



Original: **English**

No.: **ICC-01/12-01/18**

Date: **18 May 2020**

Date of submission:
13 July 2020

TRIAL CHAMBER X

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

SITUATION IN THE REPUBLIC OF MALI

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

Public

With public redacted version of Annex A

**Public redacted version of "Submission of Prosecution Trial Brief",
18 May 2020, ICC-01/12-01/18-819-Conf**

Source: Office of the Prosecutor

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I. Introduction

1. Pursuant to the direction of Trial Chamber X (“Chamber”),¹ the Prosecution submits its Trial Brief,² providing “an outline of the Prosecution case containing some details in relation to the charges”.³
2. The Trial Brief presents the main aspects of the Prosecution’s case, incorporating recent amendments to the charges.⁴ For each factual allegation, it cites some examples of relevant evidence,⁵ including additional evidence collected since the confirmation proceedings and evidence previously subject to non-disclosure or redactions. It also addresses a number of proposed corrections to the Confirmation Decision,⁶ and matters that may arise pursuant to regulation 55 of the Regulations of the Court (“RoC”).
3. The Prosecution intends to make an application as soon as possible and by 4 June for the Chamber to give notice to the Parties and participants pursuant to regulation 55 of the RoC that the legal characterisation of the facts confirmed by Pre-Trial Chamber I (“Pre-Trial Chamber”)⁷ may be subject to change to accord with the crimes confirmed, under additional counts, and with additional forms of participation.
4. In this short cover submission, the Prosecution sets out the anticipated scope of its planned request under regulation 55 of the RoC, by reference to the relevant paragraphs in the Trial Brief. In its request under regulation 55 of the RoC, the Prosecution will demonstrate that the proposed changes to the legal characterisation of facts do not exceed the facts and circumstances described in the charges and the amendments to the charges.

II. Confidentiality

5. Pursuant to regulation 23*bis*(1) of the RoC, the Prosecution files this submissions and its accompanying Annex A, the Trial Brief, confidentially. Their contents could identify

¹ ICC-01/12-01/18-548, para. 16; ICC-01/12-01/18-629; ICC-01/12-01/18-677, para. 13; ICC-01/12-01/18-770, para. 12.

² Prosecution Trial Brief (“Trial Brief”), found in confidential Annex A to the present submission.

³ ICC-01/12-01/18-770, para. 12.

⁴ See generally [REDACTED] (“Amendment Decision”).

⁵ The Trial Brief does not exhaustively summarise the evidence relied on, which is also discussed in the Document Containing the Charges ([REDACTED]) (“DCC”), Confirmation Decision ([REDACTED]) (“Confirmation Decision”) and Amendment Decision, and the Prosecution List of Evidence ([REDACTED]).

⁶ See [REDACTED] (“Decision on Procedure for Amendment”), para. 41-48.

⁷ Confirmation Decision; Amendment Decision.

protected witnesses and they refer to decisions and submissions of the same classification. A public redacted version will be filed in due course.

III. Submissions

6. The Prosecution anticipates requesting notice under regulation 55 of the RoC of the following additional forms of participation and counts:⁸

1. Additional forms of participation

(a) The criminal responsibility of the Accused for direct perpetration pursuant to article 25(3)(a) of the Statute relating to [REDACTED] under Counts 1 to 5,⁹ in addition to his criminal responsibility under article 25(3)(c) and article 25(3)(d) of the Statute as presently confirmed in relation to him under these Counts. The Accused acknowledged his role in personally flogging [REDACTED].¹⁰ In the Confirmation Decision, the Pre-Trial Chamber confirmed the additional mode of liability of direct perpetration under article 25(3)(a) of the Statute under Counts 1 to 5 where the Accused personally participated in the flogging.¹¹

(b) The criminal responsibility of the Accused pursuant to article 25(3)(c) of the Statute relating to [REDACTED],¹² and to [REDACTED],¹³ under Counts 1 to 5, in addition to his criminal responsibility under article 25(3)(d) of the Statute as presently confirmed in relation to them under these Counts. Evidence shows, *inter alia*, the Accused's presence at, and the involvement of the Islamic Police.¹⁴ In the Confirmation Decision, the Pre-Trial Chamber confirmed the additional mode of liability under article 25(3)(c) of the Statute under Counts 1 to 5 where the Accused was present and

⁸ See, in this connection [REDACTED] ("Correction and Amendment Request"), para. 25 (the degree of specificity required in the description of the facts described in the charges depends on the nature of the crimes in question and the circumstances of the Prosecution case), fn. 75 (citing authorities from the Court and from the *ad hoc* tribunals for the proposition that it is not necessary to specify every single victim).

⁹ See Trial Brief, para. 143-146, 161; Confirmation Decision, para. 307-308, 350. See also para. 912. *But see* para. 789-790 and fn. 858.

¹⁰ See Trial Brief, para. 146, citing Statement of the Accused, [REDACTED]; Statement of the Accused, [REDACTED], explicitly stating that: "[REDACTED]" See also para. 161. See further Correction and Amendment Request, para. 16-19. *Contra* Confirmation Decision, para. 789-790, fn. 858.

¹¹ Confirmation Decision, para. 279, 788. See also p. 452-457 (Counts 1-5) (finding responsibility pursuant to article 25(3)(a) and (d) of the Statute).

¹² See Trial Brief, para. 111, 148-151, 167; Confirmation Decision, para. 317-320, 350, 352, 354, 355.

¹³ See Trial Brief, para. 111, 148-151, 167; Confirmation Decision, para. 322-324, 350, 352, 354, 355.

¹⁴ See Trial Brief, para. 111, and evidence cited therein. See also Trial Brief, para. 167.

participated in securing the location where the crimes took place in the context of his function within the Islamic Police.¹⁵

(c) The criminal responsibility of the Accused pursuant to article 25(3)(c) of the Statute for cases 9 (Case of [REDACTED], Case [REDACTED]),¹⁶ 11 (Case of [REDACTED], Case [REDACTED]),¹⁷ 20 (Case of [REDACTED], Case [REDACTED]),¹⁸ 27 (Case of [REDACTED], Case [REDACTED]),¹⁹ 31 (Case of [REDACTED], Case [REDACTED]),²⁰ 35 (Case of [REDACTED], Case [REDACTED]),²¹ 37 (Case of [REDACTED]),²² 40 (Case of [REDACTED]),²³ under Count 6, in addition to his criminal responsibility under article 25(3)(d) of the Statute as presently confirmed in relation to these cases under this Count. For all these cases, the Accused wrote and signed the Islamic Police report, which formed the basis of the written judgement of the Islamic Tribunal. In the Confirmation Decision under Count 6, the Pre-Trial Chamber confirmed the additional mode of liability under article 25(3)(c) of the Statute with respect to cases where there were corresponding reports of the Islamic Police signed by the Accused and written judgements of the Islamic Tribunal.²⁴ For facts addressed in the Correction and Amendment Request, the Pre-Trial Chamber found that the additional mode of responsibility “could also be canvassed before the Trial Chamber pursuant to regulation 55” of the RoC.²⁵ The same reasoning would extend to other facts mentioned above.

¹⁵ See Confirmation Decision, para. 916 ([REDACTED]); 912 ([REDACTED]). See also para. 917 (whether presence suffices as moral encouragement to qualify as assistance under article 25(3)(c) depends for example on the position of authority of an accused over the physical perpetrators).

¹⁶ Trial Brief, para. 184-185, 218; Confirmation Decision, para. 433.

¹⁷ Trial Brief, para. 187, 218; Confirmation Decision, para. 436.

¹⁸ Trial Brief, para. 195, 218, 289; Confirmation Decision, para. 448.

¹⁹ Trial Brief, para. 204, 218; Confirmation Decision, para. 457-458. As explained in the Trial Brief, fn. 637, [REDACTED].

Trial Brief, para. 205, 218; Confirmation Decision, para. 462.

²¹ Trial Brief, para. 208-209, 218; Confirmation Decision, para. 466-467.

²² Trial Brief, para. 210, 218; Confirmation Decision, para. 469.

²³ Trial Brief, para. 213, 218; Confirmation Decision, para. 472.

²⁴ Confirmation Decision, para. 877-885, 928-929. See also para. 968-975.

²⁵ [REDACTED] (“Decision on Procedure for Amendment”), para. 47 (in respect of additional modes of responsibility “put forward by the Prosecutor in her Request in respect of charges already confirmed and with reference to evidence submitted to the Chamber alongside the DCC”). See also para. 44-46. See further Correction and Amendment Request, para. 6-12, 20-23.

(d) The criminal responsibility of the Accused for direct perpetration pursuant to article 25(3)(a) of the Statute,²⁶ under Count 13, as shown including by his direct participation in patrols to control civilians, arresting or summoning suspects who contravened the rules of the Organisation, drafting police reports and transmitting them to the Islamic Tribunal to sanction the offenders and make them abide by their rules, and personally flogging [REDACTED]²⁷ and [REDACTED] who did not endorse the organisation's ideology,²⁸ in addition to article 25(3)(d) of the Statute as presently confirmed. The Pre-Trial Chamber found that it would consider the Accused's criminal liability for his contribution to the acts of persecution committed by the members of Ansar Dine/ AQMI but not for his commission of these acts as a direct perpetrator, apparently on the reasoning that it was the totality of underlying acts of persecution by the members of Ansar Dine/ AQMI that lead it to find persecution as a crime against humanity.²⁹ However, when an accused directly perpetrates some of the underlying acts of persecution, s/he may be held responsible as a direct perpetrator of the crime.³⁰

(e) The criminal responsibility of the Accused pursuant to article 25(3)(c) of the Statute,³¹ for all acts under Count 13, in addition to article 25(3)(d) of the Statute as presently confirmed and in addition to direct perpetration under article 25(3)(a) of the Statute for the acts indicated above.³² The Pre-Trial Chamber found that the functions the Accused exercised within the Islamic Police during the relevant period, such as drafting police reports and transmitting these reports to the Islamic Tribunal, his participation in the administration of floggings, directly or to ensure the security of the location where the floggings took place, his participation in the organisation of patrols constitute assistance having an effect on the commission of the crime of persecution.³³ This notwithstanding, the Pre-Trial Chamber did not confirm this mode of liability due to lack of substantial grounds to believe that the Accused acted with the specific

²⁶ See Trial Brief, para. 269-297 in particular para. 285-286, 289, 294-295.

²⁷ See Trial Brief, para. 111, 134-135, 161. Confirmation Decision, para. 279, 280, 788, 673.

²⁸ See above para. 6(a). Confirmation Decision, para. 673.

²⁹ Confirmation Decision, para. 792.

³⁰ See, e.g., *Prosecutor v. Ntaganda*, Judgment, ICC-01/04-02/06-2359, para. 745-752, finding Mr Ntaganda responsible as a direct perpetrator of the crime of persecution on the basis of one killing he directly perpetrated even though the underlying material acts of persecution described in the charges also included those underpinning the charges of attacking civilians, and attacking protected objects, for which he was not found responsible as direct perpetrator.

³¹ See Trial Brief, para. 269-297.

³² See above para. 6(d).

³³ Confirmation Decision, para. 935.

intent to discriminate on religious or gender grounds, and for the purpose of facilitating the commission of persecution.³⁴ First, it is not required for liability for persecution under article 25(3)(c) of the Statute for an accused to have discriminatory intent, since it suffices that an accused is aware that the direct perpetrator's crime would occur in the ordinary course of events.³⁵ Nevertheless, the Prosecution submits that the Accused had discriminatory intent.³⁶ Second, under article 25(3)(c), there is no need to establish that an accused specifically intended the commission of the crime of persecution, since the term "purpose" relates only to the accused's facilitation of the crime.³⁷ The Accused lent his assistance at a minimum with the aim of facilitating the crime of persecution.³⁸

2. Additional Counts

- (a) The criminal responsibility of the Accused for the crimes of sexual slavery as a crime against humanity pursuant to article 7(1)(g) of the Statute (Count 9) and sexual slavery as a war crime pursuant to article 8(2)(e)(vi) of the Statute (Count 10) and/or rape as a crime against humanity pursuant to article 7(1)(g) of the Statute (Count 11) and rape as a war crime pursuant to article 8(2)(e)(vi) of the Statute (Count 12), pursuant to article 25(3)(d) of the Statute, in relation to rapes committed against [REDACTED],³⁹ in addition to the crime of persecution pursuant to article 7(1)(h) of the Statute under Count 13 as presently confirmed in relation to them.⁴⁰ In its Confirmation Decision and the Amendment Decision, the Pre-Trial Chamber noted that the elements of rape as a crime against humanity under article 7(1)(g) of the Statute and rape as a war crime under article 8(2)(e)(vi) of the Statute were satisfied with respect to conduct relating to [REDACTED]

³⁴ Confirmation Decision, para. 936.

³⁵ *Prosecutor v. Bemba et al.*, Public Redacted Version of Judgement pursuant to Article 74 of the Statute, ICC-01/05-01/13-1989-Red, para. 98.

³⁶ See Trial Brief, para. 269-297 in particular para. 274, 280, 296-297. When analyzing the *mens rea* for this crime, the Pre-Trial Chamber also found that members of Ansar Dine and AQIM had discriminatory intent. The finding was based, among others, on statements issued by some members, including the Accused. See Confirmation Decision, para. 704 and fn. 1916 citing, among others, the Accused's video interview, [REDACTED].

Prosecutor v. Bemba et al., Public Redacted Version of Judgement pursuant to Article 74 of the Statute, ICC-01/05-01/13-1989-Red, para. 97.

³⁸ See Trial Brief, para. 269-297 in particular para. 294-297.

³⁹ [REDACTED]

Crimes under Count 5 and 6 are also charged in relation to [REDACTED].

and drew the Trial Chamber's attention to that fact for a potential modification of the legal qualification pursuant to regulation 55 of the RoC.⁴¹

(b) The criminal responsibility of the Accused for the crime of outrages upon personal dignity as a war crime pursuant to article 8(2)(c)(ii) of the Statute (Count 5), pursuant to article 25(3)(d) of the Statute, in relation to ██████████,⁴² in addition to the crimes of other inhumane acts as a crime against humanity pursuant to article 7(1)(k) of the Statute (Count 2), cruel treatment as a war crime pursuant to article 8(2)(c)(i) of the Statute (Count 4), sentencing without due process as a war crime pursuant to article 8(2)(c)(iv) of the Statute (Count 6) and persecution as a crime against humanity pursuant to article 7(1)(h) of the Statute (Count 13) as presently confirmed in relation to him. The Pre-Trial Chamber considered that the elements of the crime of outrages upon personal dignity were satisfied as ██████████—arrested and detained for not going to ██████████ ██████████ and given the behaviour adopted by his aggressor. The Pre-Trial Chamber found that to qualify it in this way would be coherent with the legal qualification retained for other cases dealt with in the Confirmation Decision,⁴³ and drew the Trial Chamber's attention for a potential modification of the legal qualification pursuant to regulation 55 of the RoC.⁴⁴

(c) The criminal responsibility of the Accused for the crime of sentencing without due process as a war crime pursuant to article 8(2)(c)(iv) of the Statute (Count 6), pursuant to article 25(3)(d) of the Statute, relating to the first detention of ██████████,⁴⁵ in addition to other inhumane acts as a crime against humanity pursuant to article 7(1)(k) of the Statute (Count 2), cruel treatment as a war crime pursuant to article 8(2)(c)(i) of the Statute (Count 4), outrages upon personal dignity as a war crime pursuant to article 8(2)(c)(ii) of the Statute (Count 5), other inhumane acts (forced marriage) as a crime against humanity pursuant to article 7(1)(k) of the Statute (Count 8), sexual slavery as a crime against humanity pursuant to article 7(1)(g) of the Statute (Count 9) and sexual slavery as a war crime pursuant to article 8(2)(e)(vi) of the Statute (Count 10), rape as a crime against humanity pursuant to article 7(1)(g) of the Statute (Count 11) and rape as a war crime pursuant to article 8(2)(e)(vi) of the Statute (Count 12) and

⁴¹ Confirmation Decision, para. 676, 681-682; Amendment Decision, para. 94-97.

⁴² See Trial Brief, para. 159. Confirmation Decision, para. 71.

⁴³ Amendment Decision, para. 125, citing Confirmation Decision, para. 292-294, 326 ██████████

Amendment Decision, para. 125.

⁴⁵ See Trial Brief, para. 160. Amendment Decision, para. 81-82.

persecution as a crime against humanity pursuant to article 7(1)(h) of the Statute (Count 13) as presently confirmed in relation to her. The Pre-Trial Chamber considered that the elements of the crime of sentencing without due process were satisfied and that to qualify it in this way would be coherent with the legal qualification retained for other cases dealt with in the Confirmation Decision,⁴⁶ and drew the Trial Chamber's attention for a potential modification of the legal qualification pursuant to regulation 55 of the RoC.⁴⁷

7. The Prosecution is presently considering whether to request notice under regulation 55 of the RoC of certain additional forms of participation and additional Counts as described in more detail below. The Prosecution is presently assessing the potential applicability of these legal characterisations. Should it conclude that they are potentially applicable, it will either include them in its forthcoming regulation 55 request or seek to include them in a separate request pursuant to regulation 55 of the RoC. In the latter case, this request would in any event be made before the commencement of trial. Any request by the Prosecution made under regulation 55 of the RoC is without prejudice to the Chamber's authority to modify legal characterisations *proprio motu*.

8. The assessment referred to above comprises, first, the additional forms of participation of direct and/or indirect co-perpetration under article 25(3)(a) of the Statute for all Counts.⁴⁸ It also includes the following additional Counts highlighted by the Pre-Trial Chamber:

- (a) The criminal responsibility of the Accused for the crime of torture as a crime against humanity pursuant to article 7(1)(f) of the Statute (Count 1) and torture as a war crime pursuant to article 8(2)(c)(i) of the Statute (Count 3), pursuant to article 25(3)(d) of the Statute, in relation to [REDACTED],⁴⁹ in addition to the other counts as presently confirmed in relation to her.⁵⁰ The Pre-Trial Chamber found that qualifying it in this

⁴⁶ Amendment Decision, para. 136, citing Confirmation Decision, para. 412-415 [REDACTED].

Amendment Decision, para. 136.

⁴⁸ See section 7.2 of the DCC on direct co-perpetration and section 7.3 on indirect co-perpetration, and in particular section 7.2.4 of the DCC for intent and knowledge for direct and indirect co-perpetration. See also e.g., Trial Brief, para. 3 (common plan), 37 (co-perpetrators), 29-68 (organised and hierarchical structure), 81-126 (Accused's joint control over the organisation, including ability to give orders/instructions, and discipline/punish his subordinates), section III and paras. 161-169 (Counts 1-5), para. 218-219 (Count 6), para. 240 (Count 7), para. 263-264 (Counts 8-12), 294-295 (Count 13) (contributions made by the Accused to the common plan).

⁴⁹ See Trial Brief, para. 156. Amendment Decision, para. 42.

⁵⁰ Other inhumane acts as a crime against humanity pursuant to article 7(1)(k) of the Statute (Count 2), cruel treatment as a war crime pursuant to article 8(2)(c)(i) of the Statute (Count 4), outrages upon personal dignity pursuant to article 8(2)(c)(ii) of the Statute (Count 5), sentencing without due process pursuant to article

way would be coherent with the legal qualification retained for other cases dealt with in the Confirmation Decision,⁵¹ and drew the Trial Chamber's attention for a potential modification of the legal qualification pursuant to regulation 55 of the RoC.⁵²

(b) The criminal responsibility of the Accused for the crime of torture as a crime against humanity pursuant to article 7(1)(f) of the Statute (Count 1) and torture as a war crime pursuant to article 8(2)(c)(i) of the Statute (Count 3), pursuant to article 25(3)(d) of the Statute, in relation to the first detention of [REDACTED],⁵³ in addition to the other counts as presently confirmed in relation to her.⁵⁴ The Pre-Trial Chamber found that qualifying it in this way would be coherent with the legal qualification retained for other cases dealt with in the Confirmation Decision,⁵⁵ and drew the Trial Chamber's attention for a potential modification of the legal qualification pursuant to regulation 55 of the RoC.⁵⁶

(c) The criminal responsibility of the Accused for the crime of mutilation as a war crime pursuant to article 8(2)(c)(i) of the Statute, pursuant to article 25(3)(d) of the Statute, in relation to Dédéou Maiga,⁵⁷ in addition to other Counts as presently confirmed in relation to him.⁵⁸ The Pre-Trial Chamber drew the Trial Chamber's attention for a potential modification of the legal qualification pursuant to regulation 55 of the RoC.⁵⁹

8(2)(c)(iv) of the Statute (Count 6), rape as a crime against humanity pursuant to article 7(1)(g) of the Statute (Count 11), rape as a war crime pursuant to article 8(2)(e)(vi) of the Statute (Count 12) and persecution as a crime against humanity pursuant to article 7(1)(h) of the Statute (Count 13).

⁵¹ Amendment Decision, para. 102, citing Confirmation Decision, para. 281-284 [REDACTED].

⁵² Amendment Decision, para. 104.

⁵³ See Trial Brief, para. 160. Amendment Decision, para. 81-82.

⁵⁴ See paragraph 6(c) above.

⁵⁵ Amendment Decision, para. 103, citing Confirmation Decision, para. 281-284, 301-304 [REDACTED].

[REDACTED].
Amendment Decision, para. 104.

⁵⁷ See Trial Brief, para. 147. Confirmation Decision, para. 311-313.

⁵⁸ Torture as a crime against humanity pursuant to article 7(1)(f) of the Statute (Count 1) and torture as a war crime pursuant to article 8(2)(c)(i) (Count 3), other inhumane acts as a crime against humanity pursuant to article 7(1)(k) of the Statute (Count 2), cruel treatment as a war crime pursuant to article 8(2)(c)(i) of the Statute (Count 4), outrages upon personal dignity as a war crime pursuant to article 8(2)(c)(ii), sentencing without due process as a war crime pursuant to article 8(2)(c)(iv) of the Statute (Count 6) and persecution as a crime against humanity pursuant to article 7(1)(h) of the Statute (Count 13).

⁵⁹ Confirmation Decision, para. 315.



Fatou Bensouda, Prosecutor

Dated this 18 May 2020

At The Hague, The Netherlands