Bemba et al*, paras. 285-286. The case of *Bemba et al* can be distinguished as in that case there was a legal basis provided for the transmission to the Prosecutor of the records of Mr Bemba’s non-privileged phone calls; in this case, no legal basis has been provided for this violation of Mr. Al Hassan’s rights.

Similarly, under Article 17 of the International Covenant on Civil and Political Rights, no person shall be subjected to ‘arbitrary or unlawful interference with [their] privacy’. The Human Rights Committee has interpreted the term “unlawful” as meaning ‘that no interference can take place except in cases envisaged by the law’ and ‘on the basis of law’ (General Comment No. 16, para. 3). The prohibition on “arbitrary” interferences further guarantees that even interference provided for by law is intended to ensure that such interference is consistent with the provisions, aims and objectives of the Covenant, and reasonable in the particular circumstances (para. 4).

The interference thus needs to have occurred pursuant to a law which is accessible and foreseeable. The criterion of legality is not satisfied, as there is no law which permits Mr. Al Hassan’s voice to be used for that purpose so when he attended the interviews, he was not able to make an informed decision and/or be aware that his voice would be used for that purpose. The same position applies as concerns the interpreter. Furthermore, the interference is not consistent with the aims of the human rights treaties, as it has been used to abrogate Mr. Al Hassan’s privilege against self-incrimination.

Privilege against self-incrimination

In *Prosecutor v. Delalic et al*, a Prosecution request for the Chamber to order defendant Mucic to produce a handwriting sample to confirm the authorship of a document allegedly written by Mucic was rejected, on the basis that such an order would violate the defendant’s privilege against self-incrimination (emphasis added):

45. It is significant that though absent express words in the ECHR, the provisions of Article 6 sub-paragraph 1, which protect the right to fair hearing, have been extended to include the right to protection from self-incrimination. The consideration is that it is an inherent element of any fair trial. (...)

47. The Trial Chamber is not satisfied that a handwriting sample per se can be regarded as forming material proof against an accused. We hold that where the material factor absent in the incriminating elements is the handwriting sample of the accused, the Trial Chamber cannot compel the accused to supply the missing element. To do so will be to infringe the provisions of Article 21 sub-paragraph 4(g) which protects the accused from self-incrimination. It is different where the accused voluntarily complies on demand without coercion.

48. It has been argued that in the instant case the Order for a handwriting sample bears no relevance to the case before the Trial Chamber. The Trial Chamber rejects this contention. The reason for requiring the handwriting sample is admittedly to ascertain conclusively the authorship of Exhibit 155. If authenticated, the letter will act as a sufficient admission of its contents in respect of certain counts in the indictment against the author. The obvious implication is that the accused would have been compelled by an Order of the Trial Chamber to assist the Prosecution in its investigation, and probably provide the evidence to

incriminate himself. The fact that the handwriting sample per se is neutral evidence is not the issue. If the handwriting sample taken together with other evidence will constitute material evidence to prove the charge against the accused, then the Order of the Trial Chamber would have compelled the production of self-incriminating evidence.

49. There is no duty in law or morals for the accused to fill a vacuum created by the investigative procedural gap of the Prosecution. Self-preservation is the first principle of life. It is an elementary principle of proof, that he who alleges must prove the subject matter of his allegation. Since the Prosecution alleges the authorship of Exhibit 155, it has to discharge the burden of proof unaided by the Defence. [...]

58. In construing the provisions of Article 21 sub-paragraph 4(g), it is better to rely on the words of the provision if clear and unambiguous. The words "to testify against himself" are clear and unambiguous, and require no modification or qualification. Nowhere is the privilege from self-incrimination qualified, or restricted to testimonial evidence. To read such a limitation as is suggested by the Prosecution is to read into the plain words, a condition not contemplated by the law maker. Such a construction will subvert the intention of the protection by introducing a qualification inconsistent with the true basis of the protection. The Trial Chamber cannot deprive the accused of his guaranteed right through construction of the words of the provision given without express limitation. The true basis of the protection against self-incrimination, is to protect the innocent by insulating him from the effects of coercion from law enforcement authorities. Another objective is the protection of society by conviction of the guilty. Furthermore, the right encourages witnesses to volunteer to testify who might be deterred from doing so out of fear of self-incrimination. On the whole the right seeks to protect the innocent and guilty alike.

59. The international community, due to the operation of international and regional conventions protecting fair trial rights, has come a very long way from the unabashed and egregious violation of the dignity and personality of the individual in judicial proceedings. It is the sacred and solemn duty of every judicial institution to respect and give benevolent construction to the provisions guaranteeing such rights instead of giving such a construction as to whittle down their effects.

60. The Trial Chamber, in accordance with its Statute, is enjoined to ensure that the accused has a fair trial and that the proceedings are conducted in accordance with the Rules and with full respect for his/her rights. The Trial Chamber is satisfied that the construction of the words of Article 21 sub-paragraph 4(g) adopted herein accords with the words and spirit of the provision and is consistent with the protection of the rights of the accused as provided. The Trial Chamber cannot in the circumstance exercise any jurisdiction to make the Order sought. Mucic, cannot be ordered to provide a handwriting sample. This would involve him testifying against himself.

Article 55(1)(a) of the Rome Statute states that persons under investigation under the Statute 'shall not be compelled to incriminate himself or herself or to confess guilt'. The phrasing of 'incriminat[ion]' extends beyond a right to remain silent and not provide testimony, but includes other forms of incrimination (like the provision of real evidence). Furthermore, pursuant to Article 55(2)(b) of the Rome Statute, when being questioned, Mr. Al Hassan had the right 'to remain silent' and at trial, pursuant to Article 67(1)(g), Mr. Al Hassan maintains this right 'not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence'. In making the finding in *Delalic*, the ICTY Chamber referred to a variety of comparative domestic and regional human rights decisions, including *Funke v. France* (European Court of Human Rights), and *Miranda v. Arizona* and *Gilbert v. California* (Supreme Court of the United States). Under international human rights jurisprudence, 'the right to silence and the right not to incriminate oneself ... lie at the heart of the notion of a fair procedure' and the 'right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused' (*Funke v. France*, para. 68; see also *Saunders v. United Kingdom*, para. 60; *O'Halloran and Francis v. United Kingdom*, para. 45). Pursuant to Article 21(3) of the Rome Statute, the Chamber's application and interpretation of law must be consistent with internationally recognized human rights, and this includes Mr. Al Hassan's Statutorily enshrined right to a fair trial (see Article 64(2): 'The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused' and Article 67(1): 'In the determination of any charge, the accused shall be entitled to ... a fair hearing conducted impartially, and to [specific] minimum guarantees, in full equality'.)

This privilege against self-incrimination, consistently with [Prosecutor v. Delalic et al](#) at para. 58 extracted above, is not confined to testimonial evidence. This is consistent with the findings of Trial Chamber VII in [Prosecutor v. Bemba et al](#) that, *first*, the right to silence and privilege against self-incrimination under the Statute meant that the defendant was not required to produce evidence to the Prosecution that could be potentially incriminating and *second*, that such a right applied in circumstances where the Prosecution sought the production of real evidence in the possession of the Defence (para. 14).

While in [Saunders v. United Kingdom](#), para. 69 and [O'Halloran and Francis v. United Kingdom](#), para. 47, the European Court of Human Rights has held that the privilege against self-incrimination does not extend to the use in criminal proceedings which may be obtained from the accused through recourse to compulsory powers (such as documents acquired pursuant to a warrant or breath, blood or urine samples obtained under an order), this jurisprudence is distinguishable in the present case because, as the Prosecution has explicitly asserted, Mr. Al Hassan's presence at interviews with the Prosecution, and therefore the recording of Mr. Al Hassan's voice, was not pursuant to any order or other form of compulsory power (ICC-01/12-01/18-982-Conf-Exp-Corr):

2. [...] the Accused was never arrested or held by the French or Malian authorities at the behest, or even the knowledge, of the ICC's OTP.

62. Despite the Defence's assertions, the Prosecution was not responsible for Al HASSAN's detention by the Malian authorities during the periods of time that the Prosecution sought access to him for the specific purposes of interviewing him. At no stage did the Prosecution request the French or the Malian authorities to arrest or detain the Accused, prolong his detention, or to question, let alone ill-treat, the Accused on its behalf.

Rule 111 of the [Rules of Procedure and Evidence](#) requires the recording of questioning. It would be contrary to the integrity of the proceedings to allow the Prosecution to use this evidence for this purpose, as to do so would mean that a rule which serves to protect the rights of suspects by requiring automatic recording would be transformed into a covert form of incrimination.

The burden to prove its case beyond a reasonable doubt lies with the Prosecution alone. Its duty to meet this burden cannot unlawfully include the compelling of the provision of voice identification information during the course of its investigations from an individual to whom the Prosecution had not expressly informed that this could be used for incriminating purposes. This is consistent with the emphasis placed, by international human rights courts, on individuals being notified, cautioned or warned about the incriminating nature of statements made during questioning (see ECHR: [Brusco v. France](#), para. 54; [Navone and Others v. Monaco](#), para. 74; [Stojkovic v. France and Belgium](#), para. 54; [Ibrahims and Others v. United Kingdom](#), para. 272).

Furthermore, each of the Sécurité d'État Recordings are real evidence obtained while Mr. Al Hassan was held in arbitrary detention at the Sécurité d'État and subjected to psychological torture in the form of indefinite and incommunicado detention (incorporating by reference ICC-01/12-01/18-885-Conf-Exp-Corr, paras. 15-26). These factors, and the ongoing form of coercion under which Mr. Al Hassan was held, overbore his ability to make decisions and understand consequences of his choice to speak or remain silent. The Prosecution did not explain to Mr. Al Hassan the purpose for which such evidence was being extracted from him (i.e. the Prosecution did not inform Mr. Al Hassan that his voice on the recording could be used for an incriminating purpose to identify him for a forensic purpose). Furthermore, no such warning was provided to the interpreter present at the interview whose voice is present on the recording and was also used by the witness in his report (and which, as set out above, further necessitates exclusion).

The Defence notes that the Chamber's findings with respect to Dr. Porterfield's report (and other related expert reports) in the decision on the Defence Termination Request were expressly 'without prejudice to any future determinations by the Chamber on these matters' and 'without prejudice to any future findings the Chamber might make as to admissibility of the abovementioned expert reports in a different context' (ICC-01/12-01/18-1009-Conf, para. 80). The Chamber's findings were also without prejudice to alternative remedies 'including ruling certain testimony and other materials inadmissible' or 'to any challenges to the admissibility of evidence the Defence may decide to bring under Article 69(7)' (ICC-01/12-01/18-1009-Conf, paras. 119-122).

The Prosecution's failure to explain the potentially incriminating nature of these actions to Mr. Al Hassan (and therefore its implication for his right to silence and privilege against self-incrimination) is particularly serious, because, as set out in ICC-01/12-01/18-991-Conf, para. 2:

the Prosecution must exercise a particularly high standard of diligence to safeguard the interview process against issues of undue influence or improper or equivocal waiver of rights, where the witness is held in custody;^[8] failure to satisfy this threshold triggers exclusion.^[9] This includes circumstances where the defendant was interviewed by domestic authorities outside the framework of Article 55, or by third parties.

[8]. [Sesay](#), paras. 6, 43, 46; [Bagosora](#), paras. 17, 19, 63. An additional layer of caution applies in relation to detained accomplice witnesses: *Prosecutor v. Nzabonimana*, [Trial Judgment](#), para. 81.

[9]. "[A]s a matter of law, statements by an accused person in a custodial setting which are not voluntary must be excluded under Rule 95": [Sesay](#), para. 38; [ICC-01/04-01/07-2635](#), paras. 63-65.

In such circumstances, the evidence is liable to be excluded under both the common law principle of inadmissibility and civil law principles of nullity. Such evidence falls within the exclusionary rule identified by the Human Rights Committee (which the Committee has expressly identified includes 'real evidence obtained as a result of ill-treatment but falling short of torture': [A/HRC/25/60](#), para. 29, [General Comment No. 32](#), para. 6) and the African Commission on Human and Peoples' Rights ([Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa](#), paragraph N(6)(d)(1), noting that 'any ... evidence obtained by any form of coercion of force may not be admitted as evidence or considered as probative of any fact at trial or in sentencing'). Similarly, human rights courts have found that 'the absolute nature of the evidentiary 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 evidence gathered or derived from information obtained by coercion adequately guarantees the exclusionary rule' (IACHR: [Cabrera García v. Mexico](#), para. 167).

Exclusion of the Court Recordings

Right to privacy

As detailed in the case law set out above, the use of Mr. Al Hassan and the interpreters' voices represented interferences with their rights to privacy.

When an interference with privacy occurs, the interference needs to have occurred pursuant to a law which is accessible and foreseeable. The criterion of legality is not satisfied, as there is no law which permits Mr. Al Hassan's voice to be used for that purpose so when he attended the hearing, he was not able to make an informed decision and/or be aware that his voice would be used for that purpose. The same position applies as concerns the interpreters. Furthermore, the interference is not consistent with the aims of the human rights treaties, as it has been used to abrogate Mr. Al Hassan's privilege against self-incrimination.

Privilege against self-incrimination

At trial, pursuant to Article 67(1)(g), Mr. Al Hassan maintains this right 'not to be compelled to testify or to confess guilt and to remain silent' (emphasis added). In its decision in [Prosecutor v. Delalic et al](#), rejecting a request for a defendant to produce a handwriting sample on the basis of the privilege against self-incrimination, the ICTY Chamber referred to a variety of comparative domestic and regional human rights decisions, including [Funke v. France](#) (European Court of Human Rights), and [Miranda v. Arizona](#) and [Gilbert v. California](#) (Supreme Court of the United States).

Under international human rights jurisprudence, 'the right to silence and the right not to incriminate oneself ... lie at the heart of the notion of a fair procedure' and the 'right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused' ([Funke v. France](#), para. 68; see also [Saunders v. United Kingdom](#), para. 60; [O'Halloran and Francis v. United Kingdom](#), para. 45).

Conformément au paragraphe 57 de l'annexe ICC-01/12-01/18-789-AnnA, l'Accusation vous prie de bien vouloir trouver en pièce jointe la "List of Material" concernant le témoin P-0655.

Respectueusement,

Gilles Dutertre

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