

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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**No. ICC-01/12-01/18 OA
Date: 19 February 2020**

THE 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 Redacted

Judgment

**on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I
entitled ‘Décision relative à l’exception d’irrecevabilité pour insuffisance de
gravité de l’affaire soulevée par la défense’**

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

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The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud against the decision of Pre-Trial Chamber I entitled ‘*Décision relative à l’exception d’irrecevabilité pour insuffisance de gravité de l’affaire soulevée par la défense*’ of 27 September 2019 (ICC-01/12-01/18-459),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The ‘*Décision relative à l’exception d’irrecevabilité pour insuffisance de gravité de l’affaire soulevée par la défense*’ is confirmed.

REASONS

I. KEY FINDINGS

1. The gravity requirement under article 17(1)(d) of the Statute aims at excluding those rather unusual cases where the specific facts of a given case technically qualify as crimes under the jurisdiction of the Court, but are nonetheless not of sufficient gravity to justify further action.
2. The gravity assessment under article 17(1)(d) of the Statute must be made on a case-by-case basis. It involves a holistic evaluation of all relevant quantitative and qualitative criteria, including some of the factors relevant to the determination of the sentence of a convicted person. Quantitative criteria alone, including the number of victims, are not determinative of the gravity of a given case.

II. INTRODUCTION

3. In the present appeal, the Appeals Chamber is called upon to determine whether Pre-Trial Chamber I (the ‘Pre-Trial Chamber’), in the ‘*Décision relative à l’exception d’irrecevabilité pour insuffisance de gravité de l’affaire soulevée par la défense*’ of 27 September 2019 (the ‘Impugned Decision’),¹ correctly determined that the case against Mr Al Hassan is admissible. In particular, the Appeals Chamber must decide whether the Pre-Trial Chamber correctly determined that the case brought against Mr Al Hassan meets the gravity requirement provided for in article 17(1)(d) of the Statute.

4. Mr Al Hassan raises two grounds of appeal. Under the first ground of appeal,² Mr Al Hassan argues that the Pre-Trial Chamber erred by adopting an overly broad and erroneous definition of the ‘case’ for the purposes of admissibility, which, in his view, ‘artificially inflated the gravity of the case on the basis of irrelevant considerations’.³ Under the second ground of appeal,⁴ Mr Al Hassan challenges the Pre-Trial Chamber’s exercise of its discretion in its assessment of the gravity of the case based on a purported failure to attribute sufficient weight to the nature of his individual conduct.⁵ In his view, this error was compounded by the Pre-Trial Chamber’s ‘failure to provide adequate reasons concerning its assessment of [his] conduct’.⁶ He requests the Appeals Chamber to reverse the Impugned Decision and determine that the case is inadmissible due to reasons of gravity.⁷

5. For the reasons that will be elaborated in this judgment, the Appeals Chamber rejects the appeal lodged by Mr Al Hassan and confirms the Impugned Decision.

6. This judgment shall first set out the procedural history, followed by an overview of the case, including background information, a brief description of the charges

¹ [ICC-01/12-01/18-459](#) (English translation filed on 31 October 2019, ‘[Decision on the Admissibility Challenge raised by the Defence for Insufficient Gravity of the Case](#)’, ICC-01/12-01/18-459-1(ENG)).

² [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’ \(ICC-01/12-01/18-459\)](#), 9 December 2019, ICC-01/12-01/18-475-Red (confidential version filed on 21 October 2019) (the ‘Appeal Brief’), paras 8-48.

³ [Appeal Brief](#), paras 4, 8-48.

⁴ [Appeal Brief](#), paras 49-65.

⁵ [Appeal Brief](#), paras 4, 49-65.

⁶ [Appeal Brief](#), paras 4, 51-53.

⁷ [Appeal Brief](#), para. 71.

brought against Mr Al Hassan, a summary of the Impugned Decision and the grounds of appeal raised by Mr Al Hassan. It will thereafter set out the standard of review that will guide the Appeals Chamber's analysis, the issues and questions arising from the appeal lodged by Mr Al Hassan, the legal framework relevant to the issues arising in the appeal and the observations submitted by Mali.

7. Prior to discussing the specific arguments raised under the two grounds of appeal, the Appeals Chamber will set out its interpretation of the gravity requirement provided in article 17(1)(d) of the Statute. Subsequently, the analysis of the two grounds of appeal will be structured as follows: (1) the first ground of appeal concerning the Pre-Trial Chamber's alleged error of adopting, for the purposes of admissibility, an overly broad and erroneous definition of the 'case'; and (2) the second ground of appeal concerning alleged errors in the Pre-Trial Chamber's exercise of discretion when assessing the nature of Mr Al Hassan's individual conduct.

8. Finally, the Appeals Chamber will set out its general conclusions and the appropriate relief.

III. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial Chamber

9. On 4 June 2019, Mr Al Hassan filed his submissions regarding the confirmation of charges and argued, *inter alia*, that the case brought against him does not meet the gravity requirement under article 17(1)(d) of the Statute and is thus inadmissible (the 'Admissibility Challenge').⁸

10. On 25 July 2019, the Prosecutor filed her response to the Admissibility Challenge, requesting its rejection.⁹ On 30 July 2019, the Victims filed their observations on the Admissibility Challenge, requesting its rejection.¹⁰ On 31 July 2019, the Registry transmitted the authorities of Mali's observations on the

⁸ Public redacted version of '[Submissions for the confirmation of charges](#)', ICC-01/12-01/18-394-Red (confidential version notified on the same date), paras 256-286.

⁹ [Public redacted version of "Prosecution's observations in response to the Defence's admissibility challenge", 25 July 2019, ICC-01/12-01/18-432-Conf](#), 1 August 2019, ICC-01/12-01/18-432-Red (confidential version notified on 25 July 2019).

¹⁰ [Observations en réponse à l'exception d'irrecevabilité soulevée par la Défense](#), ICC-01/12-01/18-439.

Admissibility Challenge.¹¹ On 6 August 2019, Mr Al Hassan filed a reply to the Admissibility Challenge.¹²

11. On 27 September 2019, the Pre-Trial Chamber rejected Mr Al Hassan’s Admissibility Challenge.¹³ In particular, it rejected Mr Al Hassan’s arguments that: (1) his alleged role as a minor police administrator militates against being brought before a jurisdiction looking to try the persons most responsible for the most serious crimes;¹⁴ (2) the evidence alleged to establish the contextual elements of crimes under articles 7 and 8 of the Statute cannot be taken into consideration when assessing the gravity of the case;¹⁵ (3) the actual scope of the case is limited in terms of the number of incidents, its temporal duration and the number of identified victims;¹⁶ and (4) his alleged conduct does not demonstrate the necessary aggravating or qualitative factors to meet the gravity requirement.¹⁷

12. On 30 September 2019, the Pre-Trial Chamber confirmed the charges of war crimes and crimes against humanity brought by the Prosecutor against Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (the ‘Confirmation Decision’).¹⁸

B. Proceedings before the Appeals Chamber

13. On 4 October 2019, Mr Al Hassan filed his notice of appeal under article 82(1)(a) of the Statute.¹⁹ On 21 October 2019, Mr Al Hassan filed the ‘Appeal of the Pre-Trial Chamber’s “Décision relative à l’exception d’irrecevabilité pour

¹¹ [Transmission des Observations des Autorités Maliennes en lien avec l’Exception d’Irrecevabilité soulevée par la Défense](#), ICC-01/12-01/18-441 (with confidential annex ICC-01/12-01/18-441-Conf-Anx).

¹² [Public redacted version of Defence Reply on Admissibility Challenge \(Gravity\)](#), 5 September 2019, ICC-01/12-01/18-449-Red (confidential version filed on 6 August 2019).

¹³ [Impugned Decision](#).

¹⁴ [Impugned Decision](#), paras 50-52.

¹⁵ [Impugned Decision](#), para. 53.

¹⁶ [Impugned Decision](#), paras 54-57.

¹⁷ [Impugned Decision](#), paras 54-57.

¹⁸ [Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud](#), 13 November 2019, ICC-01/12-01/18-461-Corr-Red (confidential version filed on 30 September 2019).

¹⁹ [Notice 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” \(ICC-01/12-01/18-459\)](#), ICC-01/12-01/18-462.

insuffisance de gravité de l'affaire soulevée par la défense” (ICC-01/12-01/18-459)’ (the ‘Appeal Brief’).²⁰

14. On 12 November 2019, the Prosecutor filed her response to the Appeal Brief (the ‘Response’).²¹

15. On 19 November 2019, the Victims filed their observations on issues arising in the appeal (the ‘Victims’ Observations’).²²

16. On 26 November 2019, Mr Al Hassan filed his response to the Victims’ Observations (the ‘Response to Victims’ Observations’).²³

17. On 23 December 2019, the Registry transmitted to the Appeals Chamber the observations of the authorities of Mali on issues arising in the appeal (the ‘Mali Observations’).²⁴

IV. OVERVIEW OF THE CASE

A. Background Information

18. On 18 July 2012, the Government of Mali referred the situation in Mali to the Prosecutor of the Court.²⁵ The Prosecutor proceeded with an investigation.²⁶ On 27 March 2018, the Pre-Trial Chamber issued a warrant of arrest against Mr Al Hassan.²⁷ On 31 March 2018, Mr Al Hassan was surrendered to the Court by the Malian

²⁰ ICC-01/12-01/18-475-Conf (public redacted version filed on 9 December 2019, [ICC-01/12-01/18-475-Red](#)).

²¹ [Prosecution’s Response to Defence’s ‘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” \(ICC-01/12-01/18-459\)’](#), ICC-01/12-01/18-484.

²² [Observations relatives à l’appel de la Défense intitulé « 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’ \(ICC-01/12-01/18-459\) »](#), ICC-01/12-01/18-499.

²³ Reply to ‘Observations relatives à l’appel de la Défense intitulé “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)”’, ICC-01/12-01/18-508-Conf.

²⁴ [Transmission des observations de la République du Mali](#), ICC-01/12-01/18-539 (with confidential annexe I ICC-01/12-01/18-539-Conf-AnxI and confidential annex II ICC-01/12-01/18-539-Conf-AnxII).

²⁵ The Prosecutor, [Situation in Mali – Article 53\(1\) Report](#), 16 January 2013, para. 2.

²⁶ The Prosecutor, [Situation in Mali – Article 53\(1\) Report](#), 16 January 2013, para. 14.

²⁷ [Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud](#), 14 May 2018, ICC-01/12-01/18-2-tENG.

authorities and made his first appearance before the Pre-Trial Chamber on 4 April 2018.²⁸

19. On 11 May 2018, the Prosecutor filed the document containing the charges, presenting charges of crimes against humanity and war crimes committed on the territory of the Mali between April 2012 and January 2013 (the ‘Document Containing the Charges’).²⁹ The confirmation of charges hearing took place between 8 and 17 July 2019.³⁰

20. On 30 September 2019, the Pre-Trial Chamber confirmed the charges against Mr Al Hassan.³¹ The Pre-Trial Chamber confirmed 13 counts, comprising crimes against humanity and war crimes.³² On 21 November 2019, the Presidency constituted Trial Chamber X and referred the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* to it.³³

B. Charges brought against Mr Al Hassan

21. In the Document Containing the Charges, the Prosecutor submitted that there were substantial grounds to believe that *the contextual elements* set out in articles 7 and 8 of the Rome Statute were established on the basis of the following allegations: (1) between 1 April 2012 and 28 January 2013, the armed groups Ansar Dine³⁴/AQMI³⁵ carried out a widespread and systematic attack against the civilian

²⁸ Transcript of hearing, 4 April 2018, [ICC-01/12-01/18-T-1-Red-ENG](#).

²⁹ [Version publique expurgée de la «Version amendée et corrigée du Document contenant les charges contre M. Al HASSAN Ag ABDOUL AZIZ Ag Mohamed Ag Mahmoud»ICC-01/12-01/18-335-Conf-Corr, 11 mai 2019](#), 2 July 2018, ICC-01/12-01/18-335-Corr-Red (confidential version notified on 11 May 2018).

³⁰ Transcript of hearing, 8 July 2019, [ICC-01/12-01/18-T-003-ENG](#); Transcript of hearing, 9 July 2019, [ICC-01/12-01/18-T-004-Red-ENG](#); Transcript of hearing, 10 July 2019, [ICC-01/12-01/18-T-005-Red-ENG](#); Transcript of hearing, 11 July 2019, [ICC-01/12-01/18-T-006-Red-ENG](#); Transcript of hearing, 17 July 2019, [ICC-01/12-01/18-T-007-Red-ENG](#).

³¹ [Confirmation Decision](#).

³² [Confirmation Decision](#), pp. 451-465.

³³ [Decision constituting Trial Chamber X and referring to it the case of The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud](#), ICC-01/12-01/18-501.

³⁴ Ansar Dine, whose name means ‘the defenders of religion’, is a mainly Tuareg movement, founded and directed since 10 December 2011 by Iyad Ag Ghaly, from Mali, former leader of the Tuareg rebellions of 1991 in Mali, as well as by other Tuaregs, mostly from the Ifoghas clan. Some of its members, including its leader Iyad Ag Ghaly, advocate jihad and the application of their religious ideology based on their interpretation of sharia as the only law ([Confirmation Decision](#), para. 72).

³⁵ AQMI is the new name adopted by the *Groupe salafiste pour la prédication et le combat* (‘GSPC’) in 2007 after once again lending allegiance to Al Qaeda. The GSPC was described as an Algerian armed organization formed by former jihadist civil war fighters in Algeria who refused to lay down their arms despite the amnesty declared in 1999 in that country. AQMI members are mainly from

population of Timbuktu and its environs;³⁶ (2) Ansar Dine/AQMI committed multiple acts enumerated in article 7 of the Statute pursuant to the policy of the group to carry out an attack with the aim of imposing their ideology;³⁷ (3) the crimes against humanity with which Mr Al Hassan has been charged formed part of the attack against the civilian population and the members of Ansar Dine/AQMI, including Mr Al Hassan, were aware that their conduct was part of such attack;³⁸ (5) the war crimes with which Mr Al Hassan has been charged were committed in the context of, and linked to, an armed conflict not of an international character that took place in Mali during the relevant time period between the Malian Armed Forces and, *inter alia*, Ansar Dine and AQMI;³⁹ and (6) the members of Ansar Dine/AQMI, including Mr Al Hassan, were aware of the circumstances establishing the armed conflict.⁴⁰ The Pre-Trial Chamber confirmed the foregoing allegations in the Confirmation Decision which, as noted above, was rendered on 30 September 2019.⁴¹

22. *In relation to the 13 counts* set out in the Document Containing the Charges, the Prosecutor argued that there were substantial grounds to believe that the following crimes occurred: (1) the crime against humanity of torture (article 7.1.f);⁴² (2) the crime against humanity of other inhumane acts (article 7.1.k);⁴³ (3) the war crime of

Algeria, Mauritania, Senegal, Mali, Chad, Niger and Nigeria. AQIM seeks to set up a 'jihadist Islamist project' on the territory of Azawad (a region of northern Mali that includes Timbuktu), consisting of the creation of an Islamic state 'governed by jihadists and Islamists'. The organization had successfully established networks and established itself locally in Timbuktu and the region of the same name, according to a strategy put in place in 2003 and set up commercial relations, distribution of aid of a social and humanitarian nature, alliances and marriages with members of the local population ([Confirmation Decision](#), para. 73).

³⁶ [Document Containing the Charges](#), paras 1022-1023.

³⁷ [Document Containing the Charges](#), paras 1022-1023.

³⁸ [Document Containing the Charges](#), paras 1022-1023.

³⁹ [Document Containing the Charges](#), para. 1021.

⁴⁰ [Document Containing the Charges](#), para. 1021.

⁴¹ [Confirmation Decision](#), pp. 451-452.

⁴² In relation to the following acts/victims: the flogging of two men; torture and flogging of a man for being in possession of alcohol; public flogging of P-0565 and P-0557; torture and flogging of P-0580; the detention and flogging of P-0574 for not being properly covered; the arrest, mistreatment and flogging of a girl for not being properly covered; the arrest and flogging of a woman for not being properly covered; the public flogging of a number of persons in the presence of Mr Al Hassan; the amputation of P-552 (his hand); the public flogging of a woman; the public flogging of a man; the flogging of an individual for having smoked ([Document Containing the Charges](#), paras 1041, 1051-1052, 1056-1058). The Pre-Trial Chamber confirmed the foregoing allegations with the exception of the acts linked to the individual whom the Pre-Trial Chamber considered had been subjected to other inhumane acts but not torture ([Confirmation Decision](#), pp. 452-453, para. 351).

⁴³ In relation to the same acts/victims mentioned in count 1; the flogging of P-0547 for not being sufficiently covered; and the flogging of P-0570 for having his arms uncovered sometime after the arrival of Ansar Dine/AQMI in Timbuktu ([Document Containing the Charges](#), paras 1056-1058). The

torture (article 8.2.c.i);⁴⁴ (4) the war crime of cruel treatment (article 8.2.c.i);⁴⁵ (5) the war crime of committing outrages upon personal dignity (article 8.2.c.ii);⁴⁶ (6) the war crime of passing sentences and carrying out executions without due process (article 8.2.c.iv);⁴⁷ (7) the war crime of directing an attack against protected buildings (article 8.2.e.iv);⁴⁸ (8) the crime against humanity of forced marriage as a form of other inhumane acts (article 7.1.k);⁴⁹ (9) the crime against humanity of sexual slavery (article 7.1.g);⁵⁰ (10) the war crime of sexual slavery (article 8.2.e.vi);⁵¹ (11) the crime against humanity of rape (article 7.1.g);⁵² (12) the war crime of rape (article 8.2.e.vi);⁵³ and (13) the crime against humanity of persecution (article 7.1.h).⁵⁴

Pre-Trial Chamber confirmed the foregoing allegations with the exception of the acts linked to P-0547 and P-0570 ([Confirmation Decision](#), pp. 453-454; paras 352-353).

⁴⁴ In relation to the same acts/victims mentioned in count 1 ([Document Containing the Charges](#), para. 1058). The Pre-Trial Chamber confirmed the foregoing allegations with the exception of the acts linked to the individual whom the Pre-Trial Chamber considered had been subjected to other inhumane acts but not torture ([Confirmation Decision](#), pp 454-455, para. 351).

⁴⁵ In relation to the same acts/victims mentioned in count 1 ([Document Containing the Charges](#), para. 1058). The Pre-Trial Chamber confirmed the foregoing allegations ([Confirmation Decision](#), 456-457, para. 354).

⁴⁶ In relation to the same acts/victims mentioned in count 2 and the arrest of P-0542 and her subsequent detention without food ([Document Containing the Charges](#), paras 1056-1058). The Pre-Trial Chamber confirmed the foregoing allegations ([Confirmation Decision](#), 456-457, para. 355).

⁴⁷ In relation to: the two men flogged; P-0547; P-0574; a girl; a mother; P-0570; P-0542; and a man ([Document Containing the Charges](#), para. 1066). The Pre-Trial Chamber confirmed the foregoing allegations ([Confirmation Decision](#), p. 458).

⁴⁸ In relation to the destruction of nine mausoleums/mosque around June or July 2012 ([Document Containing the Charges](#), para. 1074). The Pre-Trial Chamber confirmed the foregoing allegations ([Confirmation Decision](#), p. 462, para. 531).

⁴⁹ In relation to the following victims: P-0520; P-0602; P-0610; P-0538; P-0553; a woman; P-0557; a young girl; P-1162; and P-1460 ([Document Containing the Charges](#), para. 1087). The Pre-Trial Chamber confirmed the foregoing allegations with the exception of the facts related to victims P-0557 and a young girl ([Confirmation Decision](#), pp 462-463).

⁵⁰ In relation to the same victims mentioned in count 8 ([Document Containing the Charges](#), para. 1087). The Pre-Trial Chamber confirmed the foregoing allegations with the exception of the facts related to victims P-0557 and a young girl ([Confirmation Decision](#), p. 463).

⁵¹ In relation to the same victims mentioned in count 8 ([Document Containing the Charges](#), para. 1087). The Pre-Trial Chamber confirmed the above allegations with the exception of the facts related to victims P-0557 and a young girl ([Confirmation Decision](#), p. 464).

⁵² In relation to the same victims mentioned in count 8 ([Document Containing the Charges](#), para. 1087). The Pre-Trial Chamber confirmed the above allegations with the exception of the facts related to victims P-0557 and a young girl ([Confirmation Decision](#), pp 464-465).

⁵³ In relation to the same victims mentioned in count 8 ([Document Containing the Charges](#), para. 1087). The Pre-Trial Chamber confirmed the above allegations with the exception of the facts related to victims P-0557 and a young girl ([Confirmation Decision](#), p. 465).

⁵⁴ On the basis of gender and/or religious grounds in light of the acts underlying counts 1 to 12 and the alleged violations of rights set out in paragraph 1092 of the document containing the charges ([Document Containing the Charges](#), para. 1094). The Pre-Trial Chamber confirmed the above allegations ([Confirmation Decision](#), p. 465).

23. In relation to *Mr Al Hassan's role, functions and contribution to the alleged crimes*,⁵⁵ the Prosecutor alleged that he was the face of the Islamic Police and acted as the liaison between it and the population of Timbuktu, given his knowledge of the town and language skills.⁵⁶ Mr Al Hassan is alleged to have organised the activities and the functioning of the Islamic Police.⁵⁷ According to the Prosecutor, he was also in charge of administrative issues within the Islamic Police.⁵⁸ Mr Al Hassan is alleged to have given instructions or transmitted orders to members of the Islamic Police.⁵⁹ The Prosecutor submitted that he could take action against members of the Islamic Police, and decide offences against them, or investigate complaints about them.⁶⁰

24. The Prosecutor alleged that Mr Al Hassan took part in police patrols and the arrest and detention of members of the civilian population.⁶¹ Mr Al Hassan is alleged to have conducted investigations in Timbuktu and other localities in relation to alleged violations of the new rules instituted by Ansar Dine/AQMI.⁶² The Prosecutor further alleged that Mr Al Hassan prepared and signed police reports after these investigations, and forwarded selected cases to the Islamic court for judgment; on at least one occasion he recommended the punishment to be meted out.⁶³ He is alleged to have transported accused persons to court and convicted persons from the court to prison.⁶⁴ Mr Al Hassan is alleged to have expressed his support for the rules of Ansar Dine/AQMI as well as his satisfaction with the application and effectiveness of sanctions against the civilian population.⁶⁵ According to the Prosecutor, he assisted members of Ansar Dine/AQMI who wanted to get married, particularly members of the Islamic Police, for example by helping them obtain the necessary funds, exerting

⁵⁵ Mr Al Hassan is a Malian national, member of the group Ansar Dine. This group is alleged to have controlled the town of Timbuktu with Al-Qaida au Maghreb Islamique (AQMI) from April 2012 to January 2013 in the context of an armed conflict between the Malian Armed Forces and different armed groups ([Document Containing the Charges](#), para. 2).

⁵⁶ [Document Containing the Charges](#), para. 1041.

⁵⁷ [Document Containing the Charges](#), para. 1041.

⁵⁸ [Document Containing the Charges](#), para. 1041.

⁵⁹ [Document Containing the Charges](#), para. 1041.

⁶⁰ [Document Containing the Charges](#), para. 1041.

⁶¹ [Document Containing the Charges](#), para. 1041.

⁶² [Document Containing the Charges](#), para. 1041.

⁶³ [Document Containing the Charges](#), para. 1041.

⁶⁴ [Document Containing the Charges](#), para. 1041.

⁶⁵ [Document Containing the Charges](#), para. 1041.

de facto pressure on families.⁶⁶ Mr Al Hassan is alleged to have supported the destruction of mausoleums.⁶⁷

C. Summary of the Impugned Decision

25. In the Impugned Decision, the Pre-Trial Chamber recalled that, pursuant to rule 58(2) of the Rules, any challenge to the admissibility of a case or the jurisdiction of the Court must be determined prior to deciding on the confirmation of charges.⁶⁸ It stated that the question before it was whether the case brought against Mr Al Hassan as presented by the Prosecutor in the Document Containing the Charges was sufficiently grave within the meaning of article 17(1)(d) of the Statute.⁶⁹

26. In relation to Mr Al Hassan's arguments concerning the limited role he played as a low-ranking police administrator, the Pre-Trial Chamber referred to the jurisprudence of the Appeals Chamber and noted that the deterrent role of the Court could be compromised if it were to exclude the prosecution of certain categories of individuals from its jurisdiction.⁷⁰ The Pre-Trial Chamber considered that article 17(1)(d) of the Statute does not require the Court to only prosecute the gravest cases – it simply prevents it from prosecuting cases of marginal gravity.⁷¹

27. The Pre-Trial Chamber further rejected Mr Al Hassan's argument that certain aspects of the factual allegations presented by the Prosecutor should be excluded on the basis of an alleged lack of evidence supporting them.⁷² It held that such an assessment would be carried out in the decision on the confirmation of charges.⁷³

28. As to Mr Al Hassan's submissions concerning the irrelevance of factual allegations linked to the contextual elements of crimes under articles 7 and 8 of the Statute, the Pre-Trial Chamber stated that it would not exclude those allegations from its assessment.⁷⁴ It considered that the evaluation of gravity must be based on all

⁶⁶ [Document Containing the Charges](#), para. 1041.

⁶⁷ [Document Containing the Charges](#), para. 1072.

⁶⁸ [Impugned Decision](#), para. 46.

⁶⁹ [Impugned Decision](#), paras 46-47.

⁷⁰ [Impugned Decision](#), para. 50.

⁷¹ [Impugned Decision](#), para. 50.

⁷² [Impugned Decision](#), para. 52.

⁷³ [Impugned Decision](#), para. 52.

⁷⁴ [Impugned Decision](#), para. 53.

relevant aspects of the allegations presented by the Prosecutor taken as a whole.⁷⁵ The Pre-Trial Chamber further noted that the contextual elements are part of the constitutive elements of the crimes against humanity and war crimes allegedly committed by Mr Al Hassan.⁷⁶

29. With respect to Mr Al Hassan's contention that, regarding the crime of persecution, only identified victims should be considered for the quantitative gravity assessment, the Pre-Trial Chamber stated that it is unnecessary to identify specific victims of such crime, especially at the confirmation of charges stage.⁷⁷

30. The Pre-Trial Chamber further noted several factual allegations relevant to the gravity assessment under article 17(1)(d) of the Statute.⁷⁸ It noted the nature and the extent of the crimes, namely 13 counts of crimes against humanity and war crimes committed against the civilian population of Timbuktu and its environs over a period of 10 months.⁷⁹ The Pre-Trial Chamber further took into account allegations concerning the consequences of the alleged crimes on the direct victims and the population of Timbuktu in its entirety, in particular victims of rape, sexual slavery and forced marriage.⁸⁰ It also considered the allegations concerning the tragic consequences of the alleged amputation of P-0552.⁸¹

31. The Pre-Trial Chamber took into consideration the discriminatory motives of crimes allegedly committed against the population in Timbuktu on the basis of religious and/or gender grounds.⁸² It further considered the vulnerability of certain victims and the number of victims admitted to participate in the proceedings (882 as of the date of the rendering of the Impugned Decision).⁸³

32. The Pre-Trial Chamber noted the allegations concerning the widespread and systematic attack in the context of which the crimes were allegedly committed and the significant role attributed to Mr Al Hassan by the Prosecutor in the commission of the

⁷⁵ [Impugned Decision](#), para. 53.

⁷⁶ [Impugned Decision](#), para. 53.

⁷⁷ [Impugned Decision](#), paras 55-56.

⁷⁸ [Impugned Decision](#), para. 57.

⁷⁹ [Impugned Decision](#), para. 57.

⁸⁰ [Impugned Decision](#), para. 57.

⁸¹ [Impugned Decision](#), para. 57.

⁸² [Impugned Decision](#), para. 57.

⁸³ [Impugned Decision](#), para. 57.

crimes.⁸⁴ In particular, it observed the extent of his contribution to the Islamic police, a body established by armed groups with a view to asserting their power and imposing on the civil population their own ideological and religious views by any means.⁸⁵

33. The Pre-Trial Chamber concluded that on the basis of the allegations presented by the Prosecutor, the case brought against Mr Al Hassan was of sufficient gravity to justify further action by the Court as per article 17(1)(d) of the Statute.⁸⁶ It thus rejected the Admissibility Challenge.

D. Grounds of Appeal

34. Under the first ground of appeal, Mr Al Hassan argues that the Pre-Trial Chamber erred by adopting an overly broad and erroneous definition of ‘the case’ for the purposes of admissibility which, in his view, ‘artificially inflated the gravity of the case on the basis of irrelevant considerations’.⁸⁷ In particular, he argues that the Pre-Trial Chamber relied on the following, in his view extraneous and irrelevant, factors: (i) allegations of criminality included in the Document Containing the Charges in order to satisfy the contextual elements, but which are not linked to the conduct of Mr Al Hassan;⁸⁸ (ii) allegations of criminality that fail to satisfy the requirements of regulation 52 of the Regulations of the Court by reference in particular to the alleged crime of persecution;⁸⁹ and (iii) unidentified allegations of criminality set out in undisclosed victim applications.⁹⁰

35. Under the second ground of appeal, Mr Al Hassan is challenging the Pre-Trial Chamber’s exercise of discretion in its assessment of gravity based on a purported failure to attribute sufficient weight to the nature of his individual conduct.⁹¹ In his view, this error was compounded by the Pre-Trial Chamber’s ‘failure to provide adequate reasons concerning its assessment of [his] conduct’.⁹²

⁸⁴ [Impugned Decision](#), para. 57.

⁸⁵ [Impugned Decision](#), para. 57.

⁸⁶ [Impugned Decision](#), para. 57.

⁸⁷ [Appeal Brief](#), paras 4, 8-48.

⁸⁸ [Appeal Brief](#), paras 17-21.

⁸⁹ [Appeal Brief](#), paras 22-40.

⁹⁰ [Appeal Brief](#), paras 41-48.

⁹¹ [Appeal Brief](#), paras 4, 49-65.

⁹² [Appeal Brief](#), para. 4.

36. Mr Al Hassan requests the Appeals Chamber to reverse the Impugned Decision and determine that the case is inadmissible due to reasons of gravity.⁹³

V. MERITS

A. Standard of Review

37. In the present case, the Appeals Chamber must address whether the Pre-Trial Chamber correctly interpreted the applicable law and, if so, whether it exercised its discretion properly when rejecting Mr Al Hassan's Admissibility Challenge. Therefore, the Appeals Chamber must determine whether the Trial Chamber erred in law and/or whether it failed to exercise its discretion judiciously.

38. With respect to errors of law, the Appeals Chamber has previously found that it:

will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.

A judgment is 'materially affected by an error of law' if the Trial Chamber 'would have rendered a judgment that is substantially different from the decision that was affected by the error, if it had not made the error'. [Footnotes omitted].⁹⁴

39. With respect to discretionary decisions, the Appeals Chamber has set out the following applicable standard of review:

The Appeals Chamber recalls that it will not interfere with the Chamber's exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling. The Appeals Chamber will only disturb the

⁹³ [Appeal Brief](#), para. 71.

⁹⁴ *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute"](#), 8 June 2018, ICC-01/05-01/08-3636-Red (A), para. 36; *The Prosecutor v. Uhuru Muigai Kenyatta*, [Judgment on the Prosecutor's appeal against Trial Chamber V\(B\)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87\(7\) of the Statute"](#), 19 August 2015, ICC-01/09-02/11-1032 (OA5) (the 'Kenyatta OA5 Judgment'), para. 23. See also *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction](#), 1 December 2014, ICC-01/04-01/06-3121-Red (A5) (confidential version filed on the same date, ICC-01/04-01/06-3121-Conf) (the 'Lubanga Appeal Judgment'), para. 18; *The Prosecutor v. Simone Gbagbo*, [Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo"](#), 27 May 2015, ICC-02/11-01/12-75-Red (confidential version filed on the same date, ICC-02/11-01/12-75-Conf) (the 'Simone Gbagbo Judgment'), para. 40.

exercise of a Chamber’s discretion where it is shown that an error of law, fact or procedure was made. In this context, the Appeals Chamber has held that it will interfere with a discretionary decision only under limited conditions and has referred to standards of other courts to further elaborate that it will correct an exercise of discretion in the following broad circumstances, namely where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion. Furthermore, once it is established that the discretion was erroneously exercised, the Appeals Chamber has to be satisfied that the improper exercise of discretion materially affected the impugned decision. [Footnotes omitted].⁹⁵

40. The analysis and determination of the issues arising from the two grounds of appeal will be guided by the standard of review set out above.

B. Issues and Questions Arising in the Appeal

1. Interpretation of Article 17(1)(d) of the Statute

41. The following issues and questions arise in the context of this appeal with respect to the interpretation of article 17(1)(d) of the Statute:

- i. What is the purpose of the gravity requirement set out in article 17(1)(d) of the Statute?
- ii. What are the parameters of ‘the case’ in article 17(1)(d) of the Statute?
- iii. What are the relevant criteria for the assessment of the gravity requirement in article 17(1)(d) of the Statute?

42. Given its relevance for the overall determination of the present appeal, the first question will be addressed prior to discussing the specific arguments raised under the two grounds of appeal. The remaining issues and questions are addressed in the

⁹⁵ [Kenyatta OA5 Judgment](#), para. 22. See also *The Prosecutor v. Joseph Kony et al.*, [Judgment on the appeal of the Defence against the “Decision on the admissibility of the case under article 19 \(1\) of the Statute” of 10 March 2009](#), 16 September 2009, ICC-02/04-01/05-408, para. 80; *The Prosecutor v. Abdallah Banda Abakaer Nourain*, [Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain against Trial Chamber IV’s issuance of a warrant of arrest](#), 3 March 2015, ICC-02/05-03/09-632-Red, para. 30; *The Prosecutor v. Dominic Ongwen*, [Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”](#), 17 June 2015, ICC-02/04-01/15-251, para. 35.

determination of the first and second grounds of appeal insofar as they are relevant to arguments raised by Mr Al Hassan thereunder.

2. *First Ground of Appeal*

43. In light of the arguments advanced by Mr Al Hassan, the following issues and questions must be addressed in relation to his first ground of appeal:

- i. Is it possible for a pre-trial chamber to rely on allegations related to the contextual elements of crimes in its gravity assessment under article 17(1)(d) of the Statute? If so, how were those allegations considered in the present case?
- ii. Did the Pre-Trial Chamber erroneously rely on ‘broad allegations of criminality’, in particular in relation to the crime of persecution, for the purposes of assessing gravity under article 17(1)(d) of the Statute?
- iii. Was it correct for the Pre-Trial Chamber to rely on the number of participating victims for the purpose of assessing the gravity of the case? If so, what weight should be afforded to the number of victims in the gravity assessment?

44. These questions are addressed in section F., below.

3. *Second Ground of Appeal*

45. In light of the arguments raised by Mr Al Hassan, the following issues and questions must be addressed in relation to his second ground of appeal:

- i. Did the Pre-Trial Chamber rely on abstract notions of participation, rather than the actual nature and extent of Mr Al Hassan’s participation in the alleged crimes?
- ii. Was Mr Al Hassan’s contribution to the crimes of a *de minimis* nature, as he argues?

- iii. To what extent did the Pre-Trial Chamber rely on the number of counts as a relevant factor in assessing gravity under article 17(1)(d) of the Statute?

46. These questions are addressed in section G., below.

C. Relevant Legal Framework

47. In the context of this appeal, the Appeals Chamber must determine whether in the circumstances of this case, the Pre-Trial Chamber properly determined that the case brought against Mr Al Hassan meets the gravity requirement set out in article 17(1)(d) of the Statute.

48. Having regard to the sources of law and their order of precedence as set out in article 21(1) of the Statute, the following legal provisions are most relevant to resolving the issues arising from the two grounds of appeal:

- i) Article 17(1) of the Statute setting out those situations in which a case would be inadmissible,⁹⁶ in particular article 17(1)(d) of the Statute stating that ‘[h]aving regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: [...] [t]he case is not of sufficient gravity to justify further action by the Court’;
- ii) Article 19 of the Statute setting out the procedure for challenges to the admissibility of a case;⁹⁷

⁹⁶ (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3.’

⁹⁷ ‘2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by: (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58; [...] 3. [...] In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court. [...] 4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. [...] 6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial

- iii) The preamble of the Rome Statute; and
- iv) Article 5 setting out the four crimes falling under the material jurisdiction of the Court.⁹⁸

D. Observations by Mali

49. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

50. The Appeals Chamber has considered the submissions of Mali in its determination of the present appeal.

E. The Gravity Requirement in Article 17(1)(d) of the Statute

51. Prior to considering the specific arguments raised by Mr Al Hassan, the Appeals Chamber finds it appropriate to set out its interpretation of the gravity requirement stipulated in article 17(1)(d) of the Statute.

52. Article 17(1)(d) of the Statute reads as follows:

Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

[...]

(d) The case is not of sufficient gravity to justify further action by the Court.

Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82. [...].

⁹⁸ ‘The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.’

⁹⁹ [Mali Observations](#), pp. 3-4.

53. For the reasons that follow, the Appeals Chamber considers that the gravity requirement must be assessed on a case-by-case basis having regard to the specific facts of a given case. The purpose of this requirement is to exclude from the purview of the Court those rather unusual cases when conduct that technically fulfils all the elements of a crime under the Court's jurisdiction is nevertheless of marginal gravity only.

54. At the outset, the Appeals Chamber notes that the gravity requirement under article 17(1)(d) of the Statute is an admissibility rather than a jurisdictional requisite. Indeed, as noted during the drafting process of this provision, the determination of whether a particular case is of sufficient gravity to be admissible before the Court 'goes to the exercise, as distinct from the existence, of jurisdiction'.¹⁰⁰

55. A textual reading of article 17(1)(d) of the Statute evidences the exclusionary nature of this provision. The negative formulation ('the Court shall determine that a case is inadmissible where: [...] [t]he case *is not of sufficient gravity* to justify further action by the Court' – emphasis added) indicates that the crimes subject to the material jurisdiction of the Court are, in principle, of sufficient gravity to justify further action. However, article 17(1)(d) of the Statute makes clear that there may be cases in which the specific facts, although technically qualifying as crimes under the jurisdiction of the Court, are not sufficiently grave to require its intervention.

56. An interpretation of article 17(1)(d) of the Statute in light of the object and purpose of the Rome Statute further demonstrates that the purpose of the gravity requirement is to exclude those unusual cases in which the specific facts are only of marginal gravity. The preamble of the Statute indicates that the Court is concerned with grave crimes that deeply shock the conscience of humanity. Article 5 reaffirms that '[t]he jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole', namely genocide, crimes against humanity, war crimes and the crime of aggression.

¹⁰⁰ [Report of the International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994](#), Official Records of the General Assembly, Forty-ninth session, Supplement No. 10, UN A/CN.4/SER.A/1994/Add.1 (the 'ILC 46th Session Report'), p. 52.

57. As noted by the Appeals Chamber in the *DRC* Judgment, ‘[t]he crimes listed in articles 5 to 8 of the Statute have been carefully selected’ and ‘these crimes are considered the most serious crimes of international concern’.¹⁰¹ Thus, the jurisdiction of the Court is limited to what are, in principle, by their nature, very serious crimes. It is worth noting in this regard that article 17(1)(d) of the Statute was originally conceived in the context of debates regarding the material jurisdiction of the Court, which was initially proposed to be much broader than it currently is, including some treaty-based crimes.¹⁰² The main concern was that the Court could be ‘overwhelmed with less serious cases, whereas it is intended that it should only exercise jurisdiction over the most serious offences’.¹⁰³

58. The drafting history of article 17(1)(d) of the Statute further indicates that the purpose of this provision was to exclude those cases that fail to reflect the circumstances set out in the preamble of the Rome Statute. Indeed, ‘[t]his provision respond[ed] to suggestions made by a number of States, in order to ensure that the Court only deals with cases in the circumstances outlined in the preamble, that is to say where it is really desirable to do so’.¹⁰⁴ Whether the particular circumstances of a given case are of sufficient gravity to warrant further action by the Court is always a case-specific assessment.

59. In light of the above, the Appeals Chamber finds that the gravity requirement under article 17(1)(d) of the Statute aims at excluding those rather unusual cases

¹⁰¹ [Judgment on the Prosecutor’s Appeal against the decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’](#), 13 July 2006, ICC-01/04-169, (the judgment was rendered under seal, *ex parte*, Prosecutor only and reclassified as public on 23 September 2008) (the ‘DRC Judgment’), para. 72.

¹⁰² See [Summary records of the meetings of the forty-sixth session 2 May-22 July 1994, Vol. 1](#), UN A/CN.4/SER.A/1994, p. 25 at 41 recording a suggestion to ‘limit the subject matter only to those crimes as to whose magnitude and gravity there would be a consensus in the United Nations’. See also *ibid.*, p. 27 at 59 recording another suggestion to give to the Court ‘some discretion in certain circumstances to accept a particular case on specific grounds – for instance, that it did not consider the case of sufficient gravity to merit a trial at international level or that the existing national tribunals could handle the matter expeditiously. Such discretion on the part of the court might mitigate the concerns raised with regards to the inclusion in article 26, paragraph 2(b), of crimes under national law, such as drug-related crimes and, for that matter, the “terrorism” conventions in article 22’.

¹⁰³ [Report of the Commission to the General Assembly on the work of its forty-fourth session](#), 1992, UN A/CN.4/SER.A/1992/Add. 1 (Volume II, Part Two), p. 66 at 58 stating that ‘[i]n the case of some conventions defining offences which are frequently committed and very broad in scope, it may be necessary to limit further the range of offences which fall within the court’s jurisdiction *ratione materiae*. Otherwise there may be a risk of the court being overwhelmed with less serious cases, whereas it is intended that it should only exercise jurisdiction over the most serious offences’.

¹⁰⁴ [ILC 46th Session Report](#), p. 52.

where the specific facts of a given case technically qualify as crimes under the jurisdiction of the Court, but are nonetheless not of sufficient gravity to justify further action by the Court. In this regard, the Appeals Chamber agrees with the Pre-Trial Chamber that ‘the purpose of article 17(1)(d) of the Statute is not to oblige the Court to choose only the most serious cases, but merely to oblige it not to prosecute cases of marginal gravity’.¹⁰⁵

60. In reviewing the findings of the Pre-Trial Chamber challenged by Mr Al Hassan, the Appeals Chamber will be guided by the above interpretation of article 17(1)(d) of the Statute.

F. First Ground of Appeal

61. Under the first ground of appeal, Mr Al Hassan submits that the Pre-Trial Chamber ignored the notion of a ‘case’ for the purposes of article 17 and relied on vague and broad allegations of criminality.¹⁰⁶ In particular, he argues that the Pre-Trial Chamber erred by relying on the following factors: (i) allegations of criminality included in the Document Containing the Charges in order to satisfy the contextual elements, but which are not linked to the conduct of Mr Al Hassan;¹⁰⁷ (ii) allegations of criminality that fail to satisfy the requirements of regulation 52 of the Regulations of the Court by reference in particular to the alleged crime of persecution;¹⁰⁸ and (iii) unidentified allegations of criminality set out in undisclosed victim applications.¹⁰⁹ The Appeals Chamber will address these arguments in turn.

I. Allegations relating to the contextual elements

(a) Submissions of the Parties and Participants

62. Mr Al Hassan contends that, for the purposes of article 17(1)(d) of the Statute, the ‘case’ is circumscribed by the acts and conduct of the suspect/accused person and there must be a link to his or her personal conduct.¹¹⁰ He further maintains that convicted persons are sentenced in relation to their participation in the commission of crimes and not by reference to the full range of acts that can be relied upon to

¹⁰⁵ [Impugned Decision](#), para. 50.

¹⁰⁶ [Appeal Brief](#), paras 8-14.

¹⁰⁷ [Appeal Brief](#), paras 17-21.

¹⁰⁸ [Appeal Brief](#), paras 22-40.

¹⁰⁹ [Appeal Brief](#), paras 41-48.

¹¹⁰ [Appeal Brief](#), paras 17-18.

establish contextual elements.¹¹¹ Mr Al Hassan contends that the contextual elements are already folded into the elements of the crimes and their consideration for the purpose of assessing gravity under article 17(1)(d) would thus result in duplication.¹¹² Finally, Mr Al Hassan argues that reliance on contextual elements drastically reduces any meaningful distinction between the gravity of different cases arising from the same conflict, and that reference to the ‘most serious crimes’ in the Statute highlights the intention that the Court cannot and should not prosecute each and every case arising from a particular situation.¹¹³

63. In her response, the Prosecutor maintains that the Pre-Trial Chamber correctly considered allegations relating to the contextual elements in assessing the gravity of the case.¹¹⁴ She submits that: contextual elements are constituent elements of alleged crimes;¹¹⁵ a charge is incomplete without establishing a link to the contextual elements;¹¹⁶ as in the case of sentencing, a case’s gravity under article 17 of the Statute is not only to be assessed through the lens of the suspect’s own conduct;¹¹⁷ and in any event, allegations concerning the contextual elements do in fact engage the suspected person’s conduct – a suspect must have perpetrated the charged act ‘with knowledge of the attack’.¹¹⁸

(b) Determination by the Appeals Chamber

64. For the reasons that follow, the Appeals Chamber finds no error in the Pre-Trial Chamber’s assessment of the contextual elements in respect of its determination of the gravity requirement. Prior to addressing the specific arguments raised by Mr Al Hassan, the Appeals Chamber deems it appropriate to define the parameters of ‘the case’ for the purpose of assessing the gravity requirement under article 17(1)(d) of the Statute.

¹¹¹ [Appeal Brief](#), para. 18.

¹¹² [Appeal Brief](#), para. 18.

¹¹³ [Appeal Brief](#), para. 20.

¹¹⁴ [Response](#), paras 11-20.

¹¹⁵ [Response](#), paras 13-14.

¹¹⁶ [Response](#), paras 15-17.

¹¹⁷ [Response](#), paras 18-19.

¹¹⁸ [Response](#), para. 20.

(i) *Parameters of ‘the case’*

65. The Appeals Chamber has not yet defined the parameters of ‘the case’ for the purpose of assessing the gravity requirement under article 17(1)(d) of the Statute. However, it has done so in relation to article 17(1)(a). In that regard, the Appeals Chamber has determined that ‘the parameters of a “case” are defined by the suspect under investigation and the conduct that gives rise to criminal liability under the Statute’.¹¹⁹ It has further considered that ‘the “conduct” that defines the “case” is both that of the suspect [...] and that described in the incidents under investigation which is imputed to the suspect’.¹²⁰ In terms of how to define incidents, it has been established that ‘[i]ncident is understood as referring to a historical event, defined in time and place, in the course of which crimes within the jurisdiction of the Court were allegedly committed by one or more direct perpetrators’.¹²¹ Finally, the Appeals Chamber observed that ‘[t]he exact scope of an incident cannot be determined in the abstract’ – rather ‘[w]hat is required is an analysis of all the circumstances of a case, *including the context of the crimes and the overall allegations against the suspect*’ (emphasis added).¹²²

66. The same considerations apply when interpreting the parameters of ‘the case’ for the purpose of article 17(1)(d) of the Statute. The Appeals Chamber does not see any reason to differentiate between the parameters of ‘the case’ under article 17(1)(d) on one hand and article 17(1)(a) of the Statute on the other hand. Rather, it is important to ensure a consistent understanding of ‘the case’ for the purpose of admissibility proceedings.

(ii) *Whether the Pre-Trial Chamber erred by relying on allegations relating to the contextual elements*

67. Turning to the specific challenge of Mr Al Hassan, the Appeals Chamber notes that the contextual elements of crimes against humanity are constitutive elements of the crimes. These elements are set out in article 7(1) and (2) of the Statute. Indeed, the acts listed in article 7(1)(a)-(k) constitute crimes against humanity only ‘when

¹¹⁹ [Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’](#), 21 May 2014, ICC-01/11-01/11-547-Red (the ‘Gaddafi Admissibility Judgment’), para. 61.

¹²⁰ [Gaddafi Admissibility Judgment](#), para. 62.

¹²¹ [Gaddafi Admissibility Judgment](#), para. 62.

¹²² [Gaddafi Admissibility Judgment](#), para. 62.

committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’.¹²³

68. Furthermore, according to article 7(2)(a) of the Statute, an attack for the purposes of article 7(1) ‘means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack’. In this regard, in the case of *The Prosecutor v. William Samoei Ruto et al.*, the Appeals Chamber held that ‘the existence of the requirement of an “organizational policy” as a component of crimes against humanity is clear from the wording of article 7 (2) (a) of the Statute’ (emphasis added).¹²⁴

69. An evaluation of the factual allegations underpinning the contextual elements of the charged crimes is thus relevant to determine whether the gravity requirement under article 17(1)(d) of the Statute is met.

70. The Appeals Chamber notes that Mr Al Hassan misrepresents the Appeals Chamber’s findings in the judgment rendered in the case of *The Prosecutor v. Saif Al Islam Gaddafi and Abdullah Al-Senussi*.¹²⁵ Contrary to Mr Al Hassan’s assertion, the Appeals Chamber did not confirm ‘that contextual elements do not form part of the Chamber’s assessment of the content of “a case”’.¹²⁶ In the *Al Senussi* Judgment, the Appeals Chamber stated that ‘there is no requirement in the Statute for a crime to be prosecuted as an international crime domestically’ because ‘what is required is that the crimes prosecuted at the domestic level cover “substantially the same conduct” as those charged by the Court’.¹²⁷

¹²³ Article 7(1) of the Statute.

¹²⁴ [Decision on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Pre-Trial Chamber II of 23 January 2012 entitled ‘Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute’](#), 24 May 2012, ICC-01/09-01/11-414, para. 31. See also ICTY, Appeals Chamber, *Prosecutor v. Théoneste Bagosora et al.*, [Judgement](#), 14 December 2011, ICTR-98-41, para. 389: ‘An enumerated crime under Article 3 of the Statute constitutes a crime against humanity if it is proven to have been committed as part of a widespread or systematic attack against a civilian population on national, political, ethnic, racial or religious grounds’.

¹²⁵ [Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled ‘Decision on the admissibility of the case against Abdullah Al-Senussi’](#), 24 July 2014, ICC-01/11-01/11-565 (the ‘*Al Senussi* Judgment’).

¹²⁶ [Appeal Brief](#), para. 19.

¹²⁷ [Al Senussi Judgment](#), para. 119.

71. This finding was made in order to explain that ‘substantially the same conduct’ is not contingent upon the legal characterisation of that conduct as an international or domestic crime. It does not stand for the proposition that contextual elements are not part of the parameters of the case for the purposes of assessing gravity under article 17(1)(d) of the Statute. Therefore, Mr Al Hassan’s reliance on the *Al Senussi* Judgment is misplaced.

72. The Appeals Chamber also finds no merit in Mr Al Hassan’s argument that considering allegations relating to the contextual elements is duplicative because those elements ‘are already folded into the elements’ of the crime.¹²⁸ Contrary to Mr Al Hassan’s argument,¹²⁹ the fact that the contextual elements may be the same for cases arising from the same conflict or attack is not a valid reason to not take them into account in the gravity assessment for a given case, particularly considering that the facts underpinning the contextual elements is but one factor to be considered in determining whether the gravity requirement is met. The Statute does not foreclose the possibility of taking the same factors into consideration for different purposes.

73. In the case at hand, the Pre-Trial Chamber noted that the crimes were allegedly committed ‘against the civilian population in Timbuktu and its region over a period of around 10 months’.¹³⁰ It further observed ‘the allegation that the crimes at bar were committed as part of a widespread and systematic attack against the civilian population’.¹³¹ It is thus clear that, by referring to the ‘crimes at bar’, the circumstances of the alleged attack were not considered in the abstract, but in light of the crimes *attributed* to Mr Al Hassan and were thus incident-specific. Furthermore, given that article 7(1) of the Statute stipulates that an attack may be widespread *or* systematic, the Appeals Chamber considers that the nature of the alleged attack in this case, being both widespread *and* systematic,¹³² is a relevant consideration when determining whether the gravity requirement is fulfilled.

¹²⁸ [Appeal Brief](#), para. 18.

¹²⁹ [Appeal Brief](#), para. 20.

¹³⁰ [Impugned Decision](#), para. 57.

¹³¹ [Impugned Decision](#), para. 57.

¹³² [Document Containing the Charges](#), section 6 and para. 1023; [Confirmation Decision](#), p. 451.

74. In light of the foregoing considerations, the Appeals Chamber rejects the arguments advanced by Mr Al Hassan at paragraphs 17 to 21 of his Appeal Brief.

2. *Allegations related to the crime of persecution*

(a) **Submissions of the Parties and Participants**

75. Mr Al Hassan contends that the Pre-Trial Chamber erred by relying on allegations of criminality that are not defined in either time or place and fail to satisfy the requirements of regulation 52 of the Regulations of the Court.¹³³ He submits that: the Pre-Trial Chamber's approach diluted the standards of pleading and this was contrary to regulation 52 of the Regulations and article 67(1)(a) of the Statute;¹³⁴ the Pre-Trial Chamber's distinction between the degree of specificity required for crimes directed against individuals and those directed against a group finds no support in the Court's legal framework and lacks any other justification;¹³⁵ the quantitative assessment of the Pre-Trial Chamber was artificially inflated by acts and conduct that had no connection to specific crimes;¹³⁶ reliance on open-ended accusations is at odds with the jurisprudence of the Appeals Chamber, which established that, in the context of an admissibility assessment, it is necessary to use the underlying incidents under investigation as a comparer;¹³⁷ and there is no particular information in the sections of the Document Containing the Charges cited by the Pre-Trial Chamber concerning particular victims or conduct linked to Mr Al Hassan.¹³⁸

76. In her response, the Prosecutor maintains that the Pre-Trial Chamber correctly considered allegations related to the crime of persecution, which were properly pled.¹³⁹ She argues that: it was not erroneous to find that it is unnecessary, especially at the confirmation of charges stage, to identify victims, in particular for the crime of persecution;¹⁴⁰ Mr Al Hassan did not challenge the decision where the Pre-Trial Chamber identified a lower level of specificity for the description of facts relating to

¹³³ [Appeal Brief](#), paras 22-40.

¹³⁴ [Appeal Brief](#), para. 27.

¹³⁵ [Appeal Brief](#), paras 28-29.

¹³⁶ [Appeal Brief](#), para. 35.

¹³⁷ [Appeal Brief](#), para. 38.

¹³⁸ [Appeal Brief](#), para. 39.

¹³⁹ [Response](#), paras 21-28.

¹⁴⁰ [Response](#), paras 21, 23.

the crime of persecution;¹⁴¹ crimes directed at groups do not require pleading the identity of each specific victim;¹⁴² and in any event, the Document Containing the Charges identified the particulars to make out the elements of the crime.¹⁴³

(b) Determination by the Appeals Chamber

77. The Appeals Chamber does not find merit in Mr Al Hassan's arguments relating to the Pre-Trial Chamber's consideration of the charge of persecution for the reasons that follow.

78. The crime of persecution is set out in article 7(1)(h) of the Statute and consists of the '[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender [...] or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in [paragraph 7(1) of the Statute] or any crime within the jurisdiction of the Court'. Article 7(2)(g) of the Statute stipulates that persecution 'means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity'.

79. Regulation 52(b) of the Regulations of the Court requires the document containing the charges to include '[a] statement of 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'.

80. In the Impugned Decision, the Pre-Trial Chamber considered the alleged crime of persecution when assessing the gravity requirement in article 17(1)(d) of the Statute, both as part of its evaluation of the nature and extent of the alleged crimes by reference to the 13 counts and when noting the discriminatory motives underlying the crimes.¹⁴⁴

¹⁴¹ [Response](#), para. 22.

¹⁴² [Response](#), para. 24.

¹⁴³ [Response](#), para. 27.

81. In the Document Containing the Charges, the Prosecutor alleges that the acts of persecution are based on the facts underlying counts 1 to 12 attributed to Mr Al Hassan and the alleged violation of rights enumerated at paragraph 1092 of the Document Containing the Charges.¹⁴⁵ In relation to the facts underlying counts 1 to 12, the Prosecutor has specified historical events, defined in time and place, and individual victims, thereby complying with regulation 52 of the Regulations of the Court.¹⁴⁶ Since these facts underpin the charge of persecution, it cannot be said that this charge is not grounded in any particulars for the purposes of assessing gravity pursuant to article 17(1)(d) of the Statute. Mr Al Hassan's argument must thus be rejected.

82. The above finding is without prejudice to the correctness or otherwise of the Pre-Trial Chamber's determination that 'it is unnecessary, especially at the confirmation of charges stage, to identify the victims, in particular in the case of the crime of persecution'.¹⁴⁷ This finding seems to relate to the Prosecutor's reliance on the alleged violation of rights enumerated at paragraph 1092 of the Document Containing the Charges,¹⁴⁸ which contains less specific information than that contained in the facts underlying counts 1 to 12.

83. For present purposes, the Appeals Chamber deems it unnecessary to determine whether some of the factual allegations supporting the charge of persecution are pleaded with sufficient specificity. This is because, the charge of persecution is to a large extent based on the facts underlying counts 1 to 12 which specify, as explained above, historical events, defined in time and place, and individual victims. In addition, the count of persecution is but one of the 13 charges brought against Mr Al Hassan.

84. In these circumstances, the Appeals Chamber finds that the Pre-Trial Chamber did not err in the manner in which it considered the crime of persecution in its assessment of the gravity requirement under article 17(1)(d) of the Statute and rejects Mr Al Hassan's arguments advanced in paragraphs 22 to 40 of his Appeal Brief.

¹⁴⁵ [Document Containing the Charges](#), paras 1092, 1094.

¹⁴⁶ [Document Containing the Charges](#), paras 1044-1087.

¹⁴⁷ [Impugned Decision](#), para. 56.

¹⁴⁸ See [Admissibility Challenge](#), para. 263, n. 382.

3. *Consideration of the scope of victimhood*

(a) **Submissions of the Parties and Participants**

85. Mr Al Hassan submits that the Pre-Trial Chamber's reliance on the number of participating victims was erroneous.¹⁴⁹ He argues that: victim applications cannot constitute evidence as concerns the gravity of the charges;¹⁵⁰ the Pre-Trial Chamber's calculation of 882 victims is based on anonymous applications;¹⁵¹ the Pre-Trial Chamber's erroneous reliance on the number of participating victims was exacerbated by the broad definition of a victim set by the Pre-Trial Chamber;¹⁵² and, although the Pre-Trial Chamber indicated that it would confine its assessment to the Document Containing the Charges, the number of participating victims is not an allegation or material fact set out therein.¹⁵³

86. In her response, the Prosecutor maintains that the Pre-Trial Chamber did not err in assessing the scope of victimisation.¹⁵⁴ She argues that: participating victims provide an indication of the victims of the alleged crimes;¹⁵⁵ the Pre-Trial Chamber identified the correct benchmarks that prevented extending victims based merely on a person's presence in Timbuktu at the relevant time and did not rely on anonymous applications;¹⁵⁶ the Document Containing the Charges identified the significant number of victims underpinning the counts/crimes and pleaded that the crime of persecution affected the entire population of Timbuktu and its region;¹⁵⁷ and in any event, the number of participating victims was not the sole factor considered by the Chamber.¹⁵⁸

87. The Victims maintain that the number of victims admitted to participate in proceedings was only one of the factors considered by the Pre-Trial Chamber for the purpose of its gravity assessment under article 17(1)(d) of the Statute.¹⁵⁹ They further

¹⁴⁹ [Appeal Brief](#), para. 41.

¹⁵⁰ [Appeal Brief](#), paras 42-43.

¹⁵¹ [Appeal Brief](#), paras 44-45.

¹⁵² [Appeal Brief](#), paras 46-47.

¹⁵³ Response to Victims' Observations, para. 8.

¹⁵⁴ [Response](#), paras 29-41.

¹⁵⁵ [Response](#), para. 31.

¹⁵⁶ [Response](#), paras 34-37.

¹⁵⁷ [Response](#), para. 38.

¹⁵⁸ [Response](#), paras 38-40.

¹⁵⁹ [Victims' Observations](#), para. 13.

submit that, contrary to the argument advanced by Mr Al Hassan, the Pre-Trial Chamber did not rely on the content of the victim applications – rather it noted the significant number of victims admitted to participate.¹⁶⁰ The Victims assert that Mr Al Hassan’s argument concerning the broad definition of victim espoused by the Pre-Trial Chamber is based on a misreading of the decision on victim participation and, in any event, he did not appeal that decision and cannot use this appeal as a vehicle to challenge it.¹⁶¹

(b) Determination by the Appeals Chamber

88. The Appeals Chamber does not find merit in the arguments advanced by Mr Al Hassan for the reasons that follow. In the Appeals Chamber’s view, the arguments raised by Mr Al Hassan require it to first address the relevant criteria for the assessment of the gravity requirement under article 17(1)(d) of the Statute. After dealing with this underlying matter, the Appeals Chamber will determine whether the Pre-Trial Chamber erred by relying on the number of participating victims for the purpose of determining whether the gravity requirement in this case is met.

(i) Relevant Criteria for the Assessment of Gravity

89. In the Impugned Decision, the Pre-Trial Chamber noted previous jurisprudence of the Court and held that when determining whether the gravity requirement under article 17(1)(d) of the Statute is fulfilled, both quantitative and qualitative criteria are relevant considerations.¹⁶² It further noted that some factors listed in rule 145(1)(c) and 145(2)(b) of the Rules in relation to sentencing could provide relevant guidance to the assessment of gravity pursuant to article 17(1)(d), including the extent of the damage caused, the nature of the unlawful behaviour, the means employed to execute the crime, the degree of participation of the accused person, the degree of intent, the circumstances of manner, time and location, the existence of particularly defenceless victims, the commission of crimes with particular cruelty or where there are multiple victims, and the commission of crimes for any motive involving discrimination.¹⁶³

¹⁶⁰ [Victims’ Observations](#), paras 15-17.

¹⁶¹ [Victims’ Observations](#), paras 19-25.

¹⁶² [Impugned Decision](#), para. 47.

¹⁶³ [Impugned Decision](#), para. 48.

90. For the reasons that follow, the Appeals Chamber agrees with this approach to identifying relevant criteria for the purpose of assessing the gravity requirement under article 17(1)(d) of the Statute.

91. In its recent judgment delivered in the *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia* (the ‘Comoros Judgment’),¹⁶⁴ the Appeals Chamber stated that the assessment of gravity under article 17(1)(d) of the Statute ‘involves [...] the evaluation of numerous factors and information relating thereto’.¹⁶⁵ Although the Appeals Chamber did not further elaborate on the factors and criteria relevant to the gravity assessment in that judgment, it acknowledged that it involves several elements.

92. The Appeals Chamber considers that, as stated by various chambers of this Court, both quantitative (in particular, the number of victims) and qualitative criteria (such as nature, scale and manner of commission of the alleged crimes, including the human rights violated as a result, their impact on victims, the role and degree of participation of the accused, and whether the acts were committed on the basis of discriminatory motives) are relevant to assessing the gravity requirement in a given case. As noted by Pre-Trial Chamber II in the *Situation in the Republic of Kenya*, from a qualitative perspective, ‘it is not the number of victims that matter but rather the existence of some aggravating or qualitative factors attached to the commission of crimes, which makes it grave’.¹⁶⁶ In this regard, the Appeals Chamber considers that the quantitative criteria alone are not determinative of the gravity of a given case.

93. In this context, the Appeals Chamber notes article 78(1) of the Statute, which provides that ‘[i]n determining the sentence, the Court shall [...] take into account such factors as *the gravity of the crime*’ (emphasis added). Although gravity under article 78(1) of the Statute and rule 145(1)(c) and 145(2)(b) of the Rules is assessed at a different stage of the proceedings (after a conviction has been entered), the Appeals

¹⁶⁴ [Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I’s ‘Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”](#)’, 2 September 2019, ICC-01/13-98 (the ‘Comoros Judgment’).

¹⁶⁵ [Comoros Judgment](#), para. 81.

¹⁶⁶ [Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya](#), dated 31 March 2010 and notified on 1 April 2010, ICC-01/09-19-Corr, para. 62.

Chamber considers that some of the factors pertinent to determining the appropriate sentence of a convicted person can serve as useful guidelines for the evaluation of the gravity requirement in article 17(1)(d) of the Statute as well. This ensures a consistent understanding of gravity throughout the Statute. The Appeals Chamber has recently confirmed that this assessment may include consideration of, *inter alia*, the extent of the damage caused,¹⁶⁷ the nature of the unlawful behaviour, the circumstances of time¹⁶⁸ and the degree of participation of the convicted person.¹⁶⁹

94. In sum, the Appeals Chamber considers that the gravity assessment under article 17(1)(d) of the Statute must be made on a case-by-case basis. It involves a holistic evaluation of all relevant quantitative and qualitative criteria, including some of the factors relevant to the determination of the sentence of a convicted person. Quantitative criteria alone, including the number of victims, are not determinative of the gravity of a given case.

(ii) *Whether the Pre-Trial Chamber erred by relying on the number of participating victims*

95. The definition of victim is provided in rule 85 of the Rules:

(a) ‘Victims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;

(b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

96. The Appeals Chamber has explained that ‘[t]he harm suffered by a natural person is harm to that person, i.e., personal harm’.¹⁷⁰ It further explained that

¹⁶⁷ [Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled ‘Decision on Sentence pursuant to Article 76 of the Statute’](#), 8 March 2018, ICC-01/05-01/13-2276-Red (the ‘*Bemba et al.* Sentencing Judgment’), paras 38, 112.

¹⁶⁸ [Bemba et al. Sentencing Judgment](#), para. 169.

¹⁶⁹ [Bemba et al. Sentencing Judgment](#), para. 112.

¹⁷⁰ [The Prosecutor v. Thomas Lubanga Dyilo, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008](#), 11 July 2008, ICC-01/04-01/06-1432 (the ‘*Lubanga* Victims Judgment’), para. 1.

‘[m]aterial, physical, and psychological harm are all forms of harm that fall within the rule if they are suffered personally by the victim’.¹⁷¹

97. The Appeals Chamber notes that the number of victims is a relevant consideration in the assessment of the gravity requirement under article 17(1)(d) of the Statute, pertaining to the quantitative gravity assessment. As explained above, while relevant, quantitative criteria are not *per se* determinative of the gravity of a given case.¹⁷² In determining the number of victims, the number of participating victims may provide some indication of the scope of victimhood within the context of a case. The relevance of the number of participating victims to a gravity assessment pursuant to article 17(1)(d) must be assessed on a case-by-case basis.

98. In the Impugned Decision, the Pre-Trial Chamber noted the large number of victims admitted to participate in the proceedings which was 882 at the time the Impugned Decision was rendered.¹⁷³ The number of participating victims may be properly understood in light of the criteria set by the Pre-Trial Chamber to admit victims in this case.¹⁷⁴ The Pre-Trial Chamber required that victims, before being admitted to participate in proceedings, state their identity, the harm they suffered,¹⁷⁵ and the causal link between the harm suffered and an incident falling within the temporal,¹⁷⁶ geographic and material¹⁷⁷ parameters of the case brought against Mr Al Hassan.¹⁷⁸

¹⁷¹ [Lubanga Victims Judgment](#), para. 1.

¹⁷² See *supra* paras 94.

¹⁷³ [Impugned Decision](#), para. 57.

¹⁷⁴ See [Decision Establishing the Principles Applicable to Victims’ Applications for Participation](#), 24 May 2018, ICC-01/12-01/18-37-tENG (the ‘First Victim Participation Decision’); [Second Decision on the Principles Applicable to Victims’ Applications for Participation](#), 10 December 2018, ICC-01/12-01/18-146-tENG (the ‘Second Victim Participation Decision’).

¹⁷⁵ The Pre-Trial Chamber noted that psychological harm must meet a certain threshold and therefore established that eyewitnesses may qualify as victims if they ‘show that they were present in Timbuktu and that they witnessed a crime committed against someone else’ ([Second Victim Participation Decision](#), para. 35).

¹⁷⁶ The Pre-Trial Chamber clarified that ‘[i]n cases where the victim presenting an application has difficulties providing a precise date for the alleged acts, he or she must provide information relating to the overall context in which the alleged acts occurred in order to substantiate the claim that they occurred within the time frame of the present case’ ([Second Victim Participation Decision](#), para. 22).

¹⁷⁷ The Pre-Trial Chamber explained that the requirement in article 7(1)(h) of the Statute that the crime of persecution can be prosecuted only if the act was committed in connection with another crime within the jurisdiction of the Court ‘concerns the group or community as a whole and not each victim individually’ and therefore ‘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

99. The Appeals Chamber notes that Mr Al Hassan seems to disagree with some of the findings of the Pre-Trial Chamber in its decisions on victim participation. However, the Appeals Chamber notes that Mr Al Hassan did not seek leave to appeal the Pre-Trial Chamber's decision on victim participation and therefore does not deem it appropriate or necessary to review those findings in the present judgment.

100. In the Impugned Decision, the Pre-Trial Chamber noted the number of victims that had been admitted to participate in the case but does not seem to have attached significant weight to it.¹⁷⁹ It also had regard to the alleged repercussions of the crimes on the direct victims and on the population of Timbuktu as a whole.¹⁸⁰

101. It remains undisputed¹⁸¹ that the facts underlying the alleged crimes, as presented by the Prosecutor in the Document Containing the Charges, involve at least 10 direct victims of forced marriage, sexual slavery and rape,¹⁸² 22 direct victims of torture and other ill treatment,¹⁸³ 60 direct victims of the passing of sentences without due process,¹⁸⁴ and the destruction of ten protected buildings.¹⁸⁵ Furthermore, according to the Prosecutor, the crime against humanity of persecution affected the entire population of Timbuktu and its region.¹⁸⁶ The entire population of Timbuktu and its region potentially includes several indirect victims unaccounted by Mr Al Hassan.¹⁸⁷ In light of the foregoing and given that the Pre-Trial Chamber does not seem to have attached significant weight to the number of participating victims, the Appeals Chamber does not find an error.

102. In addition, as noted by both the Prosecutor and the Victims,¹⁸⁸ the number of participating victims was only one of the factors considered by the Pre-Trial Chamber

deprivation of his or her fundamental rights [...] 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' ([Second Victim Participation Decision](#), para. 28).

¹⁷⁸ [First Victim Participation Decision](#), para. 48.

¹⁷⁹ [Impugned Decision](#), para. 57.

¹⁸⁰ [Impugned Decision](#), para. 57.

¹⁸¹ *See* Response to Victims' Observations, para. 9.

¹⁸² [Document Containing the Charges](#), para. 1087.

¹⁸³ [Document Containing the Charges](#), para. 1058.

¹⁸⁴ [Document Containing the Charges](#), para. 1066.

¹⁸⁵ [Document Containing the Charges](#), para. 1074.

¹⁸⁶ [Document Containing the Charges](#), para. 959.

¹⁸⁷ Response to Victims' Observations, para. 9.

¹⁸⁸ [Response](#), paras 38-40; [Victims' Observations](#), para. 13.

when assessing the gravity requirement under article 17(1)(d) of the Statute and, as such, was not determinative. The Pre-Trial Chamber also considered the nature and extent of the charged crimes; the repercussions of the alleged crimes on the direct victims and on the population of Timbuktu as a whole, in particular the victims of rape, sexual slavery and other inhumane acts in the form of forced marriages; the discriminatory motive of the crimes allegedly committed against the population of Timbuktu on religious and/or gender-based grounds; the vulnerability of certain victims; the allegation that the crimes at bar were committed as part of a widespread and systematic attack against the civilian population; the significant role that the Prosecutor attributes to Mr Al Hassan in the execution of said crimes through his contribution to the Islamic Police; and Mr Al Hassan's degree of intent and degree of participation in these crimes.¹⁸⁹

103. In light of the above and without prejudice to the correctness or otherwise of the Pre-Trial Chamber's determinations on victim participation, which are not the subject of the present appeal, the Appeals Chamber rejects the arguments advanced by Mr Al Hassan at paragraphs 41 to 48 of the Appeal Brief.

4. Conclusion on the first ground of appeal

104. Having rejected the totality of arguments raised by Mr Al Hassan, the Appeals Chamber rejects the first ground of appeal.

G. Second Ground of Appeal

105. Under the second ground of appeal, Mr Al Hassan argues that the Pre-Trial Chamber erred, and abused its discretion, in its assessment of gravity by failing to attribute sufficient weight to the nature of his conduct.¹⁹⁰ In addition, he maintains that, in its assessment of the gravity requirement, the Pre-Trial Chamber placed undue weight on the number of counts with which he had been charged.¹⁹¹ The Appeals Chamber will address these arguments in turn.

¹⁸⁹ [Impugned Decision](#), para. 57.

¹⁹⁰ [Appeal Brief](#), paras 49-61.

¹⁹¹ [Appeal Brief](#), paras 62-65.

I. Assessment of the nature of Mr Al Hassan's individual conduct

(a) Submissions of the Parties and Participants

106. Mr Al Hassan argues that the Pre-Trial Chamber relied on abstract notions and labels regarding his conduct and role rather than the actual nature and extent of his participation.¹⁹² In his view, the sections of the Document Containing the Charges cited by the Pre-Trial Chamber do not support the Pre-Trial Chamber's assessment concerning the gravity of the case or the seriousness of his actions.¹⁹³ Mr Al Hassan contends that the significance of his role is undermined by the findings in the Confirmation Decision that his role was largely administrative and that his contribution to the charged crimes could not be characterised as essential.¹⁹⁴ He also submits that the conduct set out in the Document Containing the Charges points to contributions of a *de minimis* nature.¹⁹⁵

107. In her response, the Prosecutor maintains that the Pre-Trial Chamber properly assessed the nature and extent of Mr Al Hassan's participation in the crimes and provided a reasoned opinion.¹⁹⁶ In particular, she submits that: the Pre-Trial Chamber did consider the actual content of Mr Al Hassan's conduct and contribution to the alleged crimes;¹⁹⁷ the Document Containing the Charges and not the Confirmation Decision defined the parameters of the case;¹⁹⁸ the Pre-Trial Chamber's decision not to confirm charges on the basis of co-perpetration under article 25(3)(a) does not reduce the gravity of this case;¹⁹⁹ and the gravity of the case remains high based on the confirmation of most of the allegations in the Document Containing the Charges regarding Mr Al Hassan's important role and functions, and his actual conduct and contribution to the crimes.²⁰⁰

¹⁹² [Appeal Brief](#), paras 49-51.

¹⁹³ [Appeal Brief](#), paras 52-53.

¹⁹⁴ [Appeal Brief](#), paras 53-55.

¹⁹⁵ [Appeal Brief](#), paras 57-61.

¹⁹⁶ [Response](#), paras 44-51.

¹⁹⁷ [Response](#), paras 44-48.

¹⁹⁸ [Response](#), paras 52-53.

¹⁹⁹ [Response](#), paras 54-55.

²⁰⁰ [Response](#), para. 56.

108. The Victims argue that the Pre-Trial Chamber did not err in its assessment of the gravity of the facts – Mr Al Hassan’s conduct was sufficiently grave.²⁰¹

(b) Determination by the Appeals Chamber

109. For the reasons that follow, the Appeals Chamber does not find any error in the Pre-Trial Chamber’s consideration, in its assessment of the gravity requirement, of ‘the significant role that the Prosecutor attributes to Mr Al Hassan in the execution of said crimes, not least through his contribution to the Islamic Police, an organ of repression established by the armed groups to cement their power and control over the civilian population of the city of Timbuktu and its region and thereby to impose on it their own ideological and religious vision by any means’.²⁰²

110. Contrary to the arguments advanced by Mr Al Hassan,²⁰³ the Pre-Trial Chamber did not consider abstract notions and labels regarding the conduct and role of Mr Al Hassan. Rather, it considered the factual allegations presented by the Prosecutor in support of her submissions concerning the contribution of Mr Al Hassan to the alleged crimes.

111. To support its consideration of ‘the significant role that the Prosecutor attributes to Mr Al Hassan in the execution of [the] crimes’,²⁰⁴ the Pre-Trial Chamber referred to several parts of the Document Containing the Charges at footnote 109 of the Impugned Decision. Of particular relevance is the reference to section 7.2.3 of the Document Containing the Charges, in which the Prosecutor sets out detailed, factual allegations supporting her submission that Mr Al Hassan’s contribution to the crimes was essential. Although it would have been desirable for the Pre-Trial Chamber to further elaborate on the specific factual allegations supporting the Prosecutor’s significant role attributed to Mr Al Hassan, those specificities are found in the parts of the Document Containing the Charges to which the Pre-Trial Chamber referred and are thus discernible in the circumstances.²⁰⁵ Therefore, the Appeals Chamber does not

²⁰¹ [Victims’ Observations](#), para. 27.

²⁰² [Impugned Decision](#), para. 57.

²⁰³ [Appeal Brief](#), paras 49-50.

²⁰⁴ [Impugned Decision](#), para. 57.

²⁰⁵ *See in this regard The Prosecutor v. Laurent Gbagbo*, [Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled ‘Decision on the “Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo”](#)’, 26 October

find merit in Mr Al Hassan's argument that the Pre-Trial Chamber's 'fail[ed] to provide adequate reasons concerning its assessment of [his] conduct'.²⁰⁶

112. Moreover, contrary to Mr Al Hassan's argument,²⁰⁷ the conduct set out in the Document Containing the Charges does not indicate that his contribution to the crimes was minimal. The description of the role and conduct of Mr Al Hassan in the document containing charges includes allegations of him personally flogging three individuals; giving instructions or transmitting orders to members of the Islamic Police; allegedly taking action against members of the Islamic Police, and making decisions concerning offences against them, or investigating complaints about them; allegedly taking part in police patrols and the arrest and detention of members of the civilian population; allegedly leading and/or participating in the work of the police dealing with numerous cases of men and women accused of violating the new rules, such as the prohibition of adultery, theft, drinking or selling alcohol, smoking or selling cigarettes or tobacco, wearing talismans or practicing witchcraft, or violating the dress code imposed.²⁰⁸ In light of the foregoing, the Appeals Chamber does not consider that the Pre-Trial Chamber's consideration of the significant role attributed to Mr Al Hassan by the Prosecutor in the execution of the charged crimes was unreasonable.

113. Furthermore, although Mr Al Hassan is correct²⁰⁹ that, in the Confirmation Decision, the Pre-Trial Chamber considered that Mr Al Hassan had not made essential contributions to the crimes,²¹⁰ this consideration is irrelevant to the disposition of this appeal for the reasons that follow.

114. According to established jurisprudence of the Appeals Chamber, only facts pre-dating an impugned decision can be considered.²¹¹ As correctly noted by the

2012, ICC-02/11-01/11-278-Red, para. 49: 'if the reasoning provided in the Impugned Decision is read together with the evidence referred to in the footnotes [...] it is clear not only what conclusions the Chamber reached [...] but also on what basis'.

²⁰⁶ [Appeal Brief](#), paras 4, 51-53.

²⁰⁷ [Appeal Brief](#), paras 57, 59-61.

²⁰⁸ See [Document Containing the Charges](#), paras 1041, 1042, 1056(a).

²⁰⁹ [Appeal Brief](#), paras 53-56, 58.

²¹⁰ [Confirmation Decision](#), para. 849.

²¹¹ [Simone Gbagbo Judgment](#), para. 33 and references included therein: '[a]s a corrective measure, the scope of proceedings on appeal is determined by the scope of the relevant proceedings before the Pre-Trial Chamber. The instant proceedings before the Pre-Trial Chamber concluded with the issuance of

Prosecutor,²¹² since the Confirmation Decision was rendered three days after the issuance of the Impugned Decision, findings contained therein cannot be considered.²¹³ In this regard, the Appeals Chamber notes rule 58(2) of the Rules, which provides that, while a challenge to, *inter alia*, the admissibility of a case may be joined with confirmation proceedings, the Chamber ‘shall hear and decide on the challenge first’. Therefore, the Pre-Trial Chamber had no choice but to rely on the allegations contained in the Document Containing the Charges, and not on the Confirmation Decision, issued subsequently.

115. Moreover, it is irrelevant whether in the Confirmation Decision the Pre-Trial Chamber considered that Mr Al Hassan’s contributions were of an essential nature or not. While the question of whether there was an essential contribution is, in accordance with the jurisprudence of this Court,²¹⁴ relevant for liability under article 25(3)(a) of the Statute, this does not mean that, absent an essential contribution, the case is automatically not grave enough. The Statute recognises also other modes of criminal liability (*see* articles 25(3)(b) to (d) of the Statute), which do not require an essential contribution. If Mr Al Hassan’s argument were to be accepted, cases based on these modes of responsibility would automatically lack sufficient gravity to justify further action by the Court – a clearly unreasonable result that cannot have been intended by the drafters of the Statute. The Appeals Chamber recalls in this context that, depending on the circumstances, criminal liability pursuant to articles 25(3)(b), (c) and/or (d) of the Statute could be equally or more grave than liability under article 25(3)(a).²¹⁵

the Impugned Decision. Facts which postdate the Impugned Decision fall beyond the possible scope of the proceedings before the Pre-Trial Chamber and therefore beyond the scope of the proceedings on appeal’.

²¹² [Response](#), para. 53.

²¹³ Nevertheless, the Appeals Chamber notes that in the Confirmation Decision, the Pre-Trial Chamber found that Mr Al Hassan played an important role in the Islamic Police and contributed to the alleged crimes in the context of his work within the organisation ([Confirmation Decision](#), para. 848).

²¹⁴ *See e.g. Lubanga Appeal Judgment*, paras 7, 469-473.

²¹⁵ [Bemba et al. Sentencing Judgment](#), para. 60: ‘The Appeals Chamber recognises that a mode of liability describes a certain typical factual situation that is subsumed within the legal elements of the relevant provision, and that the difference between committing a crime and contributing to the crime of others would normally reflect itself in a different degree of participation and/or intent within the meaning of rule 145 (1) (c) of the Rules. This however does not mean that the principal perpetrator of a crime/offence necessarily deserves a higher sentence than the accessory to that crime/offence. Whether this is actually the case ultimately depends upon all the variable circumstances of each individual case’. *See also ibid.* para. 59.

116. As correctly noted by Mr Al Hassan,²¹⁶ the participation of an accused must be assessed on the basis of the specific factual allegations presented by the Prosecutor rather than by reference to their legal characterisation.²¹⁷ In this regard, it is recalled that the assessment of the Pre-Trial Chamber was based on the factual allegations advanced by the Prosecutor in the Document Containing the Charges.

117. In light of the foregoing considerations, the arguments advanced by Mr Al Hassan at paragraphs 49 to 61 of the Appeal Brief are rejected.

2. *The Pre-Trial Chamber's consideration of the extent and nature of the crimes*

(a) Submissions of the Parties and Participants

118. Mr Al Hassan submits that the Pre-Trial Chamber erred by placing undue weight on the number of counts with which he has been charged.²¹⁸ In his view, the Pre-Trial Chamber failed to consider the degree of overlap in relation to the underlying conduct relied upon to establish the different charges.²¹⁹ Mr Al Hassan maintains that the existence of multiple charges is not necessarily an accurate indicator of gravity and can lead to unfair and inaccurate results.²²⁰

119. In her response, the Prosecutor argues that the Pre-Trial Chamber did not place undue weight on the fact that Mr Al Hassan had been cumulatively charged with 13 counts.²²¹ She contends that cumulative charges serve to describe the full culpability of the suspect/accused person and may aggravate blameworthiness.²²²

(b) Determination by the Appeals Chamber

120. The Appeals Chamber, for the reasons that follow, does not find any error in the Pre-Trial Chamber's consideration, in its gravity assessment, of 'the nature and

²¹⁶ [Appeal Brief](#), para. 50.

²¹⁷ See in this regard [Bemba et al. Sentencing Judgment](#), para. 60: 'the Court's legal framework does not indicate an automatic correlation between the person's form of responsibility for the crime/offence for which he or she has been convicted and the sentence, nor does it provide any form of mandatory mitigation in case of conviction as an accessory to a crime/offence. Rather, as pointed out by the Prosecutor, the sentencing factors enunciated in the Statute and the Rules are fact-specific and ultimately depend on a case-by-case assessment of the individual circumstances of each case'.

²¹⁸ [Appeal Brief](#), paras 62-65.

²¹⁹ [Appeal Brief](#), paras 62-64.

²²⁰ [Appeal Brief](#), para. 65.

²²¹ [Response](#), para. 49.

²²² [Response](#), para. 50.

scale of the charged crimes, which amount to 13 counts of crimes against humanity and war crimes allegedly committed against the civilian population in Timbuktu and its region over a period of around 10 months'.²²³

121. Mr Al Hassan submits that Pre-Trial Chamber erred by affording weight to the fact that he had been charged with 13 counts.²²⁴ However, it is clear from the Impugned Decision that the focus of the Pre-Trial Chamber's assessment was the 'nature and scale of the charged crimes', rather than the number of counts or charges. As explained above, both the nature and the scale of the charged crimes are relevant criteria to the assessment of the gravity requirement under article 17(1)(d) of the Statute.²²⁵

122. The Pre-Trial Chamber was therefore correct in considering the nature and extent of the charged crimes. Indeed, in this case, the alleged crimes resulted in the violation of several fundamental human rights, including the physical and mental integrity of the victims and their human dignity,²²⁶ the right to a fair trial,²²⁷ the right to liberty and security of person,²²⁸ the human right of all persons deprived of their liberty to be treated with humanity and with respect for their inherent dignity,²²⁹ the right to freedom of thought, conscience and religion²³⁰ and the prohibition on discriminating on the grounds of religion or belief.²³¹

123. While Mr Al Hassan is correct in arguing that there is a large degree of overlap in the factual allegations supporting the 13 counts,²³² the fact that the same underlying acts violated several provisions of the Rome Statute is a relevant consideration for the purposes of assessing the gravity requirement under article 17(1)(d) of the Statute. This is because each count, amounting to a different crime under the Statute, represents distinct values of the international community that have allegedly been

²²³ [Impugned Decision](#), para. 57.

²²⁴ [Appeal Brief](#), paras 62-64.

²²⁵ *See supra* paras 89-94.

²²⁶ Article 7 of the International Covenant on Civil and Political Rights (the 'ICCPR').

²²⁷ Article 14 of the ICCPR.

²²⁸ Article 9(1) of the ICCPR.

²²⁹ Article 10(1) of the ICCPR.

²³⁰ Article 18 of the ICCPR.

²³¹ Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

²³² [Appeal Brief](#), paras 62-65.

violated.²³³ Moreover, as noted by Pre-Trial Chamber II in the case of *The Prosecutor v. Dominic Ongwen*, ‘certain crimes under the Statute may, although based on the same set of facts, be not alternative to each other, but concurrently lead to a conviction’, particularly ‘when each of these crimes requires proof of a distinct legal element or offends a different protected interest’.²³⁴

124. As noted above, some factors relevant to the determination of the sentence to be imposed upon a convicted person may be relevant when assessing the gravity of a case for the purposes of determining admissibility under article 17(1)(d) of the Statute.²³⁵ In this regard, whether the conduct attributed to the accused amounted to the violation of several provisions of the Rome Statute and infringed numerous internationally recognised human rights is relevant when determining, for instance, the extent of the damage caused²³⁶ and the nature of the unlawful behaviour.²³⁷

125. In light of the foregoing considerations, the arguments advanced by Mr Al Hassan at paragraphs 62 to 65 of the Appeal Brief are rejected.

3. *Conclusion on the second ground of appeal*

126. Having rejected the totality of arguments raised by Mr Al Hassan, the Appeals Chamber rejects the second ground of appeal.

VI. GENERAL CONCLUSIONS

127. The Appeals Chamber reaches the following conclusions:

- i) The gravity requirement under article 17(1)(d) of the Statute aims at excluding those rather unusual cases where the specific facts of a given case technically qualify as crimes under the jurisdiction of

²³³ [Bemba et al. Conviction Judgment](#), paras 750-751 referring to ICTY, Appeals Chamber, *Prosecutor v. Zejnir Delalic et al.*, [Judgement](#), 20 February 2001, IT-96-21, paras 412-413; ICTY, Appeals Chamber, *Prosecutor v. Dragoljub Kunarac et al.*, [Judgement](#), 12 June 2002, IT-96-23 & 23/1, paras 168-169; ICTY, Appeals Chamber, *Prosecutor v. Radislav Krstic*, [Judgement](#), 19 April 2004, IT-98-33, para. 217.

²³⁴ [Decision on the confirmation of charges against Dominic Ongwen](#), 23 March 2016, ICC-02/04-01/15-422-Red, para. 32; [Bemba et al. Sentencing Judgment](#), paras 750-751.

²³⁵ See *supra* paras 89-94.

²³⁶ [Bemba et al. Sentencing Judgment](#), paras 38, 112.

²³⁷ [Bemba et al. Sentencing Judgment](#), para. 169.

the Court but are nonetheless not of sufficient gravity to justify further action.

- ii) The parameters of ‘the case’ for the purpose of article 17(1)(d) of the Statute are defined by the suspect under investigation and the conduct that gives rise to criminal liability under the Statute as defined by the Appeals Chamber in the context of interpreting article 17(1)(a) of the Statute.
- iii) The gravity assessment under article 17(1)(d) of the Statute must be made on a case-by-case basis. It involves a holistic evaluation of all relevant quantitative and qualitative criteria, including some of the factors relevant to the determination of the sentence of a convicted person. The quantitative criteria are not determinative of the gravity of a given case.
- iv) The Pre-Trial Chamber did not err in considering the circumstances of the alleged attack, which constituted the contextual elements of the crimes, because they were addressed by reference to the crimes attributed to Mr Al Hassan and were thus incident-specific.
- v) The Pre-Trial Chamber did not err in the manner in which it considered the crime of persecution in its assessment of the gravity requirement because specific historical events and victims have been identified in relation to the facts supporting counts 1 to 12.
- vi) The number of participating victims provides an indication of the scope of victimhood and the number of victims is one of the relevant considerations in the assessment of the gravity requirement for the purposes of article 17(1)(d) of the Statute.
- vii) The Pre-Trial Chamber did not err in considering the ‘significant role’ attributed to Mr Al Hassan by the Prosecutor because it considered the factual allegations presented by the Prosecutor in

support of her submissions concerning the contribution of Mr Al Hassan to the alleged crimes. In addition, the conduct set out in the Document Containing the Charges does not allege that he made only minimal contributions to the crimes.

- viii) The Pre-Trial Chamber did not err in considering the nature and scale of the charged crimes – these are part of the relevant criteria for the assessment of the gravity requirement under article 17(1)(d) of the Statute.
- ix) The fact that the same underlying acts violated several provisions of the Rome Statute is a relevant consideration for the purposes of assessing gravity under article 17(1)(d) of the Statute.

VII. APPROPRIATE RELIEF

128. In an appeal pursuant to article 82(1)(a) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158(1) of the Rules). In the present case, given that the Appeals Chamber has rejected all grounds of appeal as the Pre-Trial Chamber did not err in its determination that the case brought against Mr Al Hassan meets the gravity requirement within the meaning of article 17(1)(d) of the Statute and its conclusions were not unreasonable and did not amount to an abuse of discretion, it is appropriate to confirm the Impugned Decision.

Done in both English and French, the English version being authoritative.



Judge Luz del Carmen Ibáñez Carranza
Presiding

Dated this 19th day of February 2020

At The Hague, The Netherlands