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TRIAL CHAMBER X

Before:

**Judge Antoine Kesia-Mbe Mindua, Presiding Judge
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

**Public redacted version of ‘Decision on application for notice of possibility of
variation of legal characterisation pursuant to Regulation 55(2) of the
Regulations of the Court’**

Decision to be notified in accordance with Regulation 31 of the *Regulations of the Court* to:

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TRIAL CHAMBER X (the ‘Chamber’) of the International Criminal Court, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, having regard to Articles 64(2) and 67(1) of the Rome Statute (the ‘Statute’) and Regulations 52 and 55 of the Regulations of the Court (the ‘Regulations’), issues this ‘Decision on application for notice of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court’.

I. Procedural history

1. On 30 September 2019, Pre-Trial Chamber I (hereinafter: ‘PTC I’) confirmed charges against Mr Al Hassan following a hearing on the confirmation of charges over five days in July 2019 (the ‘Confirmation Decision’).¹ A Defence request for leave to appeal this decision was rejected by PTC I on 18 November 2019.²
2. On 31 January 2020, the Office of the Prosecutor (the ‘Prosecution’) filed a request for corrections and amendments of the Confirmation Decision before PTC I (the ‘Prosecution Request to Amend the Charges’).³
3. On 21 February 2020, PTC I issued a decision in which it *inter alia*: (i) rejected Parts I and II of the Prosecution Request to Amend the Charges; (ii) directed the Prosecution to file additional observations by 4 March 2020; (iii) directed responses from the legal representatives of victims and the Defence to the Prosecution Request to Amend the Charges, to be filed by 28 February and 16 March respectively; and (iv) directed the Prosecution to disclose additional evidence by 24 February 2020 (the ‘21 February 2020 Decision’).⁴

¹ Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18-461-Conf (a corrected version of the decision was filed on 8 November 2019, ICC-01/12-01/18-461-Conf-Corr; a public redacted version was filed on 13 November 2019, ICC-01/12-01/18-461-Conf-Corr-Red).

² Décision relative à la requête de la défense aux fins d’autorisation d’interjeter appel de la Décision relative à la confirmation des charges et transmissions du dossier à la présidence en vertu de la règle 129 du Règlement de procédure et de preuve, ICC-01/12-01/18-498-Secret-Exp (secret *ex parte*, available only to the Prosecution and the Victims and Witnesses Unit; a confidential *ex parte* redacted version, available only to the Prosecution, the Defence and the Victims and Witnesses Unit, and a public redacted version were filed simultaneously, ICC-01/12-01/18-498-Conf-Exp-Red and ICC-01/12-01/18-498-Red2 respectively).

³ Prosecution Request for corrections and amendments concerning the Confirmation Decision, ICC-01/12-01/18-568-Conf (with confidential Annexes A to D; a public redacted version was filed on 17 February 2020, ICC-01/12-01/18-568-Red).

⁴ Decision on the Applicable Procedure following the Prosecutor’s Filing of Her Request for Corrections and Amendments of the Decision to Confirm the Charges, 21 February 2020, ICC-01/12-01/18-608-Conf-tENG (a public redacted version was filed on the same date, ICC-01/12-01/18-608-Red-tENG; English translations of the decision were notified on 15 April 2020 and 27 July 2020 respectively).

4. On 23 April 2020, following submissions from the Prosecution⁵ and the Defence,⁶ PTC I issued a decision, *inter alia*, amending the confirmed charges against Mr Al Hassan (the ‘23 April 2020 Decision’; together with the Confirmation Decision, the ‘Charging Documents’).⁷ A Defence request for leave to appeal this decision was rejected by PTC I, by majority, on 23 June 2020.⁸
5. On 6 May 2020, the Chamber issued its ‘Decision on the conduct of proceedings’,⁹ in which it, *inter alia*, issued English and French versions of a document containing a self-contained set of charges.¹⁰ These documents were amended by the Chamber on 2 July 2020,¹¹ on the basis of submissions from the parties and participants.¹²

⁵ Prosecution’s further observations regarding its request for corrections and amendments concerning the Confirmation Decision, 4 March 2020, ICC-01/12-01/18-625-Conf-Exp (with confidential Annexes A and B; a confidential redacted version was filed on the same date, ICC-01/12-01/18-625-Conf-Red; a public redacted version was filed on 17 April 2020, ICC-01/12-01/18-625-Red2).

⁶ Defence response to Prosecution Request for Corrections and Amendments concerning the Confirmation Decision, 16 March 2020, ICC-01/12-01/18-664-Conf (with confidential Annexes A and C and confidential *ex parte* Annex B, only available to the Defence and the Prosecution; a public redacted version was filed on 17 April 2020, ICC-01/12-01/18-664-Red).

⁷ Décision portant modification des charges confirmées le 30 septembre 2019 à l’encontre d’Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18-767-Conf (with a confidential Annex, ICC-01/12-01/18-767-Conf-Anx; a corrected version of the decision was filed on 1 May 2020, ICC-01/12-01/18-767-Conf-Corr; a public redacted version of the decision was filed on 8 May 2020, ICC-01/12-01/18-767-Corr-Red, with an Annex, ICC-01/12-01/18-767-Anx-Red).

⁸ Décision relative à la requête de la défense pour autorisation d’interjeter appel de la Décision portant modification des charges confirmées le 30 septembre 2019 à l’encontre d’Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18-893 (filed on 22 June 2020; dissenting opinion of Juge Alapini-Gansou filed simultaneously, ICC-01/12-01/18-893-Anx). *See also* PTC I, Décision relative aux corrections apportées par le Procureur à ses observations déposées suite à la « Décision sur la procédure applicable suite au dépôt par le Procureur de sa requête pour corrections et modifications de la Décision relative à la confirmation des charges », 18 June 2020, ICC-01/12-01/18-888-Conf (public redacted version filed simultaneously).

⁹ ICC-01/12-01/18-789 (with one public annex and two confidential annexes).

¹⁰ ICC-01/12-01/18-789-AnxB-Conf and ICC-01/12-01/18-789-AnxC-Conf.

¹¹ Decision on the Self-contained set of charges, ICC-01/12-01/18-923-Conf, with confidential Annexes A and B.

¹² Observations en application de la Décision du 28 mai 2020 (ICC-01/12-01/18-831), 11 June 2020, ICC-01/12-01/18-872-Conf; Observations de l’Accusation sur les chefs d’accusation autonomes (“self-contained set of charges”) conformément aux paragraphes 19 et 20 de la décision ICC-01/12-01/18-831 de la Chambre, 12 June 2020, ICC-01/12-01/18-881; Defence observations on the form of the charges, 12 June 2020, ICC-01/12-01/18-882-Conf; Réponse aux observations de la Défense ICC-01/12-01/18-882-Conf, 25 June 2020, ICC-01/12-01/18-903-Conf; Prosecution Response to “Defence Observations on the form of the charges” (ICC-01/12-01/18-882-Conf), 25 June 2020, ICC-01/12-01/18-904-Conf.

6. On 11 June 2020, the Chamber partially granted a Prosecution request¹³ for an extension of the page limit for its forthcoming application under Regulation 55(2) of the Regulations.¹⁴
7. On 23 June 2020, the Prosecution filed its application for notice to be given pursuant to Regulation 55(2) of the Regulations (the ‘Prosecution Application for Notice’).¹⁵
8. On 8 July 2020, the Defence filed its response to the Prosecution Application for Notice (the ‘Defence Response’).¹⁶

II. Analysis and conclusions

A. The scope of the Chamber’s inquiry and the applicable law

9. As recognised by the Appeals Chamber, Regulation 55 of the Regulations empowers a trial chamber to change the legal characterisation of the facts in order ‘to close accountability gaps, a purpose that is fully consistent with the Statute’.¹⁷ Regulation 55(2) of the Regulations may be invoked at ‘any time during the trial’. The ‘trial’ is not limited only to the hearing of evidence, but has been interpreted to include the phase after the Chamber has been seised of the case and before opening statements,¹⁸ as well as

¹³ Prosecution’s urgent request for an extension of the page limit for regulation 55(2) application, 5 June 2020, ICC-01/12-01/18-863-Conf.

¹⁴ Decision on the Prosecution’s urgent request for an extension of the page limit for Regulation 55 application, ICC-01/12-01/18-874.

¹⁵ Prosecution’s application for notice to be given pursuant to regulation 55(2) of the Regulations of the Court, ICC-01/12-01/18-894-Conf.

¹⁶ Defence response to “Prosecution’s application for notice to be given pursuant to regulation 55(2) of the Regulations of the Court” (ICC-01/12-01/18-894-Conf), ICC-01/12-01/18-941-Conf (notified on 9 July 2020). An extension of time limit was granted to the Defence to submit its response after 16:00; *see* email from the Defence to the Chamber, 8 July 2020, at 10:21 and email from the Chamber, 8 July 2020, at 10:32.

¹⁷ Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court”, 8 December 2009, ICC-01/04-01/06-2205 (OA15 OA16) (‘Lubanga OA15 OA16’), para. 77; *see also* Appeals Chamber, *The Prosecutor v. Germain Katanga*, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled “Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons”, 27 March 2013, ICC-01/04-01/07-3363 (OA13) (‘Katanga OA13’), paras 22 and 104; Trial Chamber II, *The Prosecutor v. Germain Katanga*, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, 21 November 2012, ICC-01/04-01/07-3319-tENG (‘Katanga Notice Decision’), paras 8 and 12.

¹⁸ Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled “Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court”, 18 December 2015, ICC-02/11-01/15-369 (OA7) (‘Gbagbo OA7’), paras 51, 57, 67. *See also* Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial

deliberations.¹⁹ In order to safeguard the rights of the accused and avoid unnecessary delays (such as adjournments or recalling of witnesses), a Regulation 55(2) notice should always be given as soon as possible.²⁰

10. From the language of the provision, a Regulation 55 inquiry involves a three stage process:²¹
 - i. The Chamber decides whether it appears to it that the legal characterisation of facts may be subject to change and gives notice to the parties and participants of such a possibility (Regulation 55(2));
 - ii. Having heard the evidence in the case and at an appropriate stage of the proceedings, the Chamber shall give the participants the opportunity to make oral or written submissions as to the appropriateness of the actual legal re-characterisation (Regulation 55(2)) and ensures that the parties and participants have adequate time and facilities for effective preparation (Regulation 55(2)-(3)); and
 - iii. In its decision under Article 74 of the Statute, the Chamber decides whether to make the proposed re-characterisation for which notice was given at the first stage (Regulation 55(1)).

proceedings, and the manner in which evidence shall be submitted, 13 December 2007, ICC-01/04-01/06-1084 ('First *Lubanga* Notice Decision'), para. 47. *See also* Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Applications for Notice of Possibility of Variation of Legal Characterisation, 12 December 2013, ICC-01/09-01/11-1122 ('*Ruto and Sang* Notice Decision'), para. 28.

¹⁹ *Katanga* OA13, ICC-01/04-01/07-3363, paras 17, 21, 24 and 93; *see also* *Katanga* Notice Decision, ICC-01/04-01/07-3319-tENG, paras 5-6 and 15-20.

²⁰ *Katanga* OA13, ICC-01/04-01/07-3363, paras 24 and 102; *Ruto and Sang* Notice Decision, ICC-01/09-01/11-1122, paras 27, 29 and 42; *see also* Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Order Regarding Applications for Notice of Possibility of Variation of Legal Characterisation, 5 September 2013, ICC-01/09-01/11-907 ('*Ruto and Sang* Preliminary Notice Order'), para. 10; Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, 14 July 2009, ICC-01/04-01/06-2049, para. 33; Minority opinion on the "Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", 17 July 2009, ICC-01/04-01/06-2054, paras 22 ('unless the Chamber automatically incorporates significant additional measures to protect the rights of the accused, changes to the legal characterization of the facts made at the very end of the case [...] will inevitably infringe certain central safeguards provided for in the Rome Statute (as reflected in other international provisions), and it will run counter to the approach taken in key human rights jurisprudence') and 51; Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision adjourning the evidence in the case and consideration of Regulation 55, 2 October 2009, ICC-01/04-01/06-2143, para. 21.

²¹ *Ruto and Sang* Notice Decision, ICC-01/09-01/11-1122, para. 19; Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba et al.*, Decision on Prosecution Application to Provide Notice pursuant to Regulation 55, 15 September 2015, ICC-01/05-01/13-1250 ('*Bemba et al.* Notice Decision'), para. 8.

11. The present issue before the Chamber is not a question of actual legal re-characterisation of any facts under Regulation 55(1) of the Regulations. Rather, the issue is whether notice of the possibility of such a re-characterisation should be given under Regulation 55(2) of the Regulations. The activation of Regulation 55 of the Regulations is a discretionary decision. In this respect, the Chamber may consider different factors to guide its assessment of the matter. In particular, regard may be had to whether the exercise of this discretion would be consistent with the principal purpose of Regulation 55 to ‘close accountability gaps’, as established by the Appeals Chamber.²² However, in principle, the pre-trial chamber’s *obiter dicta* on the matter are not relevant factors to be taken into account by the Chamber for the purpose of deciding whether notice shall be given or not.²³
12. As indicated above, notice of any legal re-characterisation essentially depends on *whether and when it appears to the Chamber* that legal re-characterisation may be possible in this case. Based on the jurisprudence, such an ‘appearance’ can arise from: (i) the ‘facts and circumstances’ described in the charges;²⁴ and/or (ii) the evidence led at trial.²⁵ Regulation 55 does not impose limitations on the number of potential re-characterisations, nor is it a prerequisite that existing legal characterisations be found insufficient.²⁶
13. Any change cannot exceed the ‘facts and circumstances’ described in the charges.²⁷ In deciding whether a re-characterisation is possible, a Chamber should take into account the elements of the offence and how these elements are covered by the ‘facts and circumstances’.²⁸ The decision is made having regard to the elements required on the face of the relevant statutory provision, without expressing any view about the correct legal interpretation thereof.²⁹

²² *Lubanga* OA15 OA16, ICC-01/04-01/06-2205, para. 77; *see also Katanga* OA13, ICC-01/04-01/07-3363, paras 22 and 104.

²³ *Gbagbo* OA7, ICC-02/11-01/15-369, para. 72.

²⁴ *Ruto and Sang* Notice Decision, ICC-01/09-01/11-1122, para. 24.

²⁵ *Katanga* OA13, ICC-01/04-01/07-3363, paras 21-22; *Ruto and Sang* Notice Decision, ICC-01/09-01/11-1122, para. 24; *see also Katanga* Notice Decision, ICC-01/04-01/07-3319-tENG, paras 5-6, 17 and 19.

²⁶ *Lubanga* OA15 OA16, ICC-01/04-01/06-2205, para. 100; *Ruto and Sang* Notice Decision, ICC-01/09-01/11-1122, para. 40.

²⁷ Regulation 55(1) of the Regulations; Article 74(2) of the Statute; *see also Lubanga* OA15 OA16, ICC-01/04-01/06-2205, paras 88, 93-94, 97 and 100.

²⁸ *See Lubanga* OA15 OA16, ICC-01/04-01/06-2205, para. 109; *see also* Trial Chamber II, *The Prosecutor v. Germain Katanga*, Judgment pursuant to Article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436-tENG (‘*Katanga* Judgment’), para. 1450.

²⁹ *Katanga* OA13, ICC-01/04-01/07-3363, paras 53 and 56.

14. In order to ensure that adequate notice is given in accordance with Regulation 55(2), the relevant ‘facts and circumstances’ are required to be exhaustively identified.³⁰ However, the Chamber need not indicate the evidence which may be presented in support of the proposed re-characterisation.³¹

B. Analysis of the re-characterisations sought

15. In its Application for Notice, the Prosecution seeks notice of a number of possible legal re-characterisations of facts which relate both to crimes and to modes of liability. Some of them were identified by PTC I in the Charging Documents, others by the Prosecution in its Request to Amend the Charges before PTC I and in its Application for Notice before the Chamber.

1. Re-characterisations of facts related to crimes

16. In its Application for Notice,³² the Prosecution seeks notice of the following possible legal re-characterisations suggested by PTC I in the Charging Documents:³³ torture (counts 1 and 3) for P-1134; torture (counts 1 and 3) for P-0609; outrages upon personal dignity (count 5) for P-1708; passing of irregular sentences (count 6) for P-0609; rape (counts 11 and 12) for P-0570; rape (counts 11 and 12) for P-0547; rape (counts 11 and 12) for P-0574; rape (counts 11 and 12) for P-0542; and mutilation (Article 8(2)(c)(i) of the Statute) for Dédéou Maiga’s amputation. In its Application for Notice,³⁴ the Prosecution further requests that the Chamber issue notice of the following possible re-characterisations: torture, other inhumane acts, cruel treatment and outrages upon personal dignity (counts 1 to 5) for P-0574; other inhumane acts, cruel treatment and outrages upon personal

³⁰ *Katanga* OA13, ICC-01/04-01/07-3363, para. 101. Trial Chamber V(A) considered that, in order to provide adequate notice, the facts and circumstances that would support the proposed recharacterisation must be exhaustively identified, thereby permitting the Defence to be able to make full submission on whether the facts and circumstances described in the charges are exceeded and, if notice under Regulation 55(2) of the Regulations is given, to be informed in detail of the factual allegations to which any potential change in the legal characterisation of the facts relate. *See e.g. Ruto and Sang* Preliminary Notice Order, ICC-01/09-01/11-907, para. 10. The LRV failed to abide by this order and, on this basis, its Regulation 55 request was denied. *See Ruto and Sang* Notice Decision, ICC-01/09-01/11-1122, paras 45 and 49.

³¹ *Katanga* Further Notice Decision, ICC-01/04-01/07-3371-tENG, paras 13 (to notify the defence of all the evidence that may be presented in support of the allegations ‘would in effect to be to anticipate the deliberations’) and 15.

³² Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 75.

³³ Confirmation Decision, ICC-01/12-01/18-461-Conf-Corr, para. 315 (Dédéou Maiga); paras 676 and 681-682 (P-0570, P-0547, P-0574 and P-0542); 23 April 2020 Decision, ICC-01/12-01/18-767-Conf-Corr, paras 94-97 (P-0570, P-0547, P-0574 and P-0542); para. 125 (P-1708); paras 103-104 and 136 (P-0609); para. 104 (P-1134).

³⁴ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, paras 79-81.

dignity (counts 2, 4 and 5) for P-0570; other inhumane acts, cruel treatment and outrages upon personal dignity (counts 2, 4 and 5) for P-0542; and other inhumane acts, cruel treatment and outrages upon personal dignity (counts 2, 4 and 5) for P-0547.

17. The Defence submits that the Prosecution Application for Notice should be rejected in full and that the fact that PTC I proposed many of the re-characterisations does not constitute a sufficient basis for granting the Application.³⁵ Concerning P-1708, P-0609, P-1134 and Dédéou Maiga, the Defence submits that the Prosecution justified both its failure to include these victims in the initial confirmation of charges hearing, and the considerable delay as concerns the subsequent introduction of its Request to Amend the Charges, by reference to the need to take a cautious and considered approach as concerns the relevance of this evidence, in light of the body of evidence as a whole.³⁶ The Defence further alleges that when it submitted its Request to Amend the Charges, the Prosecution also had the benefit of PTC I's legal and factual approach to the existing charges.³⁷ The Defence argues accordingly that, if there was a legal and factual basis to include these additional characterisations, they could, and should, have been included in the Prosecution Request to Amend the Charges.³⁸

i. P-1134

18. According to the facts and circumstances described at paragraph 42 of the 23 April 2020 Decision, P-1134 was allegedly subjected to multiple acts of violence and ill-treatment in the context of her arrest and five-day detention, including a rape by multiple men. As a result, she allegedly had to spend two weeks in the hospital to recover.³⁹ The acts of coercion, violence and other forms of ill-treatment, including acts of a sexual nature, allegedly committed against P-1134 are currently characterised in the Charging Documents as offences charged in counts 2 (other inhumane acts), 4 (cruel treatment), 5 (outrages upon personal dignity), 6 (passing of irregular sentences), 11 and 12 (rape), and 13 (persecution).

³⁵ Defence Response, ICC-01/12-01/18-941-Conf, paras 1-2.

³⁶ Defence Response, ICC-01/12-01/18-941-Conf, para. 48.

³⁷ Defence Response, ICC-01/12-01/18-941-Conf, para. 48.

³⁸ Defence Response, ICC-01/12-01/18-941-Conf, para. 48.

³⁹ 23 April 2020 Decision, ICC-01/12-01/18-767-Conf-Corr, para. 42.

19. PTC I suggested⁴⁰ and the Prosecution now requests⁴¹ that the Chamber give notice that these facts and circumstances may also be considered as acts of torture under counts 1 and 3.
20. PTC I noted that although the Prosecution did not ask for the incident linked to P-1134 to be characterised as torture, the following legal findings could be made: that the element of severe pain required to characterise torture was satisfied, taking notably into account the victim's age, together with her vulnerability and mental state, the conditions of her detention, her physical state, and the fact that she was raped by [REDACTED] different men, and the rape of her co-detainee; and that, in order to reflect as fully as possible the harm suffered by P-1134, the acts allegedly committed against her should be characterised as a whole as the crime of torture.⁴²
21. In its Application for Notice, the Prosecution submits that PTC I's factual findings concerning P-1134 show severe pain as required for the crime of torture, based on the combination of the rapes and other circumstances of P-1134's detention, given her age, physical and psychological state, detention conditions and collective rape.⁴³ The Prosecution further submits that these factual findings show that: (i) P-1134 was in the perpetrator's custody or control; (ii) the pain did not arise only from, and was not inherent in or incidental to, lawful sanctions; (iii) the infliction of pain was for a prohibited purpose, as P-1134 was arrested for not being covered, detained at the *Banque Malienne de Solidarité* (the 'BMS'), and raped in detention.⁴⁴ According to the Prosecution, these factual findings, including the nature of the crime, also establish the perpetrators' intent to commit this crime, and intent and knowledge that these acts would result in severe pain.⁴⁵
22. The Defence submits that the Prosecution's arguments and citations do not relate to this alleged victim, and that the Prosecution has thus failed to discharge its burden of demonstrating that the proposed notice falls within the scope of the confirmed facts and

⁴⁰ 23 April 2020 Decision, ICC-01/12-01/18-767-Conf-Corr, para. 102.

⁴¹ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 87.

⁴² 23 April 2020 Decision, ICC-01/12-01/18-767-Conf-Corr, para. 102.

⁴³ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 88.

⁴⁴ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 89.

⁴⁵ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 89.

circumstances.⁴⁶ The Defence also submits that the underlying evidence is of a contradictory and hearsay nature and PTC I's decision to confirm certain factual findings does not satisfy the need to establish that there is a sufficiently clear and precise factual basis to fulfil both the necessary elements of torture and the link to Mr Al Hassan's own knowledge and conduct.⁴⁷ The Defence further argues that the latter is rendered impossible by the fact that the alleged conduct was committed by masked men, and allegedly took place at the BMS between November 2012 and January 2013 (which is not when the Islamic Police was allegedly present in the BMS).⁴⁸

23. Having regard to the elements required on the face of Articles 7(1)(f) and 8(2)(c)(i) of the Statute and the facts and circumstances described in the charges, as set out in paragraph 42 of the 23 April 2020 Decision, the Chamber finds that the Prosecution has demonstrated that the legal elements of torture as a crime against humanity and as a war crime (counts 1 and 3) may be derived from the facts and circumstances confirmed by PTC I in relation to P-1134.
24. The Chamber considers that, for present purposes and without prejudice to any decision under Regulation 55(1) of the Regulations and Article 74 of the Statute, the legal elements are covered by the relevant facts and circumstances and the potential re-characterisation sought does not exceed the facts and circumstances described in the charges. This assessment is made without making any determination as to the legal interpretation of these legal elements.
25. Furthermore, the Chamber considers that the request for notice pursuant to Regulation 55(2) in relation to this incident raises an issue which could result in an accountability gap. As analysed above, there is a possibility that ultimately the evidence could demonstrate that the alleged acts of coercion, violence and other forms of ill-treatment in relation to P-1134 were of such a nature so as to meet the constitutive elements of 'torture'. In that circumstance, the Chamber should not be precluded from convicting for the crime which most properly describes the acts committed and which has a distinct value in terms of accountability and the establishment of the truth.

⁴⁶ Defence Response, ICC-01/12-01/18-941-Conf, para. 51.

⁴⁷ Defence Response, ICC-01/12-01/18-941-Conf, para. 51.

⁴⁸ Defence Response, ICC-01/12-01/18-941-Conf, para. 51.

26. As to the argument raised by the Defence concerning the need to establish a link to Mr Al Hassan's own knowledge and conduct, the Chamber considers that its assessment under Regulation 55(2) of the Regulations does not require an analysis of the link to Mr Al Hassan's knowledge and conduct, an issue which will be addressed in the final judgment of the Chamber. Instead, what is at stake here, as analysed and developed above, is whether the legal elements of the crime of torture are covered by the facts and circumstances linked to the acts allegedly committed against P-1134, without having regard to the criminal responsibility of Mr Al Hassan at the present stage.

ii. P-0609

27. According to the facts and circumstances described at paragraph 81 of the 23 April 2020 Decision, P-0609 was allegedly detained a first time and received lashes on a number of occasions during her one-day detention. She was later assigned a husband against her will, detained, placed at the disposal of men and forced to have sexual intercourse with them.⁴⁹ The acts of coercion, violence and other forms of ill-treatment, including acts of a sexual nature, allegedly committed against P-0609 are currently characterised in the Charging Documents as offences charged in counts 2 (other inhumane acts), 4 (cruel treatment), 5 (outrages upon personal dignity), 8 (other inhumane acts in the form of forced marriage), 9 and 10 (sexual slavery), 11 and 12 (rape), and 13 (persecution).
28. PTC I suggested⁵⁰ and the Prosecution now requests⁵¹ that the Chamber give notice that the acts allegedly committed against this victim, relating to her first detention, may also be considered as acts of torture under counts 1 and 3 and as the crime of passing of irregular sentences under count 6.
29. PTC I noted that although the Prosecution did not ask that P-0609's first detention be characterised as torture or as the passing of irregular sentences, it considered that the following legal findings could be made: that the severe suffering test required to characterise torture could be satisfied for P-0609's first detention;⁵² and that the elements

⁴⁹ 23 April 2020 Decision, ICC-01/12-01/18-767-Conf-Corr, para. 82.

⁵⁰ 23 April 2020 Decision, ICC-01/12-01/18-767-Conf-Corr, paras 103, 136.

⁵¹ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 84.

⁵² 23 April 2020 Decision, ICC-01/12-01/18-767-Conf-Corr, para. 103.

necessary for the characterisation of the crime of passing of irregular sentences were satisfied.⁵³

30. The Prosecution submits that PTC I's factual findings concerning P-0609's first detention show that: (i) the severity of the suffering for torture could be established given that P-0609 was flogged several times; (ii) P-0609 was detained and mistreated for wearing jewellery; (iii) as she was detained, she was in the perpetrator's custody or control; and (iv) the pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.⁵⁴ According to the Prosecution, these factual findings also establish that the perpetrators intended to commit this crime, and had intent and knowledge that these acts would result in severe pain or suffering.⁵⁵ The Prosecution further submits that the same factual findings show that a sentence was pronounced without previous judgment by members of the armed groups, at the time authorities empowered to sentence, and that the perpetrators acted with intent and knowledge, issued the sentence for a particular purpose and ordered its direct execution without previous judgment.⁵⁶
31. The Defence submits that the identity of P-0609 has yet to be disclosed to the Defence and that this allegation therefore continues to concern an anonymous victim, and to be based on anonymous summaries of domestic complaints.⁵⁷ The Defence also argues that the allegations concerning P-0609's initial arrest are dated between April 2012 and January 2013, and that they therefore potentially pre-date Mr Al Hassan's alleged contributions to the common plan. It further submits that neither the charges, nor the underlying evidence specify the identity of the perpetrators. In the Defence's view, given the heightened/special intent that applies to torture, and the prejudicial impact as concerns the Chamber's reliance on anonymous allegations, there is no probative factual basis to conclude that Mr Al Hassan made a knowing and intentional contribution to acts, committed by unknown perpetrators, and which potentially pre-date the charging period.
32. Having regard to the elements required on the face of Articles 7(1)(f), 8(2)(c)(i) and 8(2)(c)(iv) of the Statute and the facts and circumstances described in the charges, as set out in paragraph 81 of the 23 April 2020 Decision, the Chamber finds that the Prosecution

⁵³ 23 April 2020 Decision, ICC-01/12-01/18-767-Conf-Corr, para. 136.

⁵⁴ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 85.

⁵⁵ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 85.

⁵⁶ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 86.

⁵⁷ Defence Response, ICC-01/12-01/18-941-Conf, para. 50.

has demonstrated that the legal elements of torture as a crime against humanity and as a war crime (counts 1 and 3) and the crime of passing of irregular sentences (count 6) may be derived from the facts and circumstances confirmed by PTC I in relation to P-0609's alleged first detention.

33. The Chamber considers that, for present purposes and without prejudice to any decision under Regulation 55(1) of the Regulations and Article 74 of the Statute, the legal elements are covered by the relevant facts and circumstances and the potential re-characterisation does not exceed the facts and circumstances described in the charges. This assessment is made without making any determination as to the legal interpretation of the relevant legal elements.
34. For the same reasons as expressed above,⁵⁸ the Chamber considers that the request for notice pursuant to Regulation 55(2) in relation to this incident with respect to the crime of torture (counts 1 and 3) raises an issue which could result in an accountability gap.
35. However, in the view of the Chamber, a similar conclusion cannot be drawn in relation to count 6. While the legal elements of the crime of passing of irregular sentences may be derived from the facts and circumstances confirmed by PTC I, as stated above, and although issuing a notice under Regulation 55(2) might contribute to the consistency of the charges read as a whole, the Chamber considers that the activation of Regulation 55 would not, in the present instance, be an appropriate exercise of its discretion under the Regulation. Indeed, the Chamber considers that the legal characterisation of the acts allegedly committed against P-0609, with the possible addition of the crime of torture as described above, properly captures the essence of the acts committed in terms of accountability and the establishment of the truth. In these circumstances, issuing a notice under Regulation 55(2) for the crime of passing of irregular sentences for this incident would essentially involve the Chamber in a prosecutorial function, so as to ensure the general consistency of the charges, as it is not necessary to address any accountability gap given the nature of the various crimes already available to the Chamber in relation to the alleged conduct.

⁵⁸ See above at para. 25.

36. With respect to the crime of torture, as to the argument raised by the Defence concerning Mr Al Hassan's contributions to the acts allegedly committed against P-0609, the Chamber refers to its findings above.⁵⁹ What is at stake here, as analysed and developed above, is whether the legal elements of the crime of torture are covered by the relevant facts and circumstances linked to P-0609, without having regard to the criminal responsibility of Mr Al Hassan at the present stage.

iii. P-1708

37. According to the facts and circumstances described at paragraphs 71 and 108 of the 23 April 2020 Decision, P-1708, [REDACTED], was allegedly put in detention [REDACTED] and [REDACTED]. The ill-treatment allegedly committed against P-1708 is currently characterised in the Charging Documents as an offence charged in counts 2 (other inhumane acts), 4 (cruel treatment), 6 (passing of irregular sentences), and 13 (persecution).
38. PTC I suggested⁶⁰ and the Prosecution now requests⁶¹ that the Chamber give notice that the acts allegedly committed against P-1708 may also be considered as outrages upon personal dignity under count 5.
39. PTC I noted that, although the Prosecution did not request that the acts allegedly committed against P-1708 be characterised as outrages upon personal dignity, the elements of this crime could be satisfied in the present case considering the fact that P-1708 [REDACTED] and the perpetrators' conduct towards him.⁶²
40. The Prosecution submits that PTC I's factual findings concerning P-1708 show that the perpetrator degraded or otherwise violated P-1708's dignity to the required level of severity, notably taking into account the fact that Mohamed Moussa arrested P-1708 for not attending prayer and detained him at the BMS [REDACTED]; that P-1708 [REDACTED]; and that Moussa [REDACTED].⁶³ According to the Prosecution, these

⁵⁹ See above at para. 26.

⁶⁰ 23 April 2020 Decision, ICC-01/12-01/18-767-Conf-Corr, para. 125.

⁶¹ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 82.

⁶² 23 April 2020 Decision, ICC-01/12-01/18-767-Conf-Corr, para. 125.

⁶³ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 83.

factual findings, including the nature of the crime, also establish intent to commit this crime and intent and knowledge that these acts would result in a violation of dignity.⁶⁴

41. The Defence argues that P-0641's testimony, and PTC I's findings concerning this testimony, fail to support the conclusion that Mohamed Moussa knew that P-1708 [REDACTED] at the time he was arrested, or that he maintained him in detention after this fact was disclosed to him.⁶⁵ The Defence further argues that there is also no information concerning the severity of the alleged humiliation or degradation: arrest and temporary detention do not, in themselves, satisfy this threshold. Given that [REDACTED] did not witness P-1708's arrest or conditions of detention, any findings on these matters would, according to the Defence, constitute pure speculation. In the Defence's view, there are also no factual findings concerning Mr Al Hassan's knowledge as concerns P-1708's [REDACTED], or that his conduct would contribute to P-1708's alleged humiliation or degradation.
42. Having regard to the elements required on the face of Article 8(2)(c)(ii) of the Statute and the facts and circumstances described in the charges, as set out in paragraphs 71 and 108 of the 23 April 2020 Decision, the Chamber finds that the Prosecution has demonstrated that the legal elements of the war crime of outrages upon personal dignity (count 5) may be derived from the facts and circumstances confirmed by PTC I in relation to P-1708.
43. The Chamber considers that for present purposes and without prejudice to any decision under Regulation 55(1) of the Regulations and Article 74 of the Statute, the legal elements are covered by the relevant facts and circumstances and the potential re-characterisation does not exceed the facts and circumstances described in the charges. Contrary to the Defence submissions, in its assessment of P-1708's suffering, PTC I notably took into account the vulnerability of the witness, [REDACTED] by Mohamed Moussa [REDACTED] even after being told about [REDACTED].⁶⁶ The Chamber emphasises that this assessment is made without making any determination as to the legal interpretation of the relevant legal elements.

⁶⁴ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 83.

⁶⁵ Defence Response, ICC-01/12-01/18-941-Conf, para. 49.

⁶⁶ 23 April 2020 Decision, ICC-01/12-01/18-767-Conf-Corr, para. 108.

44. Nevertheless, the Chamber is of the view that although the legal elements of the war crime of outrages upon personal dignity may be derived from the facts and circumstances confirmed by PTC I in relation to P-1708, granting this request would not, in the present instance, be an appropriate exercise of the Chamber's discretion under Regulation 55 of the Regulations. The Chamber considers that the current legal characterisation of the acts allegedly committed against P-1708 properly captures the essence of the acts committed in terms of accountability and the establishment of the truth. In these circumstances, issuing a notice under Regulation 55(2) for the crime of outrages upon personal dignity for this incident would essentially involve the Chamber in a prosecutorial function, so as to ensure the general consistency of the charges, as it is not necessary to address any accountability gap given the nature of the various crimes already available to the Chamber in relation to the alleged conduct.

iv. P-0570, P-0547, P-0574, and P-0542

45. According to the facts and circumstances described in the charges, P-0570,⁶⁷ P-0547,⁶⁸ P-0574,⁶⁹ and P-0542⁷⁰ were allegedly detained, and coerced into having sexual relations or subjected to acts of a sexual nature without having the capacity to give free consent during their detention.⁷¹ The acts of a sexual nature allegedly committed against P-0570, P-0547, P-0574, and P-0542 are currently characterised exclusively as offences charged in count 13.

a. First request

46. PTC I suggested⁷² and the Prosecution now requests⁷³ that the Chamber give notice that the acts of a sexual nature allegedly committed against P-0570, P-0547, P-0574, and P-0542 may also be considered as rape under counts 11 and 12.

47. PTC I noted that although the Prosecution did not request that the acts allegedly committed against P-0570, P-0547, P-0574 and P-0542 be characterised as rape, the legal elements of the crime of rape as a crime against humanity and as a war crime were established to

⁶⁷ Confirmation Decision, ICC-01/12-01/18-461-Conf-Corr, para. 677.

⁶⁸ Confirmation Decision, ICC-01/12-01/18-461-Conf-Corr, para. 678.

⁶⁹ Confirmation Decision, ICC-01/12-01/18-461-Conf-Corr, para. 679.

⁷⁰ Confirmation Decision, ICC-01/12-01/18-461-Conf-Corr, para. 680.

⁷¹ Confirmation Decision, ICC-01/12-01/18-461-Conf-Corr, para. 681.

⁷² Confirmation Decision, ICC-01/12-01/18-461-Conf-Corr, para. 682; 23 April 2020 Decision, ICC-01/12-01/18-767-Conf-Corr, paras 94-97.

⁷³ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 78.

the standard required, finding notably that: (i) the facts described by the victims show the invasion of their bodies by penetration; (ii) the conditions and circumstances surrounding these acts of invasion show that the act was committed by force, the threat of force or by taking advantage of the coercive environment present at the time in Timbuktu; (iii) these acts were allegedly committed while the victims were in detention, under the full control of their jailer, and noted in this respect the state of vulnerability of these victims who had valid reasons to fear for their lives; (iv) the coercion was all the more significant in that these acts were in each instance committed collectively against a single victim; and (v) the subjective elements required under Article 30 of the Statute were established.⁷⁴ PTC I also pointed out that, although they suffered harm similar to that suffered by other victims, the acts allegedly committed against P-0570, P-0547, P-0574 and P-0542 were not characterised in the same way in the Confirmation Decision.⁷⁵

48. In its Application for Notice, the Prosecution submits that PTC I's factual findings concerning these victims show that the legal elements of the crime of rape under Articles 7(1)(g) and 8(2)(e)(vi) of the Statute are established, notably: (i) the invasion of victims' bodies by penetration; (ii) that the acts were committed by force, threat of force or taking advantage of coercive environment, as a result of circumstances, including the victims' detention; and (iii) that the perpetrators, who were members of the armed groups, acted with requisite mental element because they inflicted acts of violence and humiliation, exercised force, threats and coercion and were aware of the victims' circumstances.⁷⁶
49. The Defence submits that the cases of P-0570, P-0547, P-0574 and P-0542 are currently set out in the charges under the count of persecution, and that as such, there is no 'impunity gap'. The Defence further submits that the Prosecution affirmed to PTC I that its decision not to charge these allegations as rape was intentional, and not an inadvertent omission.⁷⁷
50. In addition, referring to the reasoning of PTC I concerning the crime of persecution, the Defence argues that whereas PTC I made findings concerning Mr Al Hassan's alleged responsibility in relation to the general category of 'persecution', it made no factual findings concerning his knowledge and contributions to these particular incidents, or the

⁷⁴ Confirmation Decision, ICC-01/12-01/18-461-Conf-Corr, paras 681-682.

⁷⁵ 23 April 2020 Decision, ICC-01/12-01/18-767-Conf-Corr, paras 96-97.

⁷⁶ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 78.

⁷⁷ Defence Response, ICC-01/12-01/18-941-Conf, para. 38.

linkage between these incidents and the common plan.⁷⁸ As such, the Defence submits that there are no confirmed facts and circumstances which would form the basis for a conclusion that Mr Al Hassan made knowing or intentional contributions to the commission of these incidents.⁷⁹ The proposed notice would thus result in charges that are defective and prejudicial, given the absence of particulars on these points.⁸⁰ The Defence further argues that PTC I's factual findings concerning other incidents of rape are not applicable to these incidents, as they focus on Mr Al Hassan's alleged knowledge and contributions to acts of forcible marriage (comprising rape).⁸¹

51. Having regard to the elements required on the face of Articles 7(1)(g) and 8(2)(e)(vi) of the Statute and the facts and circumstances described in the charges, as set out in paragraphs 677 (for P-0570), 678 (for P-0547), 679 (for P-0574), as well as 680 (for P-0542) of the Confirmation Decision, the Chamber finds that the Prosecution has demonstrated that the legal elements of rape as a crime against humanity and as a war crime (counts 11 and 12) may be derived from the facts and circumstances confirmed by PTC I in relation to P-0570, P-0547, P-0574, and P-0542. The Chamber notes that the circumstances in which these victims were allegedly arrested and detained, which are developed in paragraphs 282, 331, 334 and 337 of the Confirmation Decision, may also be factually relevant to element 2 of the crime against humanity and the war crime of rape and the overall coercive environment in which these victims were allegedly placed.⁸²
52. The Chamber considers that for present purposes and without prejudice to any decision under Regulation 55(1) of the Regulations and Article 74 of the Statute, the legal elements are covered by the relevant facts and circumstances and the possible re-characterisation would not exceed the facts and circumstances described in the charges. This assessment is made without making any determination as to the legal interpretation of the relevant legal elements.
53. Furthermore, the Chamber considers that the request for notice pursuant to Regulation 55(2) in relation to these incidents raises an issue which could result in an accountability gap. The Chamber is of the view that the characterisation of acts of sexual violence as

⁷⁸ Defence Response, ICC-01/12-01/18-941-Conf, para. 40.

⁷⁹ Defence Response, ICC-01/12-01/18-941-Conf, para. 40.

⁸⁰ Defence Response, ICC-01/12-01/18-941-Conf, para. 40.

⁸¹ Defence Response, ICC-01/12-01/18-941-Conf, para. 41.

⁸² Article 7(1)(g)-1 and Article 8(2)(e)(vi)-1 of the Elements of Crimes.

‘persecution’ does not have the same meaning as their characterisation as ‘rape’. Rape, with the particular harm occasioned on the victim, must be recognised as such when supported by the evidence, both for the establishment of the truth and for accountability. Thus, given that the legal elements of the crime of rape may be derived from the facts and circumstances found by PTC I, the Chamber must have the possibility to consider the crime of rape in relation to these allegations to avoid the type of accountability gap that Regulation 55 was designed to prevent.

54. Finally, as to the argument raised by the Defence concerning Mr Al Hassan’s conduct and knowledge, the Chamber notes that, in the Confirmation Decision, PTC I only examined the responsibility of Mr Al Hassan for acts of sexual violence that were committed as part of the practice of forced marriages or as part of the underlying acts of persecution referred to under count 13.⁸³ However, in the 23 April 2020 Decision, PTC I confirmed Mr Al Hassan’s liability under Article 25(3)(d) of the Statute for crimes of rape in detention under counts 11 and 12, including the incidents linked to P-1134, P-0636 and P-1674, as confirmed by it.⁸⁴
55. As part of its analysis, PTC I notably found that the common purpose of the armed groups also included the commission of crimes of rape, perpetrated in detention and consisting of the criminal acts relating to P-1134, P-0636 and P-1674.⁸⁵ It further found that, judging from his acts and his role within the Islamic police, Mr Al Hassan contributed to creating, promoting and maintaining an environment that was coercive, violent and oppressive to women and which led to the crimes committed against the women of Timbuktu, including when women were detained under the control of members of Ansar Dine/AQIM.⁸⁶ PTC I also found that, judging from his role within the Islamic police and his contributions to the practice of forced marriages, Mr Al Hassan was fully aware of the conditions in which women were detained and the sexual abuses that were perpetrated during these detentions.⁸⁷ Contrary to the Defence submissions,⁸⁸ the Chamber therefore observes that PTC I’s findings in relation to incidents involving acts of a sexual nature did not exclusively focus on Mr Al Hassan’s alleged knowledge and contributions to acts of

⁸³ 23 April 2020 Decision, ICC-01/12-01/18-767-Conf-Corr, para. 179.

⁸⁴ 23 April 2020 Decision, ICC-01/12-01/18-767-Conf-Corr, para. 192.

⁸⁵ 23 April 2020 Decision, ICC-01/12-01/18-767-Conf-Corr, para. 188.

⁸⁶ 23 April 2020 Decision, ICC-01/12-01/18-767-Conf-Corr, para. 190.

⁸⁷ 23 April 2020 Decision, ICC-01/12-01/18-767-Conf-Corr, para. 194.

⁸⁸ Defence Response, ICC-01/12-01/18-941-Conf, para. 41.

forced marriage, but also concerned his alleged knowledge and contributions to acts of a sexual nature allegedly committed against women while they were detained and under the control of members of the armed groups.

56. The Chamber further refers to its findings above.⁸⁹ What is at stake here, as analysed and developed above, is whether the legal elements of the crimes of rape are covered by the facts and circumstances linked to the acts of a sexual nature allegedly committed against P-0570, P-0547, P-0574 and P-0542, without having regard to the criminal responsibility of Mr Al Hassan at the present stage. The Chamber notes that the relevant facts and circumstances, which were confirmed under count 13 of the charges, remain unchanged and further notes that the alleged link between each incident and the common purpose of the armed groups, as well as Mr Al Hassan's alleged knowledge and contributions, will be fully considered and addressed in the final judgment of the Chamber.

b. Additional requests

57. In its Application for Notice, the Prosecution further seeks notice of possible re-characterisation such that the rapes allegedly committed against these victims may also be considered, as appropriate, under counts 1 to 5.⁹⁰

(a) P-0574 (counts 1 to 5)

58. The Prosecution submits that the findings relating to P-0574's alleged rapes in detention justify including them in counts 1 to 5.⁹¹
59. This submission presents unique issues in terms of the application of Regulation 55 of the Regulations. Allegations of acts of violence and other forms of ill-treatment committed against P-0574 are already included under counts 1 to 5. Unlike the instances above, the Prosecution does not seek notice of possible re-characterisation such that facts and circumstances in relation to a particular victim, standing alone, could be found to have a different legal characterisation. Rather, the Prosecution's concern is that in its Confirmation Decision, PTC I did not reference its findings on the alleged acts of a sexual nature committed against P-0574 while in detention in confirming the charges under

⁸⁹ See above at para. 26.

⁹⁰ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 77.

⁹¹ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 80.

counts 1 to 5. At this point, the Prosecution seeks, by way of Regulation 55, to have those facts included under these counts, already confirmed by PTC I.

60. The Chamber is of the view that it is unnecessary to resort to Regulation 55 in this context. A trial chamber may consider all relevant facts and circumstances, confirmed by the pre-trial chamber, in assessing each count. Moreover, even given the structure and the specification of the charges in this particular case, there is no issue of lack of notice or prejudice to the Defence in that the relevant incident with reference to the particular victim was already included in counts 1 to 5.
61. The Chamber considers that should the evidence establish that P-0574 was subjected to acts of a sexual nature during her detention, that would ultimately be highly relevant to the assessment of whether alleged acts of violence and other forms of mistreatment were committed against P-0574 under counts 1 to 5. In this regard, the Chamber agrees with PTC I's statement, concerning another alleged victim, that [TRANSLATION] 'it is impossible in practice to dissociate [the act of rape and the other conditions of her detention as a whole] and reach the conclusion that the victim suffered inhumane acts and cruel treatment "on the one hand" and a rape "on the other", because it was the same victim, the same person, who experienced those events at the same time or within a very short space of time. The act of rape does not exist separately from the context of other inhumane acts and cruel treatment but aggravates that context [...].'⁹²
62. The Chamber considers that this logic applies similarly to the alleged sufferings of P-0574 during her detention. While PTC I has assessed part of the facts and circumstances relating to this victim under counts 1 to 5, the Chamber may also take into consideration under these counts facts and circumstances linked to the acts of a sexual nature allegedly committed against P-0574, in order to reflect exhaustively the sufferings as well as the humiliations, degradations and/or other violations of dignity allegedly endured by this victim during her detention. For complete clarity, it is therefore noted that the Chamber may take into consideration alleged acts of sexual violence committed against P-0574 in its assessment and analysis of counts 1 to 5.

⁹² 23 April 2020 Decision, ICC-01/12-01/18-767-Conf-Corr, para. 102.

63. Consequently, the Chamber declines to provide notice pursuant to Regulations 55(2) of the Regulations of the possible re-characterisations sought under counts 1 to 5 for P-0574.

(b) P-0542, P-0547 and P-0570 (count 5 as well as counts 2 and 4)

64. The Prosecution suggests including PTC I's factual findings in relation to the alleged rapes in detention of P-0570, P-0542 and P-0547 in count 5. The Prosecution also suggests re-characterising the alleged rapes in detention of P-0570, P-0542 and P-0547 together with the other facts already retained under count 5 as other inhumane acts (count 2) and cruel treatment (count 4). The Prosecution submits that PTC I's findings show these crimes' material and mental elements.⁹³

65. The Prosecution recalls PTC I's overall factual findings as follows: (i) P-0570 was beaten and thrown into a vehicle during her arrest in her relatives' presence, threatened with being killed, then raped by three armed men during her one-day detention, becoming pregnant from the rapes; (ii) P-0542 was arrested and detained without food for three days and nights in a dirty room where she had to relieve herself on the floor, her eyes were covered and her hands tied; she was raped, woke up naked and covered with blood, and became pregnant as a result of the rape; (iii) P-0547 was arrested [REDACTED]; she was then detained for the day without food, had to relieve herself in the cell, was threatened to be killed and was raped during her detention.⁹⁴

66. The Defence submits, as concerns P-0547 in particular, that the Prosecution specifically indicated at the confirmation stage that the allegations concerning the factual incident of rape were not included in counts 1 to 5.⁹⁵ According to the Defence, this alleged factual incident therefore falls outside the scope of the charges.⁹⁶

67. With respect to the other incidents referred to by the Prosecution, the Defence submits that PTC I considered that the evidence presented by the Prosecution did not allow for qualifying the violence allegedly committed against P-0547 and P-0570 as the crime

⁹³ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 81.

⁹⁴ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 81.

⁹⁵ Defence Response, ICC-01/12-01/18-941-Conf, para. 42.

⁹⁶ Defence Response, ICC-01/12-01/18-941-Conf, para. 42.

against humanity of other inhumane acts pursuant to Article 7(1)(k) of the Statute.⁹⁷ The Defence further submits that, in the 23 April 2020 Decision, PTC I specified that its factual findings regarding P-0542, P-0570 and P-0547 were confined to certain paragraphs of the Confirmation Decision, which are not the ones relied upon by the Prosecution in its Application for Notice.⁹⁸ As such, the Defence submits that the Prosecution's reliance on paragraphs 677, 680, and 678 of the Confirmation Decision falls outside the scope of the confirmed facts and circumstances of this case, and the remaining paragraphs do not substantiate the factual allegations that have been advanced in support of the proposed re-characterisations.⁹⁹

68. In relation to count 5, the Prosecution request raises the same issues as set out above regarding P-0574, as allegations of acts of violence and other forms of ill-treatment committed against P-0542, P-0570 and P-0547 are already included under count 5, but PTC I did not reference its findings on the alleged acts of a sexual nature committed against these victims while in detention in confirming the charges under this count. As explained above and following the same reasoning, the Chamber is of the view that it is unnecessary to resort to Regulation 55 in this context. However, consistent with the approach above, the Chamber notes for complete clarity that it may take into consideration alleged acts of sexual violence committed against P-0542, P-0570 and P-0547 in its assessment and analysis of count 5.
69. Consequently, the Chamber declines to provide notice pursuant to Regulations 55(2) of the Regulations of the possible re-characterisations sought under count 5 for P-0542, P-0570 and P-0547.
70. In relation to counts 2 and 4, regarding P-0542, considering the elements required on the face of Articles 7(1)(k) and 8(2)(c)(i) of the Statute and all facts and circumstances described in the charges, which are set out in paragraphs 331 and 680 of the Confirmation Decision, the Chamber finds that the Prosecution has demonstrated that the legal elements of the crime of other inhumane acts (count 2) and the crime of cruel treatment (count 4) may be derived from all facts and circumstances confirmed by PTC I in relation to P-0542.

⁹⁷ Defence Response, ICC-01/12-01/18-941-Conf, para. 42, *referring to* Confirmation Decision, ICC-01/12-01/18-461-Conf-Corr, paras 338 and 353.

⁹⁸ Defence Response, ICC-01/12-01/18-941-Conf, paras 43-44.

⁹⁹ Defence Response, ICC-01/12-01/18-941-Conf, para. 44.

71. The Chamber considers that for present purposes and without prejudice to any decision under Regulation 55(1) of the Regulations and Article 74 of the Statute, the legal elements are covered by the relevant facts and circumstances and the possible re-characterisation does not exceed the facts and circumstances described in the charges. This assessment is made without making any determination as to the legal interpretation of the relevant legal elements. Moreover, in terms of an accountability gap, the Chamber is of the view that given the scope of the alleged conduct, if ultimately supported by the evidence, the crime of other inhumane acts and the crime of cruel treatment could be the most appropriate legal characterisation.
72. Regarding P-0547 and P-0570, the Chamber notes that PTC I declined to confirm the facts and circumstances as described in paragraphs 334 and 337 of the Confirmation Decision under count 2 (other inhumane acts).¹⁰⁰ PTC I considered that it could not be established to the requisite standard that the threshold of suffering required for the crime of other inhumane acts as a crime against humanity was met. It however considered that the facts could constitute the crime of outrages upon personal dignity as a war crime (count 5).
73. As highlighted by the Prosecution, the Chamber observes that PTC I conducted its assessment of the sufferings allegedly endured by these victims on the basis of the facts and circumstances as described in paragraphs 334 and 337 of the Confirmation Decision, and therefore did not take into account the acts of a sexual nature allegedly committed against these victims during their detention as part of its assessment. The Chamber considers that looking at all the forms of ill-treatment these victims allegedly suffered from, including the acts of a sexual nature, as a whole, may potentially lead to a different assessment.
74. However, bearing in mind the negative finding of PTC I regarding the required threshold of suffering for count 2, the Chamber finds that it would be in a better position to make its assessment for these incidents at a later stage, upon hearing the testimony of the relevant witnesses in court. The Chamber therefore declines to provide notice of the possible re-characterisations sought under count 2 and count 4 at this stage.

¹⁰⁰ Confirmation Decision, ICC-01/12-01/18-461-Conf-Corr, paras 335, 338, 353.

75. Nonetheless, the Chamber emphasises that it is ultimately its prerogative to decide if and when to give notice under Regulation 55(2) of the Regulations. Consequently, the above assessment is without prejudice to provide notice at a later point in time, either *proprio motu* or following a request, should it consider it to be appropriate to do so at the relevant time.¹⁰¹

v. Dédéou Maiga

76. According to the facts and circumstances described at paragraphs 311 to 313 of the Confirmation Decision, Dédéou Maiga was notably sentenced to having his hand amputated, which sentence was carried out publicly. The acts of violence and other forms of ill-treatment allegedly committed against Dédéou Maiga are charged in counts 1 and 3 (torture), 2 (other inhumane acts), 4 (cruel treatment), 5 (outrages upon personal dignity), 6 (passing of irregular sentence), and 13 (persecution).
77. PTC I suggested¹⁰² and the Prosecution now requests¹⁰³ that the Chamber give notice that Dédéou Maiga's amputation may also be considered as an act of mutilation pursuant to Article 8(2)(c)(i) of the Statute.
78. The Prosecution submits that PTC I's factual findings concerning Dédéou Maiga show that: the tribunal sentenced him to have his hand amputated, which sentence was carried out; Dédéou Maiga's hand was amputated by a member of the armed groups; as well as the fact that the perpetrator intended to commit this crime and had the requisite intent and knowledge.¹⁰⁴
79. The Defence argues that the proposed notice would expand the scope of the confirmed facts and circumstances. The Defence submits that the Prosecution made a deliberate decision not to include the crime of mutilation in the initial charges, and that it would be unfair and prejudicial for the Prosecution to adopt a completely different position, on the (then) eve of trial.¹⁰⁵

¹⁰¹ See Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the Prosecution's Application for Notice to be given pursuant to Regulation 55(2) on Mr Yekatom's Individual Criminal Responsibility, 2 June 2020, ICC-01/14-01/18-542.

¹⁰² Confirmation Decision, ICC-01/12-01/18-461-Conf-Corr, para. 315.

¹⁰³ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 90.

¹⁰⁴ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 90.

¹⁰⁵ Defence Response, ICC-01/12-01/18-941-Conf, para. 52, referring to ICC-01/12-01/18-430-Conf, para. 34.

80. Having regard to the elements required on the face of Article 8(2)(c)(i) of the Statute and the facts and circumstances described in the charges, as set out in paragraphs 311-313 of the Confirmation Decision, the Chamber finds that the Prosecution has demonstrated that the legal elements of the war crime of mutilation may be derived from the facts and circumstances confirmed by PTC I in relation to Dédéou Maiga.
81. The Chamber considers that for present purposes and without prejudice to any decision under Regulation 55(1) of the Regulations and Article 74 of the Statute, the legal elements are covered by the relevant facts and circumstances and the potential re-characterisation does not exceed the facts and circumstances described in the charges. This assessment is made without making any determination as to the legal interpretation of the relevant legal elements.
82. Furthermore, the Chamber considers that the request for notice pursuant to Regulation 55(2) in relation to this incident raises an issue which could result in an accountability gap. In an instance where it is alleged that the acts of violence and other forms of ill-treatment resulted in permanent debilitation of the victim, accountability requires that the legal characterisation reflects this circumstance. This is best achieved by including the possibility of a finding of an act of mutilation pursuant to Article 8(2)(c)(i) of the Statute.

vi. Rights of the accused

83. Notice of a possible change in the legal characterisation of the facts does not constitute *per se* a violation of the accused's rights.¹⁰⁶ However, it is the affirmative obligation of the Chamber to ensure that any eventual re-characterisation does not render a trial unfair.¹⁰⁷ How the safeguards set out in Regulation 55(2)-(3) of the Regulations must be applied to protect the rights of the accused fully and whether additional safeguards must be implemented depends on the circumstances of the case.¹⁰⁸ Concerning the crimes allegedly committed against P-1134, P-0609, P-0570, P-0547, P-0574, P-0542 and

¹⁰⁶ *Lubanga* OA15 OA16, ICC-01/04-01/06-2205, para. 86; *Katanga* Notice Decision, ICC-01/04-01/07-3319-tENG/FRA, paras 44 and 46; *Katanga* Judgment, ICC-01/04-01/07-3436-tENG, para. 1486.

¹⁰⁷ *Lubanga* OA15 OA16, ICC-01/04-01/06-2205, para. 85.

¹⁰⁸ *Lubanga* OA15 OA16, ICC-01/04-01/06-2205, paras 85-86; *see also Katanga* OA13, ICC-01/04-01/07-3363, para. 88; *Ruto and Sang* Notice Decision, ICC-01/09-01/11-1122, para. 20; Trial Chamber III, *Bemba*, Decision on "Defence Request for Leave to Appeal the Decision on the Temporary Suspension of the Proceedings Pursuant to Regulation 55(2) of the Regulations of the Court and related Procedural Deadlines" of 11 January 2013, 16 January 2013, ICC-01/05-01/08-2487-Red, para. 22; *Katanga* Notice Decision, ICC-01/04-01/07-3319-tENG/FRA, paras 11-13; *Katanga* Judgment, ICC-01/04-01/07-3436-tENG, paras 1444 and 1575-1576.

Dédéou Maiga, the Chamber considers that giving the requested notice for the possible re-characterisations does not cause unfairness to the accused at this stage of the proceedings.

84. First, the Defence is aware that Regulation 55 notice is a possibility in light of PTC I's clear legal findings on the matter in the Charging Documents. Second, the Defence is informed in detail of the facts and circumstances relied upon for the proposed re-characterisations which are referred to by the Chamber above in relation to the relevant incidents. Third, in light of the order of presentation of the Prosecution witnesses,¹⁰⁹ the Chamber finds that waiting for the presentation of the evidence relevant to the above incidents, for which the possibility of variation of legal re-characterisation clearly appears, would be more prejudicial for the accused. Indeed, on the basis of the current schedule, the witnesses who are expected to testify about these incidents will appear before the Chamber at an advanced stage of the trial. Fourth, the notice comes at an early point in the trial proceedings, allowing the Defence to have an adequate opportunity to adapt its strategy as necessary.
85. On the basis of these considerations, the Chamber finds that giving notice pursuant to Regulation 55(2) of the Regulations now for the relevant charged incidents will avoid any undue prejudice to the accused, and the fairness and expeditiousness of the proceedings.¹¹⁰

vii. Conclusion

86. It appears to the Chamber that the legal characterisation of the facts and circumstances described in the charges may be subject to change as follows:
- the facts and circumstances underlying the incident related to P-1134 may be considered as torture as a crime against humanity and as a war crime, under counts 1 and 3 of the charges; with the same mode of liability confirmed by PTC I for other counts related to this incident, namely Article 25(3)(d) of the Statute;

¹⁰⁹ See Order of Prosecution Witnesses, 12 May 2020, ICC-01/12-01/18-805-Conf-AnxA, *annexed to* Prosecution submission of further information in the Prosecution List of Witnesses and of the Prosecution Final List of Evidence, ICC-01/12-01/18-805-Conf (notified on 13 May 2020). See also Forthcoming Witness Lists sent by email by the Prosecution on 25 August 2020 at 17:35, 1 September 2020 at 19:15, 15 October 2020 at 08:35 and 30 November 2020 at 14:52.

¹¹⁰ See *Gbagbo* OA7, ICC-02/11-01/15-369, para. 51.

- the facts and circumstances underlying the incident related to P-0609 may be considered as torture as a crime against humanity and as a war crime, under counts 1 and 3 of the charges; with the same mode of liability confirmed by PTC I for other counts related to this incident, namely Article 25(3)(d) of the Statute;
- the facts and circumstances underlying the incidents related to P-0570, P0547, P-0574 and P-0542 may be considered as rape as a crime against humanity and as a war crime, under counts 11 and 12 of the charges; with the same mode of liability confirmed by PTC I for other counts related to these incidents, namely Article 25(3)(d) of the Statute;
- the facts and circumstances underlying the incident related to P-0542 may be considered as the crime against humanity of other inhumane acts and the war crime of cruel treatment, under counts 2 and 4 of the charges; with the same mode of liability confirmed by PTC I for other counts related to this incident, namely Article 25(3)(d) of the Statute;
- the facts and circumstances underlying the incident related to Dédéou Maiga may be considered as the war crime of mutilation, under an additional count of the charges; with the same mode of liability confirmed by PTC I for other counts related to this incident, namely Article 25(3)(d) of the Statute.

87. The Chamber notes that the notice of the potential re-characterisation concerning Dédéou Maiga concerns a new count which is not yet part of the case as confirmed. The Chamber considers it of assistance to receive an addendum to the trial brief filed by the Prosecution on 18 May 2020,¹¹¹ wherein the Prosecution explains its case, with accompanying evidence, under each of the proposed legal characterisations for which notice pursuant to Regulation 55(2) of the Regulations has now been given. The Prosecution is directed to file this addendum by 29 January 2021.

¹¹¹ Prosecution Trial Brief, ICC-01/12-01/18-815-Conf-AnxA, *annexed to* Submission of Prosecution Trial Brief, ICC-01/12-01/18-819-Conf (notified on 19 May 2020).

2. *Re-characterisations of facts related to modes of liability*

88. The Prosecution requests the Chamber to notify the parties and participants of the possibility of the legal re-characterisation of facts regarding the accused's criminal responsibility as described in the Charging Documents.¹¹² The Prosecution groups the requested additional modes of responsibility into two distinct sets: those already contained in the Prosecution's Request to Amend the Charges and in relation to which PTC I already indicated that they could be canvassed before the Chamber; and those not contained in the Prosecution's Request to Amend the Charges but for which PTC I's factual findings in the Charging Documents still, according to the Prosecution, justify possible re-characterisation.¹¹³
89. The Prosecution submits that these additional modes of liability supplement the legal characterisations confirmed by PTC I, as set out in the Charging Documents, and are based on the same confirmed facts. The Prosecution argues that giving timely notice of these additional modes is consistent with the practice of this Court and the *ad hoc* tribunals, and would allow the Chamber to select the legal characterisations better fitting the accused's contributions at the end of the trial.¹¹⁴
90. The Chamber notes that the Appeals Chamber has confirmed that pursuant to Regulation 55, a trial chamber can re-characterise facts and circumstances to include a mode of liability that was considered, but not confirmed by the pre-trial chamber, so long as the facts and circumstances that could potentially be re-characterised were confirmed by that pre-trial chamber.¹¹⁵

i. Initial re-characterisations sought

a. Article 25(3)(a) of the Statute for incident concerning [REDACTED]

91. The Prosecution seeks notice of possible re-characterisation of Mr Al Hassan's responsibility as direct perpetrator pursuant to Article 25(3)(a) of the Statute in relation to [REDACTED] under counts 1 and 3 (torture), 2 (other inhumane acts), 4 (cruel treatment)

¹¹² Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 1.

¹¹³ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 8.

¹¹⁴ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 9.

¹¹⁵ *Gbagbo* OA7, ICC-02/11-01/15-369, para. 32.

and 5 (outrages upon personal dignity). This mode of liability would be alternative to Mr Al Hassan's responsibility under Article 25(3)(c) and Article 25(3)(d) of the Statute as confirmed by PTC I in relation to this victim for these counts.¹¹⁶

92. The Prosecution submits that the need for notice arises from the evidence showing the accused's involvement including [REDACTED] that he personally flogged [REDACTED]. According to the Prosecution, PTC I found that [REDACTED] he participated in the flogging of [REDACTED], but nevertheless 'incorrectly stated'¹¹⁷ that the nature of his participation was unknown. The Prosecution also notes that PTC I, in its 21 February 2020 Decision, stated the Trial Chamber had the authority to re-characterise the accused's responsibility for [REDACTED] such that it falls under Article 25(3)(a) of the Statute.¹¹⁸
93. According to the Prosecution, while PTC I appears to have overlooked some of the key evidence as to the nature of the accused's participation in flogging this victim, re-characterisation to direct perpetration under Article 25(3)(a) is consistent with the following PTC I factual findings: (i) the accused's official involvement, as part of his functions within the Islamic Police, in executing sanctions ordered by the Islamic Tribunal, including attending punishment and securing locations, and even carrying out the flogging of the persons sentenced; (ii) the accused's official involvement, given his functions within the Islamic Police, in personally flogging two men around 8 July 2012, for which he was regarded as a direct perpetrator; (iii) the accused's official involvement, given his functions within the Islamic Police, in signing the Islamic Police report concerning [REDACTED], which was transmitted to the Tribunal that sentenced them, and — with others, including Islamic Police members — attending their flogging and ensuring a security perimeter.¹¹⁹
94. The Defence opposes the proposed notice. It argues that in the Confirmation Decision, PTC I explicitly found that the Prosecution had failed to substantiate the factual aspects of its allegation that Mr Al Hassan made a sufficient contribution to the incident concerning [REDACTED] to be characterised as a direct perpetrator. The Defence

¹¹⁶ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 13.

¹¹⁷ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 14.

¹¹⁸ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 13.

¹¹⁹ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 15.

submits that although PTC I found that there were substantial grounds to believe that Mr Al Hassan was present, the Prosecution had not established, to the requisite standard, any further forms of participation in the flogging itself and that this fact does not form part of the confirmed facts and circumstances of the case.¹²⁰

95. The Defence further argues that, specifically, PTC I found that the Prosecution had not established that Mr Al Hassan [REDACTED] having flogged [REDACTED], but rather PTC I considered the evidential material presented by the Prosecution to be sufficient to establish that Mr Al Hassan was present during the flogging along with other men ensuring the security between the person flogged and the public.¹²¹
96. The Defence finally alleges that the Prosecution's reliance on Mr Al Hassan's statement to reopen this issue is also 'extremely problematic', particularly in light of the fact that the relevant extracts are taken out of context.¹²² In this regard, the Defence contests the nature of Mr Al Hassan's statements and submits that this is not an appropriate basis for re-characterising and aggravating the charges.¹²³
97. The Chamber agrees with the Defence that the specific facts relied upon by the Prosecution based on [REDACTED] he was present and personally participated in the whipping do not appear in the Confirmation Decision. To the contrary, and as noted by the Defence, PTC I assessed Mr Al Hassan's personal participation in the whipping of [REDACTED] and declined to confirm charges under Article 25(3)(a) of the Statute, having found that it was not demonstrated that he had personally flogged the alleged victim.¹²⁴
98. As indicated above, there is no legal impediment to a trial chamber re-characterising facts and circumstances to include a mode of liability that was considered, but not confirmed by a pre-trial chamber.¹²⁵

¹²⁰ Defence response, ICC-01/12-01/18-941-Conf, para. 13.

¹²¹ Defence Response, ICC-01/12-01/18-941-Conf, para. 15.

¹²² Defence Response, ICC-01/12-01/18-941-Conf, para. 19.

¹²³ Defence Response, ICC-01/12-01/18-941-Conf, para. 20.

¹²⁴ Confirmation Decision, ICC-01/12-01/18-461-Conf-Corr, paras 789-790.

¹²⁵ See above at para. 90.

99. In the present case however, the Prosecution seeks that notice be given for a mode of liability at a stage where the issue has recently been fully assessed and adjudicated by PTC I. This mode of liability – which formed part of the Prosecution’s document containing the charges (the ‘DCC’) – was expressly considered and excluded by PTC I.¹²⁶
100. At this point, in light of PTC I’s findings and prior to the hearing of evidence in relation to this particular matter, it does not appear to the Chamber that the legal characterisation may be subject to change. For the moment, the Chamber will defer to PTC I’s findings and declines to provide notice of the possible re-characterisation sought.
101. Nonetheless, the Chamber emphasises that it is ultimately its prerogative to decide if and when to give notice under Regulation 55 of the Regulations. Consequently, the above assessment is without prejudice to provide notice at a later point in time, either *proprio motu* or following a request, should it consider it to be appropriate to do so at the relevant time.¹²⁷

b. Article 25(3)(c) of the Statute for seven cases under count 6

102. According to the facts and circumstances described at paragraphs 436, 448, 457-458, 462, 466-467, 469, 472 of the Confirmation Decision, the individuals referred to in case 11/1433-2012, case 25/1433-2012, case 46/1433-2012, case 55/1433-2012, case 67/1434-2013, [REDACTED], and [REDACTED] (the ‘seven cases’) were all sentenced by the Islamic Tribunal. These cases are currently characterised as offences charged under count 6 (passing of irregular sentences) and Mr Al Hassan’s responsibility is charged pursuant to Article 25(3)(d) of the Statute.
103. The Prosecution seeks notice of possible re-characterisation of Mr Al Hassan’s responsibility pursuant to Article 25(3)(c) of the Statute in respect of the seven cases under count 6.¹²⁸
104. The Prosecution submits that the need for notice arises from evidence that, for all these cases, there is an Islamic Police report drafted and signed by the accused and a

¹²⁶ Confirmation Decision, ICC-01/12-01/18-461-Conf-Corr, paras 789-790.

¹²⁷ See Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the Prosecution’s Application for Notice to be given pursuant to Regulation 55(2) on Mr Yekatom’s Individual Criminal Responsibility, 2 June 2020, ICC-01/14-01/18-542.

¹²⁸ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 17.

corresponding written Islamic Tribunal judgment. It adds that PTC I generally confirmed the mode of liability under Article 25(3)(c) of the Statute with respect to cases where there were Islamic Police reports drafted and signed by the accused and corresponding written Islamic Tribunal judgments.¹²⁹

105. The Defence argues that the Prosecution's attempt to broaden the scope of the confirmed charges should be dismissed *in limine*, as the Prosecution has itself acknowledged that several of these judgments were not included in the charges and that the gravamen of its request to correct the charges was not a legal requalification, but a dispute concerning the manner in which PTC I appreciated or evaluated the evidence concerning these reports.¹³⁰ Further, the Prosecution had the opportunity to seek leave to appeal the Confirmation Decision regarding these incidents and failed to do so.¹³¹
106. In addition, the Defence submits that the proposed re-characterisations are in contradiction with the facts confirmed by PTC I.¹³² In the Defence's view, the factual record concerning the seven cases shows good reason why PTC I declined to classify the conduct under Article 25(3)(c) of the Statute, as (i) the link between the Islamic Police and the Islamic Tribunal is weaker in all seven cases; (ii) there is a clear distinction between the seven cases and the cases that were recognised as falling under Article 25(3)(c) of the Statute by PTC I in terms of the sentences imposed, as the sentences in the seven cases were much less serious than those in the cases recognised as falling under Article 25(3)(c).¹³³
107. The Chamber notes that, in the Confirmation Decision, PTC I found that the victims referred to in the seven cases were sentenced by the Islamic Tribunal, on the basis of written judgments from that Tribunal.¹³⁴ The Chamber further notes that, in its assessment of the seven cases and the facts and circumstances underlying each of them, PTC I did not refer to Islamic Police reports allegedly drafted and signed by the accused and corresponding to these written Islamic Tribunal judgments, as submitted by the Prosecution, and made no explicit finding in this regard.

¹²⁹ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 18.

¹³⁰ Defence response, ICC-01/12-01/18-941-Conf, para. 26.

¹³¹ Defence response, ICC-01/12-01/18-941-Conf, para. 26.

¹³² Defence response, ICC-01/12-01/18-941-Conf, para. 27.

¹³³ Defence response, ICC-01/12-01/18-941-Conf, para. 28.

¹³⁴ Confirmation Decision, ICC-01/12-01/18-461-Conf-Corr, paras 436, 448, 457-458, 462, 466-467, 469, 472.

108. The Chamber notes that the Islamic Police reports and Islamic Tribunal judgments allegedly related to the seven cases have been formally submitted on the case record.¹³⁵
109. The Chamber takes note of PTC I's factual finding, as part of its assessment of Mr Al Hassan's functions and powers within the Islamic Police, that Mr Al Hassan drafted reports for the Islamic Police, making written records of the accounts given by persons who reported incidents and by suspects in relation to cases which arose in Timbuktu or in the Timbuktu region, and affixed his own signature to the Islamic Police's reports.¹³⁶ PTC I also found that Mr Al Hassan 'investigated' at the request of the Emirs of the Islamic Police, made written records of the facts reported, and signed the documents which he compiled as an investigator.¹³⁷ PTC I further found that Mr Al Hassan acted on behalf of the Islamic Police and sent, at least on some occasions, Islamic Police reports to the Islamic Tribunal, notably the ones he had written and signed.¹³⁸ As per the above, Mr Al Hassan's role with regard to the drafting of Islamic Police reports and their transmission to the Islamic Tribunal forms an integral part of PTC I's factual findings and narrative.
110. Having regard to the elements required on the face of Article 25(3)(c) of the Statute and the facts and circumstances described in the charges, as set out in paragraphs 436, 448, 457-458, 462, 466-467, 469, 472, 733-735, 740-743 and 754-758 of the Confirmation Decision, as well as the evidence received, the Chamber finds that the Prosecution has demonstrated that the legal elements of Article 25(3)(c) of the Statute in relation to the seven cases under count 6 may be derived from the facts and circumstances confirmed by PTC I.
111. The Chamber considers that for present purposes and without prejudice to any decision under Regulation 55(1) of the Regulations and Article 74 of the Statute, the legal elements are covered by the relevant facts and circumstances and the possible re-characterisation would not exceed the facts and circumstances described in the charges. This assessment is made without making any determination as to the legal interpretation of the relevant legal elements.

¹³⁵ See email Decision on submitted material for P-0007, 18 September 2020, at 18:36 and email Decision on submitted material for P-0102, 1 October 2020, at 12:01.

¹³⁶ Confirmation Decision, ICC-01/12-01/18-461-Conf-Corr, paras 733-735.

¹³⁷ Confirmation Decision, ICC-01/12-01/18-461-Conf-Corr, paras 740-743.

¹³⁸ Confirmation Decision, ICC-01/12-01/18-461-Conf-Corr, paras 754-758.

112. Finally, the Chamber finds that issuing notice of the possible re-characterisation of Mr Al Hassan's responsibility pursuant to Article 25(3)(c) of the Statute in respect of the seven cases under count 6 does not cause unfairness to the accused at this stage of the proceedings. Indeed, the Chamber notes that the Defence is informed in detail of the facts and circumstances relied upon for the proposed re-characterisations. Further, as mentioned above, the Chamber has received a body of evidence related to the seven cases and considers that waiting for the presentation of additional evidence relevant to the above incidents would be more prejudicial for the accused. In addition, the notice comes at an early point in the trial proceedings, allowing the Defence to have an adequate opportunity to adapt its strategy as necessary.
113. On the basis of these considerations, the Chamber finds that giving Regulation 55(2) notice now for the relevant charged incidents will avoid any undue prejudice to the accused, and the fairness and expeditiousness of the proceedings.
114. Consequently, it appears to the Chamber that the legal characterisation of the facts and circumstances described in the charges may be subject to change as follows: the facts and circumstances underlying the incidents related to the individuals referred to in case 11/1433-2012, case 25/1433-2012, case 46/1433-2012, case 55/1433-2012, case 67/1434-2013, [REDACTED], and [REDACTED], under count 6 of the charges, may be subject to change to include Mr Al Hassan's liability under Article 25(3)(c) of the Statute.

ii. New re-characterisations sought

a. Direct/indirect co-perpetration under Article 25(3)(a) of the Statute for all counts

115. The Prosecution seeks notice of possible re-characterisation of Mr Al Hassan's responsibility as a direct/indirect co-perpetrator pursuant to Article 25(3)(a) of the Statute for all counts.¹³⁹ This mode of liability would be alternative to Mr Al Hassan's responsibility under Article 25(3)(d) of the Statute as confirmed by PTC I.¹⁴⁰
116. The Prosecution recalls that PTC I found that two objective elements for direct and indirect co-perpetration were established to the required standard, namely, that: (i) a common plan with an element of criminality existed and (ii) this agreement involved two

¹³⁹ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 23.

¹⁴⁰ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 23.

or more persons, including the accused. According to the Prosecution, the only *actus reus* finding that PTC I did not consider that it could make, required for Article 25(3)(a) of the Statute, was that the accused made an essential contribution to implementing the common plan.¹⁴¹

117. The Prosecution submits that, on the basis of PTC I's factual findings, which will be 'supported by the evidence to be heard at trial',¹⁴² the Chamber may conclude that: (i) the accused made an 'essential' contribution to implementing the common plan; and, without the accused's contributions, the crimes would have been committed in a significantly different way; and (ii) in the context of indirect co-perpetration, the accused, together with his co-perpetrators, exercised joint control over the organisation.¹⁴³
118. Regarding the *mens rea* of Article 25(3)(a) of the Statute, the Prosecution submits that although PTC I made no final conclusions on the subjective elements for co-perpetration, its factual findings nonetheless establish that the accused acted with the requisite intent and knowledge.¹⁴⁴
119. The Defence argues that PTC I made clear and unequivocal factual findings that the Prosecution had not demonstrated, to the necessary standard of proof, that Mr Al Hassan made essential contributions to the charged incidents or common plan, or that he had the power to frustrate their commission, or to cause them to be committed in a different manner.¹⁴⁵ The Prosecution did not seek leave to appeal PTC I's factual findings concerning the nature and extent of Mr Al Hassan's alleged contributions to the charged crimes, and there is therefore no basis for the Prosecution to re-litigate these factual questions.¹⁴⁶
120. The Defence adds that the Prosecution mischaracterises the Confirmation Decision and its exposition of the law fails to take into account the particularities of its own common plan, which was drawn in extremely broad strokes to encompass almost all of the crimes

¹⁴¹ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 25.

¹⁴² Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 24.

¹⁴³ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, paras 24-56.

¹⁴⁴ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, paras 26-28.

¹⁴⁵ Defence response, ICC-01/12-01/18-941-Conf, para. 29.

¹⁴⁶ Defence response, ICC-01/12-01/18-941-Conf, para. 29.

alleged to have taken place in Timbuktu over a period of over a year.¹⁴⁷ The Defence further submits that the Prosecution never pleaded that, without Mr Al Hassan's contributions, the crimes of the organisation would have occurred in a significantly different manner, and PTC I therefore had no power to confirm these facts.¹⁴⁸ As such, it would fall outside the Chamber's competence to rely on factual criteria that were never pleaded and thus never confirmed.¹⁴⁹

121. In addition, the Defence argues that the Prosecution's suggestion that the Chamber should employ a more lenient approach in assessing Mr Al Hassan's contributions to other charges crimes is misconceived and unfounded, as theoretical structures concerning modes of liability do not undercut the need for the Prosecution to demonstrate that the core elements of responsibility are met.¹⁵⁰
122. Finally, as concerns indirect co-perpetration, the Defence submits that the Prosecution failed to address the fact that PTC I made clear factual findings that Mr Al Hassan's role was largely administrative, that he did not exercise control over the organisation or the common plan and that Mr Al Hassan's contribution to the crimes resulting from the common plan could not be said to be essential, but rather that the common plan was implemented, and the crimes were committed, by a multitude of bodies and their respective members.¹⁵¹
123. As indicated above, there is no legal impediment to a trial chamber re-characterising facts and circumstances to include a mode of liability that was considered, but not confirmed by a pre-trial chamber.¹⁵²
124. In the present case however, the Prosecution seeks that notice be given for a mode of liability at a stage where the issue has recently been fully assessed and adjudicated by PTC I. This mode of liability – which formed part of the Prosecution's DCC – was expressly considered and excluded by PTC I. It notably found that Mr Al Hassan had not made essential contributions, as the Prosecution had not demonstrated that Mr Al Hassan had

¹⁴⁷ Defence response, ICC-01/12-01/18-941-Conf, paras 30-31.

¹⁴⁸ Defence response, ICC-01/12-01/18-941-Conf, para. 32.

¹⁴⁹ Defence response, ICC-01/12-01/18-941-Conf, para. 32.

¹⁵⁰ Defence response, ICC-01/12-01/18-941-Conf, paras 33-35.

¹⁵¹ Defence response, ICC-01/12-01/18-941-Conf, para. 36.

¹⁵² *See above* at para. 90.

the power to frustrate the commission of the crimes or that, without his contributions, the crimes would have been committed in a significantly different way.¹⁵³

125. At this point, in light of PTC I's finding and prior to the hearing of further evidence, it does not appear to the Chamber that the legal characterisation may be subject to change. For the moment, the Chamber will defer to PTC I's findings and declines to provide notice of the possible re-characterisation sought.
126. Nonetheless, the Chamber emphasises that it is ultimately its prerogative to decide if and when to give notice under Regulation 55 of the Regulations. Consequently, the above assessment is without prejudice to provide notice at a later point in time, either *proprio motu* or following a request, should it consider it to be appropriate to do so at the relevant time.¹⁵⁴

b. Article 25(3)(d)(i) of the Statute for all counts

127. In the Charging Documents, PTC I confirmed Mr Al Hassan's criminal liability pursuant to Article 25(3)(d) of the Statute for all the counts confirmed.
128. The Prosecution submits that PTC I made no explicit findings under Article 25(3)(d)(i) of the Statute and that, based on the Confirmation Decision, it is possible for the Chamber to apply both Article 25(3)(d)(i) and (ii) of the Statute.¹⁵⁵ However, for the sake of certainty, the Prosecution asks the Chamber to give explicit notice that the accused may be responsible, alternatively, under Article 25(3)(d)(i) or (ii) on all counts.¹⁵⁶ In particular, the Prosecution argues that PTC I's factual findings enable the Chamber to conclude that Article 25(3)(d)(i) of the Statute also applies.¹⁵⁷ The Defence did not respond on this request.
129. The Chamber observes that the operative part of the Charging documents confirm the criminal responsibility of Mr Al Hassan pursuant to Article 25(3)(d) of the Statute altogether, without specifying whether his criminal responsibility is limited to Article

¹⁵³ Confirmation Decision, ICC-01/12-01/18-461-Conf-Corr, paras 848-853.

¹⁵⁴ See Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the Prosecution's Application for Notice to be given pursuant to Regulation 55(2) on Mr Yekatom's Individual Criminal Responsibility, 2 June 2020, ICC-01/14-01/18-542.

¹⁵⁵ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 57.

¹⁵⁶ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 58.

¹⁵⁷ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 58.

25(3)(d)(i) or Article 25(3)(d)(ii) of the Statute. Although PTC I made findings on Article 25(3)(d)(ii) specifically, the Chamber understands the charges, as enumerated in the operative parts of the Charging Documents, to include Article 25(3)(d)(i) and (ii) of the Statute. In the Chamber's view, there is no need to provide notice under Regulation 55 of the Regulations in relation to this issue. The Chamber may consider Article 25(3)(d) in its entirety as necessary at the relevant time.

c. Direct perpetration under Article 25(3)(a) of the Statute for acts under count 13

130. The Prosecution seeks notice of possible re-characterisation of Mr Al Hassan's responsibility as direct perpetrator pursuant to Article 25(3)(a) of the Statute for acts under count 13 (persecution), by means of personally flogging two men around 8 July 2012, personally flogging [REDACTED], and his direct participation in other persecutory acts.¹⁵⁸ This mode of liability would be alternative to Mr Al Hassan's responsibility under Article 25(3)(d) of the Statute as characterised by PTC I for the count of persecution.¹⁵⁹
131. The Prosecution submits that, while it had *inter alia* charged the accused as a direct perpetrator of persecution under count 13 due to his personal commission of persecutory acts, PTC I did not characterise his responsibility for specific acts of persecution as direct perpetration under Article 25(3)(a) of the Statute, but only as part of his wider contribution to the totality of the acts of persecution committed by the armed groups.¹⁶⁰ The Prosecution argues that this was not legally required and that PTC I's factual findings give rise to the possibility of the facts' legal re-characterisation, to reflect the accused's direct perpetration of certain persecutory acts, without exceeding the facts and circumstances confirmed.¹⁶¹
132. The Defence submits that there is no factual foundation for the proposed re-characterisation.¹⁶² According to the Defence, the Prosecution failed to plead in its DCC that Mr Al Hassan possessed the intent for persecution and, although the Defence raised this issue during its confirmation submissions, the Prosecution failed to cure this defect.¹⁶³

¹⁵⁸ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 59.

¹⁵⁹ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 59.

¹⁶⁰ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 60.

¹⁶¹ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, paras 60-65.

¹⁶² Defence response, ICC-01/12-01/18-941-Conf, para. 37.

¹⁶³ Defence response, ICC-01/12-01/18-941-Conf, para. 37.

Further, the Prosecution requested that PTC I adopt a holistic approach to persecution, under which the Prosecution did not need to particularise and prove the elements of persecution for each charged incident.¹⁶⁴ Consequently, the Defence argues that, as the sole author of the charges, the Prosecution must accept responsibility and any consequences that might stem from omissions, vagueness or errors set out in these charges.¹⁶⁵

133. The Chamber observes that the Prosecution essentially puts into question PTC I's legal reasoning in relation to the crime of persecution under Article 25(3)(a) of the Statute and its assessment of the facts in relation to the alleged intent of the accused to discriminate on religious and/or gender grounds for the crime of persecution, which was conducted under a different mode of liability.
134. The Chamber notes that liability under Article 25(3)(a) of the Statute was expressly considered and excluded by PTC I.¹⁶⁶ The Chamber further recalls that PTC I fully assessed and adjudicated the facts and circumstances underlying the intent to discriminate required for the crime of persecution, and stated that there was insufficient evidence that the accused had acted with the specific intent required.¹⁶⁷
135. At this point, in light of PTC I's finding and prior to the hearing of further evidence, it does not appear to the Chamber that the legal characterisation may be subject to change. For the moment, the Chamber will defer to PTC I's findings and declines to provide notice of the possible re-characterisation sought.
136. Nonetheless, as above, the Chamber emphasises that it is ultimately its prerogative to decide if and when to give notice under Regulation 55 of the Regulations. Consequently, the above assessment is without prejudice to provide notice at a later point in time, either *proprio motu* or following a request, should it consider it to be appropriate to do so at the relevant time.¹⁶⁸

¹⁶⁴ Defence response, ICC-01/12-01/18-941-Conf, para. 37.

¹⁶⁵ Defence response, ICC-01/12-01/18-941-Conf, para. 37.

¹⁶⁶ Confirmation Decision, ICC-01/12-01/18-461-Conf-Corr, paras 792-793.

¹⁶⁷ Confirmation Decision, ICC-01/12-01/18-461-Conf-Corr, para. 936.

¹⁶⁸ See Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the Prosecution's Application for Notice to be given pursuant to Regulation 55(2) on Mr Yekatom's Individual Criminal Responsibility, 2 June 2020, ICC-01/14-01/18-542.

d. Article 25(3)(c) of the Statute for acts under count 13

137. The Prosecution seeks notice of possible re-characterisation of Mr Al Hassan's responsibility pursuant to Article 25(3)(c) of the Statute for acts under count 13 (persecution), through which the accused allegedly aided, abetted or otherwise assisted in the commission of the crimes under counts 1 to 12, and in the other persecutory acts.¹⁶⁹ This mode of liability would be alternative to Mr Al Hassan's responsibility under Article 25(3)(d) of the Statute as characterised by PTC I for the count of persecution and alternative, as appropriate, to his Article 25(3)(a) responsibility for direct perpetration as sought.¹⁷⁰
138. The Prosecution acknowledges that PTC I did not confirm the accused's responsibility pursuant to Article 25(3)(c) of the Statute for persecution, considering that there was insufficient evidence that the accused acted with the specific intent to discriminate on religious and/or gender grounds *and* for the purpose of facilitating the commission of persecution.¹⁷¹ However, the Prosecution submits that it is not required for liability for persecution under Article 25(3)(c) of the Statute for an accused to have discriminatory intent and there is no need under Article 25(3)(c) to establish that an accused specifically intended the commission of persecution.¹⁷² The Prosecution adds that, notwithstanding PTC I's conclusions, its factual findings can support the inference of discriminatory intent and of the required mental state, and, as such, any proposed legal re-characterisation would not exceed the facts and circumstances confirmed.¹⁷³
139. The Chamber observes that the Prosecution contests PTC I's interpretation of the legal requirements under Article 25(3)(c) of the Statute for the crime of persecution. Notwithstanding whether it is required for an accused to have discriminatory intent for liability for persecution under Article 25(3)(c) of the Statute, the Chamber notes that PTC I specifically found that there was insufficient evidence to conclude that the accused had

¹⁶⁹ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 66.

¹⁷⁰ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 66.

¹⁷¹ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, para. 67.

¹⁷² Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, paras 68-69.

¹⁷³ Prosecution Application for Notice, ICC-01/12-01/18-894-Conf, paras 68-74.

acted for the purpose of facilitating the commission of the crime of persecution, which is an essential legal criteria to assess liability under Article 25(3)(c) of the Statute.¹⁷⁴

140. At this point, in light of PTC I's finding and prior to the hearing of further evidence, it does not appear to the Chamber that the legal characterisation may be subject to change. For the moment, the Chamber will defer to PTC I's findings and declines to provide notice of the possible re-characterisation sought.

141. Nonetheless, as above, the Chamber emphasises that it is ultimately its prerogative to decide if and when to give notice under Regulation 55 of the Regulations. Consequently, the above assessment is without prejudice to provide notice at a later point in time, either *proprio motu* or following a request, should it consider it to be appropriate to do so at the relevant time.¹⁷⁵

¹⁷⁴ Confirmation Decision, ICC-01/12-01/18-461-Conf-Corr, para. 936. *See also* Confirmation Decision, ICC-01/12-01/18-461-Conf-Corr, para. 908, *referring notably to* Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", 8 March 2018, ICC-01/05-01/13-2275-Red, para. 1400.

¹⁷⁵ *See* Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the Prosecution's Application for Notice to be given pursuant to Regulation 55(2) on Mr Yekatom's Individual Criminal Responsibility, 2 June 2020, ICC-01/14-01/18-542.

FOR THESE REASONS, THE CHAMBER HEREBY

NOTIFIES the parties and participants of the possibility that the legal characterisation of the facts and circumstances set out in the charges in relation to P-1134, P-0609, P-0570, P-0547, P-0574, P-0542, and Dédéou Maiga may be subject to change, as described in paragraph 86 above;

NOTIFIES the parties and participants of the possibility that the legal characterisation of the facts and circumstances set out in the charges in relation to the individuals referred to in case 11/1433-2012, case 25/1433-2012, case 46/1433-2012, case 55/1433-2012, case 67/1434-2013, [REDACTED], and [REDACTED], under count 6 of the charges, may be subject to change to include Mr Al Hassan's liability under Article 25(3)(c) of the Statute;

ORDERS the Prosecution, in accordance with the instructions given in paragraph 87 above, to file an addendum to its trial brief by 29 January 2021; and

REJECTS all other requests.

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

Judge Antoine Kesia-Mbe Mindua
Presiding Judge

Judge Tomoko Akane

Judge Kimberly Prost

Dated this Thursday, 17 December 2020

At The Hague, The Netherlands