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**APPEALS CHAMBER**

**Before:** Judge Luz del Carmen Ibáñez Carranza, Presiding  
Judge Chile Eboe-Osuji  
Judge Howard Morrison  
Judge Piotr Hofmański  
Judge Solomy Balungi Bossa

**SITUATION IN THE REPUBLIC OF MALI**

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

**Public**

**Public redacted version of Appeal of the Pre-Trial Chamber's "Décision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense" (ICC-01/12-01/18-459)**

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

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## Introduction

1. Mr. Al Hassan is a small fish, out of water. The material allegations set out in the Document Containing the Charges ('DCC')<sup>1</sup> ascribe to him a peripheral role in the events in Timbuktu in 2012: he was there, and he formed part of the civilian administration, but his role was largely administrative, and his contribution were neutral or of a *de minimis* nature. Mr. Al Hassan has been charged on the basis of his functions within the Islamic Police, but these functions mirrored those of persons holding equivalent functions, throughout the world, without censure or penal consequence. The true nature of the charges in this case have also been obscured through the use of nebulous allegations directed towards Ansar Dine's policies rather than criminal acts, and violations of human rights law rather than serious crimes of concern to the international community as a whole. Mr. Al Hassan's alleged connection to criminal acts is of such a tenuous nature, that if the same theory of liability were to be applied to UN peacekeeping operations, it would mean that anyone participating in such an operation would be liable for any criminal acts committed by any peacekeeper, during the course of the operation.
2. The Court's gravity threshold has been defined primarily by what it is not rather than what it is: the Court has rejected several challenges to gravity on the grounds that the threshold for prosecution at this Court has been met, but the Court has yet to enunciate clearly what this threshold is, or to provide any direction as to the type of case or defendant who should not be prosecuted at the Court.
3. What is clear, however, is that the mere fact that the defendant has been charged with war crimes and/or crime against humanity is not in itself sufficient to satisfy the gravity threshold – otherwise the process of challenging gravity would be obsolete. It is also clear that the gravity threshold should be interpreted and applied in a manner, which is consistent with the Court's objective to eliminate impunity, and to do so through universal ratifications. This objective is not compatible with the prosecution of this case. The prosecution of this case before the ICC drags the Court into the

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<sup>1</sup> 'Document contenant les charges contre M. Al HASSAN Ag ABDOUL AZIZ Ag Mohamed Ag Mahmoud', ICC-01/12-01/18-335-Conf.

dangerous territory of adjudicating social and religious mores, rather than criminal conduct, and legislating reform from above and outside, rather than within States. Prosecuting Mr. Al Hassan, for performing largely administrative tasks within the Islamic Police, will deter States, which apply Sharia law, from ratifying the ICC Statute. It will also divert time and resources from the effective investigation and prosecution of serious instances of genocide, war crimes and crimes against humanity.

4. If the Pre-Trial Chamber had evaluated the content of the case against Mr. Al Hassan correctly, it would have reached a similar conclusion, and halted the further prosecution of this case before the ICC. Instead, the Chamber based its determination on a range of information and factors, which were extraneous to Mr. Al Hassan's individual responsibility, and the gravity of the case against him. The Chamber's dismissal of the Defence challenge to admissibility, on grounds of gravity ('the Decision'),<sup>2</sup> is therefore vitiated by the following cumulative legal errors:
  - i. The Chamber adopted an overly broad, and erroneous definition of the 'case' for the purposes of admissibility, and as a result, artificially inflated the gravity of the case on the basis of irrelevant considerations (Ground 1); and
  - ii. The Chamber erred, and abused its discretion, by failing to attribute sufficient weight, in its assessment of gravity, to the nature of Mr. Al Hassan's individual conduct. This error is compounded by the Chamber's failure to provide adequate reasons concerning its assessment of Mr. Al Hassan's conduct (Ground 2).
  
5. The manner in which the Pre-Trial Chamber approached the assessment of gravity was impacted by previous determinations that it had made as concerns the degree of information required by Regulation 52 of the Regulations of the Court for charges concerning attacks against groups, and the definition of a participating victim. An appeal against a decision on admissibility may also encompass procedural decisions, which preceded, and impacted on the manner in which the Chamber adjudicated the admissibility challenge.<sup>3</sup> For example, in the *Ruto et al.* case, the Appeals Chamber reviewed preliminary decisions concerning requests to convene a hearing and to

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<sup>2</sup> 'Décision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense', ICC-01/12-01/18-459.

<sup>3</sup> ICC-02/04-01/05-408, para. 47; ICC-01/09-01/11-307, para. 87.

tender additional evidence, as part of its judgment of the ultimate determination on admissibility.<sup>4</sup> The current appeal therefore encompasses the impact of these prior determinations on the Trial Chamber's evaluation of the gravity of this case.

6. In terms of relief sought, the Defence requests the Appeals Chamber to overturn the Decision, and declare that the case fails to satisfy the requisite gravity threshold for prosecution before the ICC. In the alternative, the Defence requests the Appeals Chamber to refer the application back to the Chamber, for a fresh determination, in accordance with correct legal standards. Since the Defence has not requested that the proceedings be suspended pending the adjudication of this appeal, the matter should be referred to the Chamber composed by the Presidency to hear this case.

### **Classification**

7. The Appeal refers to information contained within the Confirmation Decision.<sup>5</sup> The Pre-Trial Chamber has not yet filed a public redacted version of the Confirmation Decision. The Defence will therefore file public redacted version of this Appeal, as soon as a public redacted version of the Confirmation Decision is issued.

### **Ground 1: The Chamber adopted an overly broad and erroneous definition of the 'case' for the purposes of admissibility**

8. Article 17(1)(c) of the Statute specifies that the Court shall determine that a 'case' is inadmissible where the 'case' is of insufficient gravity to justify further action by the Court. The Chamber must first define the content of the 'case' before it, in order to assess its gravity. This notion of a 'case' has consistently been defined, for the purposes of Article 17 admissibility proceedings, by reference to the identity and conduct of the defendant. The latter, in turn, is defined by reference to concrete incidents set out in the arrest warrant, or the Document Containing the Charges (DCC).

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<sup>4</sup> ICC-01/09-01/11-307, para. 87.

<sup>5</sup> 'Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud', ICC-01/12-01/18-461-Conf.

9. The Pre-Trial Chamber eschewed any reference to this definition or related case law. Instead,<sup>6</sup>

*La Chambre rappelle que les paramètres d'une « affaire » sont ceux fixés dans le document auquel les textes assignent la fonction de définir les allégations portées contre la personne concernée à un stade donné de la procédure. Dans le cas présent, il s'agit du DCC, lequel contient les charges sur la base desquelles le Procureur demande à la Chambre de renvoyer M. Al Hassan devant une chambre de première instance.*

10. This approach, which conflated the parameters of a case with its content, constituted a legal error. As a result of this error, the Pre-Trial Chamber relied on vague and extremely broad allegations of criminality, which were not anchored to incidents or a conduct of conduct, defined in time and space. As a result, the Chamber relied on extraneous information and considerations, and adopted an inflated and inaccurate assessment of gravity. This error therefore materially affected the outcome of the Decision.
11. In terms of the definitional error, the DCC frames the outer limits of a case for the purposes of ICC trial proceedings, but not the specific contents of a case, for the purposes of admissibility proceedings. This is because the DCC can contain peripheral information, for example, information concerning historical context, which is superfluous to the elements of the offences, or the conduct of the defendant. For this reason, some Chambers have distinguished between ‘material facts’ and ‘subsidiary facts’ set out in the DCC,<sup>7</sup> and other Chambers have clarified that:<sup>8</sup>

The “facts and circumstances” underlying charges are to be distinguished from other factual allegations which may be contained in a DCC as a whole. These other allegations may provide general background information or indicate intermediate steps in the prosecution’s chain of reasoning. However, they are not central to the charges and could not be the subject of any legal recharacterisation pursuant to Regulation 55.

<sup>6</sup> Decision, para. 45.

<sup>7</sup> [Chambers Practice Manual](#), 2017, p. 12-13; *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-373, [Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute, 23 January 2012](#), paras 47-48.

<sup>8</sup> *Prosecutor v. Ruto & Sang*, [ICC-01/09-01/11-475](#), Order regarding the content of charges, 20 November 2012, paras. 8-10.

12. Although the Appeals Chamber has not endorsed a specific terminology (for example, material *versus* subsidiary facts), it has confirmed that not all information and allegations in the DCC are relevant to, or form part of the charges themselves.<sup>9</sup> If such information cannot be used to recharacterise the charges, it also follows that such information also cannot be relied upon to assess the gravity of the existing charges or case.
13. Within the particular context of admissibility proceedings, the Appeals Chamber has endorsed the same person/same conduct test as an appropriate reference point for defining the material elements comprising an ICC ‘case’, and further confirmed that the defendant’s ‘conduct’ should be assessed by reference to specific incidents.<sup>10</sup> These incidents are constituted by historical events, defined in time and location.<sup>11</sup> As explained by the Prosecution:<sup>12</sup>

The ordinary meaning of “case” and “conduct” indicates that a case before the ICC must be based on particular prohibited conduct, with reference to facts occurring during specific incidents. This constitutes the subject-matter before the Court. [...]

A cursory review of the definition of the terms “case” (“[a] thing that befalls or happens to anyone, an event” or “[t]he state of facts juridically considered”) “affaire” (defined as a trial, case or lawsuit, each of which are based on a particular set of facts placed before the court) and “asunto” (the subject matter which is being dealt with; criminal proceeding, judicial proceeding) – used in the English, French and Spanish versions of Article 17 – indicates that the term should be understood as being constituted by the underlying event, incident and circumstances – i.e. in the criminal context, the conduct of the suspect in relation to a given incident. The definition of the terms “conduct” (behaviour, acts or omissions), “comportement” (behaviour, conduct, reaction) and “conducta” (set of actions, behaviour) referred to in Article 17(1)(c)

<sup>9</sup> *Prosecutor v. Lubanga*, ICC-01/04-01/06-2205, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court”, 8 December 2009, fn. 163.

<sup>10</sup> ICC-01/11-01/11-565, para. 99, citing para. 62 of the Gaddafi Admissibility Appeals Judgment (ICC-01/11-01/11-547-Red), which in turn states that, “[f]or the purposes of defining a “case” in article 17(1)(a) of the Statute, in situations such as the present, the Appeals Chamber considers that the conduct described in the incidents under investigation which is imputed to the suspect is a necessary component of the case. Such conduct forms the core of any criminal case because without it, there would be no case. At the same time, it is the conduct of the suspect him or herself that is the basis for the case against him or her”.

<sup>11</sup> ICC-01/11-01/11-565, para. 99.

<sup>12</sup> ICC-01/11-01/11-321-Red, paras. 34 and 35.

further confirms that this term should be understood as facts or acts related to a given event or incident.

14. The ‘person’ aspect of the same person/same conduct test also requires that the defendant must be alleged to bear criminal responsibility for the events in question.<sup>13</sup> It follows that for the purposes of admissibility assessments, the content of an ICC case is confined to historical events (defined in space and time), which are caused by the culpable conduct of the defendant.
15. As a result of the Pre-Trial Chamber’s failure to base its evaluation on the proper content of this case, the Chamber relied upon a range of extraneous and irrelevant factors. This included:
- i. Allegations of criminality, that were included in the DCC in order to satisfy the contextual elements, but which had no pleaded nexus to the conduct of Mr. Al Hassan;
  - ii. Broad allegations of criminality, which are not predicated on incidents, defined in either time or place, and which fail to satisfy the requirements of Regulation 52 of the Regulations of the Court; and
  - iii. Nebulous, anonymous allegations of criminality, set out in undisclosed victim applications.
16. As will be demonstrated below, the Chamber’s reliance on these factors erroneously and artificially inflated the gravity of the case.

***A) Allegations of criminality, that were included in the DCC in order to satisfy the contextual elements, but which had no pleaded nexus to the conduct of Mr. Al Hassan***

17. Contextual elements play a critical role in differentiating between ‘ordinary crimes’ and crimes falling under the jurisdiction of the Court’. The case is, nonetheless, defined and circumscribed by the acts and conduct of the defendant. And, in accordance with the

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<sup>13</sup> *Prosecutor v. Ruto et al.*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, 30 August 2011, ICC-01/09-01/11-307, paras. 40, 41.



foundational principle of individual responsibility, set out in Article 25,<sup>14</sup> if the defendant is convicted, he or she must be sentenced on the basis of the defendant's acts and conduct: the actions of others are relevant only insofar as they are related to those of the defendant.

18. Accordingly, if a defendant is charged with inhumane acts, as a crime against humanity, the Chamber's preliminary determination, as to whether there has been a widespread or systematic attack against a civilian population, may potentially encompass a range of different Article 7 crimes, which have no nexus to the personal conduct of the defendant. If this contextual element is fulfilled through evidence of a sufficient number of incidents,<sup>15</sup> then the Court has jurisdiction to prosecute and potentially convict the defendant for inhumane acts. But, if the defendant is sentenced, he or she must be sentenced by reference to his or her involvement in the commission of inhumane acts, and not the crimes relied upon to establish the contextual elements. If such contextual crimes were relied upon in a stand-alone manner, it would also result in duplication, since such 'contextual crimes' are already folded into the elements of the offence of inhumane treatment, and the classification of this crime as a crime against humanity.
19. ICC case law also confirms that contextual elements do not form part of the Chamber's assessment of the content of a 'case' for the purposes of admissibility challenges. Thus, in the *Senussi* case, the Appeals Chamber upheld the Pre-Trial Chamber's determination that the national authorities were investigating the same 'case' against Mr. Abdullah Al Senussi as the ICC, even though he had only been charged with 'ordinary crimes' in Libya.<sup>16</sup>
20. Finally, the Chamber's reliance on crimes, which are pleaded in the DCC for the purpose of establishing 'contextual elements', obliterates the distinction between the assessment of the gravity of the situation, as compared to that of a case. This free-standing reliance on contextual crimes eliminates, or at the very least, drastically reduces any meaningful distinction between the gravity of different cases, arising from the same conflict, and the situation of different defendants, accused of crimes arising from the same contextual

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<sup>14</sup> Article 25(2): "A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute."

<sup>15</sup> ICC-02/11-01/11-572, para. 47.

<sup>16</sup> ICC-01/11-01/11-565, para. 119.

background. The reference to ‘most serious crimes’ underscores the intention, underpinning the Statute, that the ICC cannot and should not prosecute each and every case arising from a particular situation. The purpose of Article 17(1) is to assess whether a specific case is sufficiently grave to be tried before the ICC, and to establish a marker between cases arising from a particular conflict or course of widespread or systemic violence, which should be tried internationally, and those, which properly belong before domestic courts. Accordingly, the mere fact that the threshold for establishing the existence of crimes against humanity or war crimes has been met is insufficient to satisfy the gravity threshold – otherwise, all crimes within the jurisdiction of the Court would satisfy the gravity threshold, and the need for such a gravity determination would be otiose. For this reason, Pre-Trial Chamber II has underlined that,<sup>17</sup>

all crimes that fall within the subject-matter jurisdiction of the Court are serious, and thus, the reference to the insufficiency of gravity is actually an additional safeguard, which prevents the Court from investigating, prosecuting and trying peripheral cases.

21. The ultimate determination as to gravity must, therefore, rest on an assessment of criminal acts and conduct, which have been attributed to the defendant. Since the Pre-Trial Chamber relied on conduct, which had no established or verified nexus to the personal conduct of Mr. Al Hassan, the Chamber’s assessment of gravity was flawed in a material manner.

***B) Broad allegations of criminality, which are not predicted on incidents, defined in either time or place, and which fail to satisfy the requirements of Regulation 52 of the RoC***

22. Rather than assessing specific charges, comprised of incidents or a particular course of conduct, the Pre-Trial Chamber used the broad outlines of the DCC as the compass for its gravity determination. The gravity determination was therefore based on, and contaminated by, the vague and nebulous allegations of ‘criminality’, which did not concern identified incidents or a course of conduct involving particular crimes. This error is particularly evident in relation to the Chamber’s findings concerning the extent of

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<sup>17</sup> ICC-01/09-19, para. 56.

persecutory acts in Timbuktu.<sup>18</sup> The Chamber's ultimate conclusion is therefore vitiated by the fact that the Chamber based its quantitative and qualitative assessment of gravity on irrelevant considerations.

23. In its challenge to gravity, the Defence argued that the Pre-Trial Chamber's assessment of gravity should be confined to incidents, which were pleaded with sufficient clarity and precision in the DCC, to comply with the requirements of Regulation 52 of the Regulations of the Court, and the right of the defendant to know the case against him – a right which is protected by Article 67(1)(a) of the Statute.<sup>19</sup> The Defence raised concerns regarding the extremely vague and defective manner in which the allegations of persecution had been pleaded, particularly as concerns the absence of any dates, details, identities, or description as concerns the nexus between certain allegations of criminality, and the conduct of Mr. Al Hassan.<sup>20</sup>
24. The Chamber's response to these arguments recognised that the DCC allegations concerning persecution lacked information on key material facts.<sup>21</sup> The Chamber averred, nonetheless, that there is a distinction between the level of precision and detail required for certain charges, as compared to those which involve crimes committed against groups.<sup>22</sup> Accordingly, whereas it was necessary for the Prosecution to describe particular criminal acts, and to indicate the date, place, and number of victims (to the extent possible) in relation to charges of rape and torture,<sup>23</sup> the Chamber accepted a far lower degree of precision as concerns the charges of persecution.
25. Accordingly, although the charges list some incidents, which are pleaded with at least a minimal degree of specificity, the Pre-Trial Chamber did not confine its assessment to such incidents. Instead, the Chamber based its quantitative assessment of gravity on broad allegations of persecution that were not defined by reference to a course of conduct

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<sup>18</sup> Decision, para. 57.

<sup>19</sup> ICC-01/12-01/18-394-Red, paras. 261, 263; ICC-01/12-01/18-449-Red, paras. 10-13.

<sup>20</sup> ICC-01/12-01/18-394-Red, paras. 261, 263; ICC-01/12-01/18-449-Red, paras. 10-13.

<sup>21</sup> Decision, paras. 55-56.

<sup>22</sup> *“Pour ce qui est des crimes, qui, par nature, sont dirigés à l'encontre d'un groupe ou d'une collectivité de personnes, comme par exemple le crime de persécution, il ne peut en revanche être attendu du Procureur un degré de précision similaire dans sa description des faits.”* ICC-01/12-01/18-459, para. 55, citing ICC-01/12-01/18-143, par. 30.

<sup>23</sup> ICC-01/12-01/18-459, para. 55, citing ICC-01/12-01/18-143, para. 30.

involving specific perpetrators and/or victims,<sup>24</sup> or, specific criminal acts, occurring in identified locations or on particular dates.<sup>25</sup> For example, in the Decision, the Chamber referenced section 8.6.2.1 of the DCC,<sup>26</sup> which sets out allegations concerning Ansar Dine policies and ideology, rather than any particular incidents or conduct linked to Mr. Al Hassan, and section 8.6.3.1, which also focusses on sexist policies, rather than acts of persecution, linked to underlying crimes or Article 7 acts.

26. This degree of vagueness is not cured by the dispositive section of the DCC, which lists several allegations, which have no apparent connection to particular crimes or identified acts under Article 7 of the Statute, including:<sup>27</sup>

- *Restrictions de certaines pratiques culturelles, telles que la musique, la télévision, la radio et le sport, les jeux et les loisirs. Destruction d'autres représentations culturelles: destruction du monument Al Farouk le 21 avril 2012 et le 27 octobre 2012 et d'autres statues traditionnelles et suppression d'images humaines des espaces publics. En outre, des interdictions des représentations humaines imagées et des manuscrites et toute littérature occidentale.*

[...]

*Imposition de restrictions quant à leur comportement, y compris leur liberté d'expression, d'association et de circulation (comme par l'interdiction qui leur est faite d'être avec des individus avec lesquels elles ne sont pas mariées ni apparentées) [...]*

27. The Chamber's dilution of the standards of pleading:

*Firstly*, was contrary to the requirements of Regulation 52, particularly when read in conjunction with the right, under Article 67(1)(a) of the Statute, to be informed promptly, and in detail of the nature, cause and content of the charges; and

*Secondly*, had the effect of eliminating any clear connection between the allegations in question and the commission of a specific crime or act falling under Article 7 of the Statute.

<sup>24</sup> “La Chambre estime donc qu’il n’est pas nécessaire, particulièrement au stade de la confirmation des charges, d’identifier les victimes notamment en ce qui concerne le crime de persécution”: ICC-01/12-01/18-459, para. 56.

<sup>25</sup> ICC-01/12-01/18-459, fn. 105: “ Voir DCC, section 8.6, en particulier sections 8.6.2.1 et 8.6.3.1”.

<sup>26</sup> ICC-01/12-01/18-459, fn. 105: “ Voir DCC, section 8.6, en particulier sections 8.6.2.1 et 8.6.3.1”.

<sup>27</sup> ICC-01/12-01/18-335-Conf, para. 1092.

28. The Pre-Trial Chamber's distinction between the degree of specificity required for crimes directed against individuals, and those which are directed against a 'group' or collectivity, finds no support in the ICC's legal framework or case law. The plain language of Regulation 52 does not differentiate between crimes committed against individuals, as compared to those which are directed against groups.<sup>28</sup>
29. There is also no teleological justification for adopting a lower or at least, such a low degree of precision for charges of persecution, simply because the crime is directed against members of a group. An attack against a group (i.e. a civilian population) is a contextual prerequisite for all crimes against humanity. Having recognised that the Prosecution was obliged to furnish specific details concerning allegations of rape or murder as a crime against humanity, there is no logical reason for carving out an exception for acts of murder or rape, which also constitute the crime of persecution.
30. The language of the Elements of Crimes also provides no support for the Chamber's approach. The crime of persecution concerns criminal conduct directed against an individual or individuals, by virtue of their membership of a group. In the Elements of Crimes, bullet point one and two of Article 7(1)(h) concerns a particular type of action, which is carried out against one or more individuals. Bullet point 4 further specifies that the conduct must be connected to a particular act falling under Article 7, or a crime, which falls under the jurisdiction of the Court. This translates to an obligation, on the part of the Prosecution, to specify clearly which particular crime or Article 7 act is being relied upon to establish this connectivity requirement.
31. Since it is necessary for the Prosecution to establish the existence of a particular prescribed act or crime under the Statute (the underlying act/crime) as an element of the offence of persecution, it follows that the degree of detail required to establish the crime of persecution can be no less than the degree which would apply to the underlying act/crime.

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<sup>28</sup> Regulation 52 specifies that: "The document containing the charges referred to in article 61 shall include: (a) The full name of the person and any other relevant identifying information; (b) A statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court; (c) A legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28."

32. Moreover, given that the existence of a connection between this underlying act/crime and the persecutory actions of the perpetrator is also an element of the offence, the degree of information set out in the charges must be sufficiently precise and detailed to satisfy the defendant's right to be informed of the nature of the connection between the persecutory conduct of the perpetrators, and the underlying crime/act.
33. This right is not respected in circumstances where the Chamber has relied on allegations where:
- The victim of the deprivation of rights is not the same person as the victim of the underlying act/crime; and
  - The absence of information concerning the perpetrator, the victims, the dates and/or the locations renders it impossible to verify the existence of a temporal or geographic connection to other crimes under the Statute, or acts falling under Article 7 of the Statute.
34. The Pre-Trial Chamber's reliance on the full array of allegations of persecution, as set out at sections 8.6.2.1 and 8.6.3.1 of the DCC, was inconsistent with Mr. Al Hassan's rights under Article 67(1)(a) of the Statute. For the most part, these sections include extremely broad allegations to the effect that the entire population of Timbuktu were 'victims' of persecution.<sup>29</sup> Although, the Prosecution set out some examples where the victims of persecution were also victims of an underlying crime or act, the Prosecution did not systematically connect each act of persecution to a particular crime or underlying act.<sup>30</sup> By relying on these sections as a whole, the Chamber also did not confine its analysis to these discrete examples.
35. The Chamber's approach therefore captured non-criminal conduct, and effectively ran roughshod over the 'connection' requirement. It resulted in a quantitative assessment that was artificially inflated by acts and conduct, which had no pleaded connection to specific crimes, and which therefore fell outside the proper scope of the Statute.

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<sup>29</sup> DCC, para. 947: "*Les femmes et jeunes filles de Tombouctou et de sa région étaient victimes de persécution religieuse comme toute la population civile en général.*"

<sup>30</sup> See paras. 25-26 *supra*.

36. The Chamber's dilution of the degree of specificity required to establish the connection element also defeated the very reason why the connection requirement was incorporated into the Statute. As explained by Daryl Robinson, the final text of the crime of persecution reflects the position that it was necessary for the Statute to exclude less serious infractions and human rights violations, which did not amount to serious crimes under international law.<sup>31</sup> There was, moreover, direct opposition to the idea that human rights violations, which were not tethered to particular criminal acts, could be brought before the Court.<sup>32</sup> This is why the drafters chose to use the language 'contrary to international law' rather than contrary to 'human rights law', and insisted that unlike the *ad hoc* Tribunals (which were established through a Chapter VII resolution of the Security Council), it was necessary to retain the obligation to establish a connection between acts of persecutory conduct, and an underlying crime under the Statute, or acts prescribed by Article 7 of the Statute.<sup>33</sup>
37. The Chamber's reliance on open-ended and vague notions of discrimination, which were unanchored to particular victims or particular historical events, ignores the ultimate compromises that were accepted in Rome, and re-writes the Statute. The Chamber therefore erred in law, and abused its discretion, by relying on irrelevant considerations, and diluted the inbuilt gravity controls for persecution.
38. The Chamber's reliance on such allegations is also incompatible with the Chamber's obligation to issue a reasoned determination as concerns any decision issued in

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<sup>31</sup> D. Robinson, 'Defining Crimes against Humanity at the Rome Conference', (1999). *American Journal of International Law*, 93(1), 1-123, at 53.

<sup>32</sup> D. Robinson, *ibid.*, at 53: "delegations were deeply concerned about the inclusion of this crime for fear that any discriminatory practices could be characterized as "crimes against humanity" by an activist court. All delegations agreed that the court's jurisdiction relates to serious violations of international criminal law, not international human rights law".

<sup>33</sup> D. Robinson, *ibid.*, at 54-55: "Nevertheless, many delegations strongly felt that such a connection was a necessary element of the crime of persecution, because of the vague and potentially elastic nature of this crime and the need to ensure an appropriate focus on its criminal nature. This position was not without merit; as Bassiouni has noted, "there is no crime known by the label 'persecution' in the world's major criminal justice systems, nor is there an international instrument that criminalizes it," and therefore "a reasonable nexus between the discriminatory policy and existing international crimes is needed". (...) the compromise reached at the Rome Conference was to require a connection between persecution and any other crime within the jurisdiction of the ICC or any act referred to in paragraph 1 (i.e., other inhumane acts). This latter phrase ensures that persecution will not be merely an auxiliary offense or aggravating factor. It is not necessary to demonstrate that the "connected" inhumane acts were committed on a widespread or systematic basis; it will suffice to show a connection between the persecution and any instance of murder, torture, rape or other inhumane act, which need not amount to a crime against humanity in its own right."

See also fn. 70: "In this respect, the compromise reached at the Rome Conference appears to be more restrictive than the law applied by the ICTY".

connection with an Article 17 challenge. In the context of an admissibility determination, if the Chamber considers the defendant to be charged with open-ended accusations of ‘persecution’, rather than incidents, which fulfil the elements of persecution, and a State or the defendant then challenges the admissibility of a case on the grounds that the State is investigating or prosecuting the ‘same conduct’, there are no specific reference points, which can be utilised to assess the degree of actual overlap between the domestic case and the ICC charge of ‘persecution’. This absence of specific anchor points falls foul of the Appeals Chamber’s directive that:<sup>34</sup>

to carry out this [admissibility] assessment, it is necessary to use, as a comparator, the underlying incidents under investigation both by the Prosecutor and the State, alongside the conduct of the suspect under investigation that gives rise to his or her criminal responsibility for the conduct described in those incidents.

39. In the particular framework of a gravity challenge, reliance on open-ended accusations leads to arbitrary results. In the absence of any fixed anchor points, the number of underlying incidents can change radically over the course of the case, transforming both the nature and the gravity of the case. The absence of specific anchor points also renders it impossible to conduct a meaningful review as to the Chamber’s assessment of gravity, or to ensure any form of consistency as concerns gravity assessments issued in different cases. For example, as set out above, the Chamber placed considerable weight on sections 8.6.2.1 and 8.6.3.1 of the DCC, but the absence of any particularized information in these sections concerning particular victims or conduct linked to Mr. Al Hassan, renders it impossible to assess the degree of quantitative and qualitative harm alleged caused by the actions of Mr. Al Hassan. The notion of gravity becomes very subjective, which is contrary to the defendant’s right to have such matters adjudicated in an impartial, transparent and objective manner.
40. If the Chamber had properly confined its analysis to sufficiently particularized charges, then it would have concluded that firstly (and as further elaborated in Ground 2), Mr. Al Hassan’s role in such charges was very limited, and secondly, that the scale of serious incidents was small, and that as such, the case falls below the gravity threshold.

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<sup>34</sup> ICC-01/11-01/11-547-Red, para. 73.



***C) Unidentified allegations of criminality, set out in undisclosed victim applications***

41. In addition to the Chamber's reliance on extraneous and irrelevant allegations, which had no clear connection to a crime under the Statute, the Chamber's gravity assessment was artificially inflated through its reliance on the number of participating victims in the case, which the Chamber calculated as 882 as of the date of the Decision.<sup>35</sup> The Chamber's reliance on this number as a gravity indicator is vitiated by two errors:

- a. The Chamber erred in law and procedure, and abused its discretion, by using information set out in victim applications to assess the gravity of the charges in this case; and
- b. The Chamber erred in law, and abused its discretion, by characterizing, as victims, individuals, who had not suffered harm as the result of crimes under the Statute.

42. The purpose of victim participation is to assert a procedural right to be heard, rather than to establish evidential facts. As noted by Trial Chamber V,<sup>36</sup>

unless these applications are submitted and discussed as evidence during the trial, the Chamber also cannot base its trial judgment on them. The Chamber therefore considers that, notwithstanding any other purpose they may fulfil for the individuals concerned, victim applications are primarily intended as a procedural mechanism to participate in proceedings.

43. If victim applications are not evidence as concerns the charges, then they also do not constitute evidence as concerns the gravity of the charges. It was, therefore, improper for the Chamber to rely on the applications for this purpose.

44. Although the Chamber can grant participating victims the right to tender evidence concerning the fact of the case, the Chamber must first erect procedural safeguards to ensure that the introduction of evidence from participating victims is not inconsistent with the defendant's right to a fair and impartial trial.<sup>37</sup> At the very least, the defendant

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<sup>35</sup> Decision, para. 57.

<sup>36</sup> ICC-01/04-02/06-449, para. 36.

<sup>37</sup> ICC-01/04-01/06-1432, para. 3.

must be afforded notice of this possibility, and appropriate disclosure as concerns the allegations in question.<sup>38</sup>

45. No such safeguards were erected in the current case. The Chamber’s calculation of 882 victims is based on anonymous applications, many of which have never been transmitted to the parties.<sup>39</sup> The Defence has never had the opportunity to contest whether Group A individuals fulfil the definition of a victim, and many (if not all) were granted the right to participate without any prior judicial evaluation as to whether the individual fulfilled the definition of a victim.<sup>40</sup>
46. The impact of the Chamber’s erroneous reliance on the number of participating victims was further exacerbated by the extremely broad definition of a victim, which was employed within the context of victim participation decisions.<sup>41</sup> The Single Judge extended the definition of a victim through the following instructions to the Registry:
- In circumstances where the applicant had not provided a date or any approximation of a date, the Registry was ordered to conclude that the events set out in the application falls within the temporal scope of the charges, if the application refers to ““2012”, along with words such as “jihadist”, “rebels” or “armed men”, or even simply a reference to the occupation of Timbuktu”;<sup>42</sup>
  - the notion of a ‘victim’ extends to anyone who was in Timbuktu during the relevant time period, and who witnessed the commission of any crimes that occurred in Timbuktu;<sup>43</sup> and

<sup>38</sup> ICC-01/04-01/06-1432, para. 100.

<sup>39</sup> In his decision on victim participation, the Single Judge determined that ‘Group A applications’ (i.e. those which the Registry assessed as meeting the definition of a victim) would not be transmitted to the parties: ICC-01/12-01/18-37-tENG, para. 59.

<sup>40</sup> The Single Judge ruled that firstly, the Registry was not obliged to provide any elaboration or justification as concerns the inclusion of particular applications within ‘Group A’ (the group which is automatically granted participation status), and secondly, that “barring a clear, material error in the Registry’s assessment of Groups A and B, he will also ratify the Registry’s assessment of the Group A and B applications”: ICC-01/12-01/18-37-tENG, p. 21.

<sup>41</sup> Decision, fn. 107, citing to ICC-01/12-01/18-391-Red.

<sup>42</sup> ICC-01/12-01/18-146-tENG, para. 23: “Thus, for example, because the Chamber concluded that there are reasonable grounds to believe that the armed groups Al-Qaida in Islamic Maghreb (AQIM) and Ansar Dine had taken control of Timbuktu and held the city from early April 2012 to 17 January 2013, the Single Judge considers a reference to “2012”, along with words such as “jihadist”, “rebels” or “armed men”, or even simply a reference to the occupation of Timbuktu, to be sufficient for the application to be considered as within the time frame of the present case.”

<sup>43</sup> ICC-01/12-01/18-146-tENG, para. 35.

- within the context of persecution, the Registry was instructed to designate anyone who described certain discriminatory acts in the application form, and identified themselves as a member of a group, which had been subjected to discriminatory acts (i.e. as a female, or a person who lived in Timbuktu, since the Single Judge also assumed that the measures imposed by Ansar Dine discriminated against the entire population),<sup>44</sup> even if the person had not suffered harm as a result of a crime under the Statute.<sup>45</sup>

47. This extremely broad approach to the definition of a ‘victim’ means that it is theoretically possible for any person who lived in Timbuktu in 2012 to participate as a victim in this case – the Prosecution and LRV recognised as such, in their responses to the admissibility challenge.<sup>46</sup> But clearly, the fact that multiple persons may have witnessed a crime, which may or may not have any nexus to the specific charges in this case, does not make the ‘case’ more grave. This is particularly the case given that the Single Judge extended the notion of the crime of persecution to discriminatory acts, which are not necessarily connected to an underlying crime or Article 7 act.

48. This broad definition of a victim would also capture individuals, who were victims of crimes or discriminatory conduct, committed by other armed groups, which were present in or around Timbuktu in 2012, and which were either opposed to Ansar Dine, or acting independently of Ansar Dine (and its alleged common plan).<sup>47</sup> The existence of 882 participating victims therefore fails to constitute an accurate marker as concerns the gravity of the particular case concerning Mr. Al Hassan’s individual responsibility. It is also highly prejudicial to create and disseminate a public impression concerning the

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<sup>44</sup> ICC-01/12-01/18-146-tENG, para. 30.

<sup>45</sup> ICC-01/12-01/18-146-tENG, para. 28: “Furthermore, the crime of persecution against an identifiable group or community can be prosecuted under article 7(1)(h) of the Statute only if the act was committed in connection with another crime within the jurisdiction of the Court, “thus filtering out discriminatory measures that would not fall within the Court’s jurisdiction if committed without such connection”. Such a requirement concerns the group or community as a whole and not each victim individually. Accordingly, an individual may claim to be the victim of a crime of persecution if he or she, as a member of a group or community that is the victim of persecution, has suffered a severe deprivation of his or her fundamental rights (such as, for example, the right to freedom of expression, freedom of assembly and association, or the right to private property) even if, by itself, such deprivation would not constitute a crime of persecution in the absence of an act or crime within the jurisdiction of the Court.”

<sup>46</sup> “virtually the entire civilian population of Timbuktu and its region was victimised as a result of the commission of these crimes, in particular, the crime of persecution under count 13”: ICC-01/12-01/18-432-Red, para. 9. See also ICC-01/12-01/18-459, para. 37.

<sup>47</sup> According to the DCC, this would include at the very least, the MNLA and the Malian armed forces (see DCC, paras. 38, 39, 72, 85, 94). There were also Arab militia based near Timbuktu during the relevant time period.

gravity of the charges in this case, which is based on information which has no nexus to Mr. Al Hassan's conduct or alleged criminality responsibility. The use of such figures is also likely to generate unrealistic expectations concerning the possible outcome of the case.

**Ground 2: The Chamber erred, and abused its discretion, by failing to attribute sufficient weight, in its assessment of gravity, to the nature of Mr. Al Hassan's individual conduct. The Chamber also erred, and abused its discretion by failing to provide adequate reasons concerning its assessment of Mr. Al Hassan's conduct**

49. The Pre-Trial Chamber noted, correctly, that the conduct of the defendant was relevant to the gravity of the case, and, that this conduct could not be assessed by reference to abstract categories, such as the 'position' of the defendant.<sup>48</sup> The Chamber failed, nonetheless, to adhere to these principles in its conclusions concerning the seriousness of Mr. Al Hassan's conduct and role in the alleged crimes. Instead, the Chamber reached its overall conclusion concerning the gravity of the case, by reference to abstract notions and labels concerning Mr. Al Hassan's role within the Islamic Police.<sup>49</sup> As a result, the Chamber failed to assess the actual nature and extent of Mr. Al Hassan's participation in the alleged crimes set out in the charges. The Chamber therefore erred, and abused its discretion, by placing too much weight on abstract positions and labels, and, failing to give any weight to the particular degree of Mr. Al Hassan's participation in the charged crimes. The Chamber's errors undermined the validity of its overall conclusion. If the Chamber had based its assessment on the description of Mr. Al Hassan's particular knowledge and conduct set out in the DCC, it would have concluded that he exercised a role of significantly reduced importance as concerns the alleged commission of crimes in Timbuktu. The Chamber's focus on conduct rather than abstract categories would have also led it to a different conclusion as concerns the number of incidents, which were attributed to Mr. Al Hassan. A proper assessment would have led the Chamber to conclude that the case against Mr. Al Hassan cannot be characterised as one, which falls within 'the most serious crimes'.

50. In terms of the correct approach to the defendant's role, in the *DRC situation*, the Appeals Chamber underscored that the seriousness of defendant's role must be assessed

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<sup>48</sup> Decision, para. 50.

<sup>49</sup> Decision, para. 57.

on a case-by-case basis, and not by reference to overly rigid formulae.<sup>50</sup> It follows, therefore, that the seriousness of the defendant's conduct cannot be assessed solely by reference to the defendant's position, the types of crimes included in the charges, or the particular mode(s) of liability set out in the charges.

51. As concerns the defendant's position, it is theoretically possible that a low-ranked defendant might be responsible for grave crimes. The Appeals Chamber has thus noted that "individuals who are not at the very top of an organization may still carry considerable influence and commit, or generate the widespread commission of, very serious crimes".<sup>51</sup> The theoretical possibility that a low-ranked offender *could* trigger serious criminal consequences does not, however, exempt the Chamber from the obligation to evaluate whether that was actually the case: it is incumbent on the Chamber to make an assessment as to whether the individual – through his conduct – exerted a considerable influence or impact on the commission of widespread or serious crimes. The Pre-Trial Chamber made no such assessment.
52. The particular DCC sections cited by the Pre-Trial Chamber in support of its overall conclusion, do not elucidate or justify the Chamber's position concerning the gravity of this case, or the seriousness of Mr. Al Hassan's actions. For example, the Chamber cited paragraphs 211-212 of the DCC: these paragraphs merely reflect the Prosecution's position that Mr. Al Hassan could be charged as a co-perpetrator and was a member of the common plan. These paragraphs do not contain any actual description of the particular ways in which Mr. Al Hassan is alleged to have contributed to the crimes.
53. The Pre-Trial Chamber also cited to "sections 4.3.1, 5 et 7.2.3" of the DCC in support of its finding that Mr. Al Hassan played an 'important role' in the commission of crimes.<sup>52</sup> These sections amount to twenty-eight pages. The sheer breadth of this reference renders it impossible to discern the particular basis for the Chamber's conclusion. It is also impossible to reconcile the Chamber's reliance on these sections, with the Chamber's finding, in the decision on the confirmation of charges, that the DCC failed to explain how and why Mr. Al Hassan's contribution to the commission of the crimes should be

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<sup>50</sup> ICC-01/04-169, para. 76.

<sup>51</sup> ICC-01/04-169-US-Exp, para. 77.

<sup>52</sup> Decision, fn. 109. The Chamber also cites paragraph 251, which merely cites back to Section 7.2.3.

characterized as an essential contribution to the common plan.<sup>53</sup> Specifically, the Chamber determined, in relation to the allegation that Mr. Al Hassan's contribution to the commission of crimes was 'essential', that:<sup>54</sup>

*le Procureur n'a pas évoqué ce critère dans son DCC. Outre la référence à la capacité de M. Al Hassan « de frustrer avec les autres co-auteurs » deux cas, à savoir la flagellation du P-0565 et P0557 et celles des [REDACTED], le Procureur n'explique pas comment, sans la contribution de M. Al Hassan, les crimes établis aux paragraphes 228-707 n'auraient pas eu lieu ou que, sans sa contribution, ces crimes auraient été commis de manière très différente. La Chambre considère en tout état de cause qu'exercer un contrôle sur deux cas (et à supposer que ce contrôle soit effectivement établi) n'équivaut pas à exercer un contrôle sur l'ensemble des crimes commis par l'organisation.*

54. This conclusion turned on the nature of the contributions set out in the DCC, rather than evidential issues (such as the sufficiency of evidence tendered to establish these contributions). It was therefore inappropriate for the Pre-Trial Chamber to use the Prosecution's description of Mr. Al Hassan as a 'co-perpetrator' as a marker concerning the gravity of his contributions, when the Chamber was aware that this description did not accurately capture the extent of his contributions to the charged crimes, as pleaded in the DCC. It is also apparent that if the Chamber had based its gravity assessment on the description of Mr. Al Hassan's conduct set out in the DCC, rather than the labels attached to this conduct, the Chamber would have reached a different conclusion concerning the nature and significance of this conduct.
55. In the Decision, the Chamber also attached importance to Mr. Al Hassan's role within the Islamic Police, without explaining why this role was significant as concerns his alleged involvement in the commission of crimes within Timbuktu.<sup>55</sup> The relevance and alleged significance of this role are also undermined by the Chamber's findings, in the confirmation decision, that this role was largely administrative:<sup>56</sup>

*M. Al Hassan travaillait inter alia comme interprète pour certains de ses supérieurs pendant les événements survenus à Tombouctou. De manière générale, son rôle était largement administratif (...).*

<sup>53</sup> ICC-01/12-01/18-461-Conf, para. 849.

<sup>54</sup> ICC-01/12-01/18-461-Conf, para. 851.

<sup>55</sup> Decision, para. 57.

<sup>56</sup> ICC-01/12-01/18-461-Conf, para. 839.

56. As concerns the Islamic Police itself, the Chamber further noted that the Islamic Police was one of seven organs, put in place during the relevant time period, and that it did not have a controlling role as concerns the execution of the common plan.<sup>57</sup> Incidents which took place within the physical quarters of the Islamic Police were attributable to a range of different organs and actors outside the Islamic Police.<sup>58</sup> Mr. Al Hassan also did not feature within the infrastructure, responsible for directing the different organs in Timbuktu during the relevant time period.<sup>59</sup> These findings are consistent with the plain text of the DCC;<sup>60</sup> the Chamber would therefore have reached a similar conclusion concerning the seriousness of Mr. Al Hassan's conduct if, rather than relying on than the modes of liability labels affixed to him, the Chamber had given appropriate weight to the DCC's description of the role of the Islamic Police within hierarchy of Ansar Dine in Timbuktu, and Mr. Al Hassan's tasks within the Islamic Police.
57. It is also significant that in the confirmation decision, the Chamber ultimately declined to make any findings concerning the particular degree of Mr. Al Hassan's contributions to the alleged crimes.<sup>61</sup> In line with the Chamber's description of Mr. Al Hassan's role as 'largely administrative', the conduct set out in the DCC points to contributions of a *de minimis* nature. This is borne out by the fact that the Chamber found that many of the contributions, which it relied upon to satisfy Article 25(3)(c) and (d), did not influence, provoke, or lead to the commission of the charged crimes. For example, the Chamber found that:
- Mr. Al Hassan's participation in the arrest of Dédéou Maiga, and his general role within the Islamic police, did not assist, influence, provoke, or lead to the carrying out of the amputation;<sup>62</sup>
  - Mr. Al Hassan's presence during the flogging of [REDACTED] did not constitute a form of influence, provocation or contribution to the decision to flog [REDACTED];<sup>63</sup>

<sup>57</sup> ICC-01/12-01/18-461-Conf, paras. 855-856.

<sup>58</sup> ICC-01/12-01/18-461-Conf, para. 856.

<sup>59</sup> ICC-01/12-01/18-461-Conf, para. 855.

<sup>60</sup> See DCC, paras. 111-114, 241-243, 366, 1029.

<sup>61</sup> ICC-01/12-01/18-461-Conf, paras. 906, 912, 916, 928, 966, 974, 986, 993, 999.

<sup>62</sup> ICC-01/12-01/18-461-Conf, paras.889-890, 930.

<sup>63</sup> ICC-01/12-01/18-461-Conf, para. 875.

- The allegation that Mr. Al Hassan wrote, and signed police reports, and his general role within the Islamic police, did not assist, or amount to a form of influence, provocation or contribution to the judgments issued by the Islamic Tribunal in connection with these cases;<sup>64</sup> and
- Mr. Al Hassan's daily functions in the Islamic Police did not constitute a form of influence or provocation as concerns the commission of discriminatory acts.<sup>65</sup>

58. Nonetheless, after noting that "*il n'est pas requis qu'un seuil spécifique soit atteint*",<sup>66</sup> the Chamber relied upon these same actions to satisfy the requirements of Article 25(3)(c) and (d). Although these findings were issued three days after the Chamber issued the Decision, the findings indicate the manner in which the Chamber would have assessed Mr. Al Hassan's conduct, as set out in the DCC, if it had based its assessment of gravity on conduct rather than labels.

59. The *de minimis* nature of Mr. Al Hassan's contributions is also reflected by the manner in which they were described in the DCC. For example, whereas Al Mahdi was found to be responsible for conceiving, directing and participating in the destruction of protected buildings, Mr. Al Hassan was merely present in Timbuktu, and working for the Islamic Police during the relevant periods.<sup>67</sup> He is not alleged to have participated in the destruction of the buildings or to have provided any form of specific assistance.<sup>68</sup> Regarding the allegations of torture and inhumane treatment, the allegations arising from direct perpetration are very limited in scope, and concern factual incidents of limited severity, and limited impact. Specifically, he is alleged to have applied the sentence ordered by the Islamic Tribunal in two instances, in a manner which adhered to Islamic principles concerning *Hudud* punishments.<sup>69</sup> As can be seen from the video referred to in the DCC, this included using a technique (holding out the hand and elbow at a 90-degree angle from the body), which minimized force and impact.<sup>70</sup> Otherwise, Mr. Al Hassan's responsibility rests on the allegations that he was present when punishments ordered by

<sup>64</sup> ICC-01/12-01/18-461-Conf, paras. 888, 890, 931.

<sup>65</sup> ICC-01/12-01/18-461-Conf, para. 895.

<sup>66</sup> ICC-01/12-01/18-461-Conf, para. 906. See also paras. 912, 916, 928, 966, 974, 986, 993, 999.

<sup>67</sup> ICC-01/12-01/18-461-Conf, para. 984, corresponding to paras. 728-732 of the DCC.

<sup>68</sup> ICC-01/12-01/18-461-Conf, paras. 976-987, corresponding to paras. 728-732 of the DCC.

<sup>69</sup> DCC, para. 209.

<sup>70</sup> DCC, para. 596.



the Islamic Tribunal were executed, signed reports of the Islamic Police concerning cases that were brought before the Islamic Tribunal, and participated in the arrest of two persons, who were subsequently subjected to mistreatment by individuals, who were from other organs (Hesbah), and who did not fall under his authority or control.<sup>71</sup> He was not present, or otherwise involved in the implementation of the amputation of the hand of Dédéou Maiga, and the Chamber found that his alleged participation in the arrest of Dédéou Maiga had no impact on the ultimate execution of this crime.<sup>72</sup>

60. Critically, the DCC avers that no-one in Timbuktu could occupy an important function without first pleading allegiance to the armed groups,<sup>73</sup> and having religious training,<sup>74</sup> and yet, Mr. Al Hassan is not alleged to have sworn an oath of allegiance to Ansar Dine, or to have undergone either religious or military training.
61. Mr. Al Hassan's knowledge as concerns allegations of rape and sexual slavery is based on the assumption that because the existence of forced marriages was notorious, and known by everyone in Timbuktu, and because Mr. Al Hassan interacted regularly with the population, he must have known of its occurrence.<sup>75</sup> His contribution, derived from his presence, when members of the Islamic Police spoke to the families of the intended brides in relation to the marriage proposal and the terms of the dowry requested by the family (one marriage did not take place because the family rejected the request), and the allegation that he assisted members of the Islamic Police in their requests to be granted financial assistance, for the purpose of paying dowries.<sup>76</sup> The DCC also did not allege that Mr. Al Hassan possessed discriminatory intent.<sup>77</sup>
62. In line with its focus on labels rather than Mr. Al Hassan's underlying conduct, the Pre-Trial Chamber also placed undue weight on the fact that Mr. Al Hassan had been charged with thirteen different crimes.<sup>78</sup> Although the number of different charges may be relevant to the totality of Mr. Al Hassan's responsibility, the Appeals Chamber has also

<sup>71</sup> ICC-01/12-01/18-461-Conf, para. 963, DCC, section 8.2.1.3.2

<sup>72</sup> ICC-01/12-01/18-461-Conf, para. 311, 889; DCC, para. 607.

<sup>73</sup> DCC, para. 96.

<sup>74</sup> DCC, paras. 227, 368.

<sup>75</sup> ICC-01/12-01/18-461-Conf, para. 989, corresponding to paras. 347, 846-849 of the DCC.

<sup>76</sup> ICC-01/12-01/18-461-Conf, paras. 990-991, corresponding to paras. 280, 347 of the DCC.

<sup>77</sup> See DCC, paras. 1088-1092. See also ICC-01/12-01/18-442-Conf, para. 32, ICC-01/12-01/18-461-Conf, para. 936.

<sup>78</sup> Decision, para. 57.

presaged that the bar to multiple convictions can arise if the elements overlap or are subsumed, and in some circumstances, “a bar to multiple convictions could also arise in situations where the same conduct fulfils the elements of two offences even if these offences have different legal elements, for instance if one offence is fully consumed by the other offence or is viewed as subsidiary to it.”<sup>79</sup> The Chamber therefore erred by failing to consider, and thus place any weight, on the degree of overlap as concerns the underlying conduct relied upon to establish the different charges.

63. The DCC relies upon Mr. Al Hassan’s ‘largely administrative’ role and conduct within the Islamic Police, to attribute responsibility to him for a range of different charges, even though the conduct itself is very limited in degree and impact. And, in many cases, the same conduct and same incidents are relied upon to support allegations concerning multiple charges. For example, the Prosecution has relied upon Mr. Al Hassan’s role within the Islamic Police to link him to particular investigations or cases that were brought before the Islamic Tribunal. The Prosecution has then relied upon this role, in conjunction with the sentences issued by the Islamic Tribunal, in support of alleged charges concerning:

- The entire process of the war crime of passing sentences without complying with necessary due process standards;<sup>80</sup>
- The punishment executed as part of the sentence as a form of inhumane act, torture, cruel treatment, or attack on the dignity of the person;<sup>81</sup> and
- The application of Sharia law as a violation of religious freedom, and thus a form of persecution.<sup>82</sup>

64. This duplication of incidents and conduct is also evident as concerns the charges regarding sexual violence.<sup>83</sup>

65. In such circumstances, the mere existence of multiple charges is not necessarily an accurate indicator of gravity, and can lead to unfair and inaccurate results in circumstances where the Chamber has failed to conduct a specific assessment of the

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<sup>79</sup> ICC-01/05-01/13-2275-Red, para. 751.

<sup>80</sup> DCC, para. 1066.

<sup>81</sup> DCC, para. 1058.

<sup>82</sup> DCC, para. 1094.

<sup>83</sup> DCC, para. 1087.

gravity of the defendant's conduct underpinning such charges, or to assess the degree to which the conduct underlying the different charges, overlaps.

### **Conclusion and Relief Sought**

66. When the State of Mali first requested the Prosecution to investigate the events in Timbuktu, it listed 14 persons, who had been identified by domestic investigations, as bearing the greatest responsibility for alleged crimes committed in the North of Mali.<sup>84</sup> Mr. Al Hassan's name was not on this list.
67. When the Prosecution submitted the request for an arrest warrant in this case, they listed the persons who bore the greatest responsibility for the actions of Ansar Dine.<sup>85</sup> Mr. Al Hassan was not included within the names.
68. After more than a year of further investigations, the DCC did not alter this hierarchy, or set out any additional aggravating features concerning Mr. Al Hassan's role within Timbuktu during the relevant time period. And, when the long-winding allegations in the DCC are distilled to their essence, Mr. Al Hassan does not feature in the critical developments that led to the commission of criminal acts in Timbuktu. The allegations portray him as a bit player, who appears sporadically in the background scenery.
69. The fact that Mr. Al Hassan was arrested and brought before the ICC is not in itself a valid reason to exercise jurisdiction over this case. His further prosecution is likely to take several years and expend considerable resources, which could otherwise be applied to the investigation, and prosecution of other defendants, and the reparation of victims (including those identified in the *Al Mahdi* case). Even if a conviction were to be entered, given the extremely minimal nature of his contributions, and the degree to which the conduct underpinning the charges overlaps, it is unlikely to result in a significant sentence.
70. Given the existence of a domestic case against Mr. Al Hassan, the dismissal of this case – for want of gravity – does not contribute to impunity; to the contrary, a decision, which

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<sup>84</sup> MLI-OTP-0001-0026 (referred to at ICC-01/12-01/18-T-007-CONF-ENG, p. 24, lns. 18-21).

<sup>85</sup> ICC-01/12-01/18-1-Red, para. 59 (referred to at ICC-01/12-01/18-T-007-CONF-ENG, p. 24, lns. 22-25).

underscores that this case would be more properly tried at the domestic level, could serve to invigorate domestic investigations concerning the events in Timbuktu.

71. For these reasons, Pre-Trial Chamber's errors concerning its assessment of the Defence gravity challenge should not be overlooked or deemed inconsequential. The Defence therefore requests the Honourable Appeals Chamber to:

- i. Reverse the 'Décision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense'; and
- ii. Determine that the case is inadmissible due to reasons of gravity.



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Associate Counsel for Mr. Al Hassan

Dated this 21<sup>st</sup> day of October 2019  
At The Hague, The Netherlands