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No.: **ICC-01/12-01/18**
Date: **27 October 2026**

THE APPEALS CHAMBER

Before: **Judge Luz del Carmen Ibáñez Carranza, Presiding Judge**
Judge Tomoko Akane
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze
Judge Erdenebalsuren Damdin

SITUATION IN THE REPUBLIC OF MALI

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

Public
With public Annexes A and B

Public redacted version of the corrigendum to the "Defence Appeal Brief against the Reparations Order (ICC-01/12-01/18-2782)", 28 July 2026, ICC-01/12-01/18-2797-Conf+Anx A, B

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

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I- INTRODUCTION

1. Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud ("Mr Al Hassan") has supported the reparations process in his case, notably by assisting in identifying direct victims, largely supporting the parties and participants' submissions for the adoption of presumptions and modalities that would benefit the victims,[1] and by also apologising to the victim community.[2] This notwithstanding, it remains essential that any reparations order issued against Mr Al Hassan must accurately and precisely reflect the scope of his conviction and the extent of his culpability as found by Trial Chamber X ("Trial Chamber") in the trial proceedings.[3] Here, the Reparations Order plainly does not respect his conviction for the crime of persecution on religious grounds and therefore warrants the intervention of the Appeals Chamber.[4]

2. As established by the the Court's jurisprudence, the Reparations Order is directed against the convicted person, and as a result, must fall squarely within the scope of his or her conviction. This is an uncontested fundamental principle of the reparations proceedings at the Court,[5] which constitutes a distinct and highly specific legal feature in international law as it attaches a largely civil claim to proceedings that are purely designed to address criminal responsibility.

3. It follows from this principle that not all victims of an armed conflict can receive reparations through the ICC framework. This is not something that Mr Al Hassan has influence or control over – it is an inherent and inevitable consequence of the Court's mandate and jurisdiction. The Court has repeatedly acknowledged this reality.

4. In *Ongwen*, the Chamber explained that "the Court's reparations proceedings are not designed to rectify all harm suffered throughout the conflict in Northern Uganda [and]

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[1] Defence Response to Reparations Submissions, ICC-01/12-01/18-2741-Red, paras 1-6.
[2] Annex A to Defence Notice of Discontinuance of Appeal, ICC-01/12-01/18-2667-AnxA; Annex A and C to Defence Disclosure of Evidence, including a statement from Mr Al Hassan, ICC-01/12-01/18-2710-AnxA (Arabic), ICC-01/12-01/18-2710-AnxC (French).
[3] Trial Judgment, ICC-01/12-01/18-2594-Red; Separate and Partly Dissenting Opinion of Judge Tomoko Akane, ICC-01/12-01/18-2594-OPI ("Judge Akane's Opinion"); Separate and Partly Dissenting Opinion of Judge Antoine Kesia-Mbe Mindua, ICC-01/12-01/18-2594-OPI3-tENG ("Judge Mindua's opinion").
[4] Reparations Order, ICC-01/12-01/18-2782.
[5] Article 75(2) "the Court may make an order directly against a convicted person", further Article 75(4) "after a person is convicted". *See* also, Rule 97(2) "or at the request of the convicted person". "The reparations order must not go beyond the crimes for which he or she was convicted." *See Lubanga* Appeals Judgement on the Reparations Award, ICC-01/04-01/06-3466-Red, para. 90; *See* also *Lubanga* Appeal Judgment on principles for reparations, ICC-01/04-01/06-3129, paras 99, 182; *Katanga* Reparations Order, ICC-01/04-01/07-3728-tENG, paras 31, 146-147, 251; *Katanga* Reparations Appeal Judgment, ICC-01/04-01/07-3778-Red, para. 153; *Ntaganda* Reparations Order, ICC-01/04-02/06-2659, paras 96, 106, 215; *Ongwen* Reparations Order, ICC-02/04-01/15-2074, para. 96; *Al Mahdi* Reparations Order, ICC-01/12-01/15-236, para. 110; *Affaire Bozizé et al.* jugement d'appel, No 13-2023, paras 101-105.

reparations in this case must be tied to the specific harm caused by Mr Ongwen",[6] and thus not all individuals who experienced harm as a consequence of the conflict could expect to receive reparations. In *Ntaganda*, the Chamber stressed that reparations concern the "very limited duty of a convicted person to repair harm caused to victims of the crimes for which that person was ultimately convicted", and are "strictly limited in reach and scope to the terms of the conviction".[7]

5. In the present case, the Reparations Chamber erred by failing to issue a Reparations Order that accurately reflected the confines of Mr Al Hassan's conviction for persecution. Mr Al Hassan was convicted of persecution on religious grounds (Count 13) under Article 25(3)(d), for his acts and conduct that comprised of Counts 1-5 and 14. This is the entire scope of his conviction for persecution. Simply because Mr Al Hassan was convicted of persecution did not permit the Trial Chamber to hold him personally liable for all acts and harms resulting from Ansar Dine/AQIM's persecutory policy imposed on Timbuktu. Mr Al Hassan's individual actions in contributing to the crime of persecution resulted in a narrowly defined set of victims, namely, the direct victims arising from his actions under Counts 1-5 and 14. Mr Al Hassan has not contested the Chamber's findings of harm against those individuals, who are entitled to have their harm repaired by him.

6. By attributing to Mr Al Hassan the global harms of Ansar Dine/AQIM's rules and prohibitions on Timbuktu, the Reparations Chamber erred by failing to undertake a proper analysis of the harms actually attributable to Mr Al Hassan. Mr Al Hassan did not have control over the entirety of the crimes committed by Ansar Dine/AQIM whilst it pursued its common purpose. He was found criminally responsible for carrying out specific contributions to the crime of persecution, which resulted in sufficiently identifiable harms. This error was coumpounded by the failure of the Chamber to apply any causal link between the crime and the harm on the part of Mr Al Hassan. This was required in order to determine a proportional award that would repair the harm Mr Al Hassan actually caused in the commission of his crime for persecution.

7. These errors then had the effect of the Chamber finding that each and every person that was in Timbuktu in 2012 – 65,202 people – were direct victims of Mr Al Hassan. This is an entirely implausible number in light of Mr Al Hassan's specific and confined contributions to the crime of persecution. The impact of this error was fatal as it carried with it a substantial

[6] *Ongwen* Reparations Order, ICC-02/04-01/15-2074, para. 51.
[7] *Ntaganda* Reparations Order Addendum, ICC-01/04-02/06-2858-Red, para. 17.

financial liability that Mr Al Hassan is now liable to repay – 7,250,000 euros. It was not fair nor just to hold Mr Al Hassan liable for all harms caused by Ansar Dine/AQIM in circumstances where his conviction of persecution does not support this. It also imputes far-reaching and extensive criminality which is not supported by the evidence and findings beyond a reasonbale doubt.

8. Given that these cumulative errors materially impacted the Reparations Order, the Appeals Chamber should amend it or remand it back to the Trial Chamber with a direction that the Reparations Order should not exceed, and must correctly reflect, the scope of Mr Al Hassan's conviction of persecution on religious grounds; his participation and contribution to this crime; and the harm actually caused by Mr Al Hassan's participation to this crime; and should limit the number of eligible direct victims as the 49 victims.

II- CONFIDENTIALITY

9. Pursuant to Regulation 23*bis*(1) of the Regulations of the Court, the Defence files this Appellant Brief confidential as it contains confidential information including information regarding protected witnesses, in addition to referring to confidential informaiton found in submissions classified as confidential. The Defence will submit a public redacted version in due course.

III- PROCEDURAL BACKGROUND

10. On 26 June 2024, The Trial Chamber, in a previous composition, issued its Trial Judgment (the "Trial Judgment"), convicting Mr Al Hassan of three counts of crimes against humanity and five counts of war crimes.[8]

11. On 20 November 2024, the Trial Chamber issued the Sentencing Decision (the "Sentencing Decision"), imposing on Mr Al Hassan a sentence of 10 years of imprisonment.[9]

12. On 13 December 2024, the Chamber issued the *Order for Submissions on Reparations*, by which it, *inter alia*: (i) instructed the parties, the Trust Fund for Victims (the "TFV"), and the Office of the Prosecutor (the "Prosecution") to make submissions on a series of issues relevant to reparations; (ii) invited the Registry and the Republic of Mali ("Mali") to make submissions on the same issues; (iii) invited persons or organisations with local expertise to request leave to file observations; and (iv) invited the Legal Representatives of Victims (the

[8] Trial Judgment, ICC-01/12-01/18-2594-Red.
[9] Sentencing Judgment, ICC-01/12-01/18-2662.

"LRVs") and the Defence to provide responses, if any, to the submissions of the parties and participants.[10]

13. On 14 March 2025, the Registry filed its report on the financial situation of Mr Al Hassan, concluding that there had been no changes in his financial situation and that he continues to be assessed as indigent.[11]

14. On 23 April 2025, the Chamber issued the *Order scheduling a reparations hearing*, in which it ordered, *inter alia*, that a reparations hearing be held during the week of 15 September 2025.[12]

15. On 5 June 2025, the Chamber instructed the Office of Public Counsel for Victims (the "OPCV") to undertake the legal representation of any of the relevant victims choosing to be represented by the OPCV, and to make submissions on reparations on their behalf, in line with the instructions given to the LRVs in the Order for Submissions.[13]

16. On 11 June 2025, the Defence filed its *Defence Observations on Reparations* (the "Defence Submissions").[14] In the Defence Submissions, notwithstanding his confirmed status of indigence, Mr Al Hassan expressed his willingness to make a personal financial contribution to the TFV, and to address an apology to the affected community.

17. Subsequently, observations on reparations were also filed by the LRVs,[15] the Prosecution,[16] the Registry,[17] the TFV,[18] Queen's University Belfast,[19] the University of Edinburgh,[20] and Mama Koité Doumbia *et al.*[21]

18. On 16 July 2025, the Defence filed its *Defence Response to Observations on Reparations* (the "Defence Response"),[22] and the LRVs filed their response to the submissions of the parties, participants, and *amici curiae*.[23] In the Defence Response, the Defence reiterated

[10] Order for Submissions on Reparations, ICC-01/12-01/18-2666.
[11] Registry's Report on the Financial Situation of Mr Al Hassan, ICC-01/12-01/18-2694-Conf.
[12] Order scheduling a reparations hearing, ICC-01/12-01/18-2714.
[13] Decision on the LRVs submissions on a potential conflict of interest, ICC-01/12-01/18-2728-Conf.
[14] Defence Observations on Reparations, ICC-01/12-01/18-2729.
[15] LRVs first observation of victims in Burkina Faso, Niger and Mali, ICC-01/12-01/18-2731; LRVs' Submissions on Reparations, ICC-01/12-01/18-2732-Conf.
[16] Prosecution Submissions on Reparations, ICC-01/12-01/18-2734-Conf.
[17] Registry Submissions on Reparations, ICC-01/12-01/18-2733-Conf-Red.
[18] TFV Observations relevant to Reparations, ICC-01/12-01/18-2737.
[19] Queen's University Belfast Human Rights Centre Amicus Curiae Observation on Reparations, ICC-01/12-01/18-2730.
[20] The University of Edinburgh Amicus Curiae Observation on Reparations, ICC-01/12-01/18-2736.
[21] Amici Curiae Observations, ICC-01/12-01/18-2735.
[22] Defence Response to Reparations Submissions, ICC-01/12-01/18-2741-Red.
[23] LRVs Response to Observation on Reparation, ICC-01/12-01/18-2740.

Mr Al Hassan's offer to make a personal financial contribution to the TFV and submitted that such a contribution could form part of a symbolic ceremony.[24]

19. On the same day, 16 July 2025, the Chamber issued the *Order on the conduct of the reparations hearing*, by which it: (i) scheduled the reparations hearing for 17 September 2025; (ii) invited the parties, the OPCV, and the Prosecution to make final submissions at the hearing; and (iii) granted the TFV's request for leave to provide further information relating to cost projections and other matters.[25]

20. On 17 September 2025, the reparations hearing was held before the Chamber.[26] During the Reparations Hearing, the Defence informed the Chamber that Mr Al Hassan had sought to set aside a total of 164,000 Francs CFA (approximately €250) to be transferred to the TFV. The Defence reiterated that this financial contribution could form part of a symbolic ceremony to the benefit of the victims.[27]

21. On 23 October 2025, Mr Al Hassan made the first of a series of voluntary monetary transfers to the TFV, in the amount of €50.[28] Mr Al Hassan made subsequent transfers of €50 to the TFV on 4 December 2025, 10 December 2025, 31 December 2025, and 9 January 2026, bringing the cumulative amount transferred to €250 at the time of the TFV's notification to the Chamber.[29]

22. On 28 April 2026, the Reparations Chamber, composed of two new juges replacing Judge Mindua and Judge Akane, issued the *Reparations Order* and found Mr Al Hassan liable for the amount of 7,250,000 euros.[30]

23. On 12 May 2026, the Defence filed its Notice of Appeal against the Reparations Order pursuant to Article 82(4) of the Statute and Regulation 64 of the Regulations of the Court, identifying three grounds of appeal.[31]

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[24] Defence Response to Reparations Submissions, ICC-01/12-01/18-2741-Red, para. 18.
[25] Order on the conduct of the reparations hearing, ICC-01/12-01/18-2742.
[26] Defence Submissions During Reparations Hearing, T-219.
[27] T-219, p. 49, lines 12-18; p. 55, lines 2-23. *See* also Defence Request to File Corrections to Reparations Submissions, ICC-01/12-01/18-2752-Conf, para. 10.
[28] *See* TFV's Notification of Transfers from Mr Al Hassan, ICC-01/12-01/18-2770-Red, paras 2, 9.
[29] TFV's Notification of Transfers from Mr Al Hassan, ICC-01/12-01/18-2770-Red, paras 2, 9 (the TFV informed the Chamber that Mr Al Hassan transferred €50 on each occasion, for a cumulative total of €250 at the time of the TFV's submission). The Defence notes that the Impugned Decision (para. 216) records this final transfer as having occurred on "9 January 2025", which appears to be a typographical error for 9 January 2026 in light of the chronological context.
[30] Reparations Order, ICC-01/12-01/18-2782.
[31] Defence Notice of Appeal Against Reparations Order, ICC-01/12-01/18-2784.

24. On 13 May 2026, the OPCV and LRVs respectively filed their Notice of Appeal against the Reparation order.[32]

25. On 23 June 2026, the Registry filed its submissions on outreach, identification and eligibility process for reparations, setting out its proposed approach to outreach activities and the process for the identification of victims and assessment of eligibility under the Reparations Order.[33]

26. On 20 July 2026, the LRVs filed their *Response to the 'Registry submissions on outreach, identification and eligibility process for reparations'*, commenting on the Registry's proposed outreach, identification and eligibility process.[34]

27. On 21 July 2026, the OPCV filed its *Response to the 'Registry submissions on outreach, identification and eligibility process for reparations'*, likewise responding to the Registry's proposed implementation framework.[35]

IV- SUBMISSIONS

A. Ground 1: The Trial Chamber impermissibly expanded the scope of Mr Al Hassan's conviction and criminal responsibility for the crime of persecution (Count 13)

28. The Chamber impermissibly expanded the scope of Mr Al Hassan's conviction and criminal responsibility for the crime of persecution on religious grounds and in determining who qualified as a direct victim of persecution. This is an error of law and/or fact which had the direct impact of inflating Mr Al Hassan's liability and the total financial award issued against him.

29. Article 75(2) of the Statute outlines that a Chamber may "make an order directly against a convicted person specifying appropriate reparations". The Appeals Chamber has considered that "the obligation to repair harm arises from the individual criminal responsibility for the crimes which caused the harm and, accordingly, the person found to be criminally responsible for those crimes is the person to be held liable for reparations."[36] As such, it is imperative that

[32] OPCV Notice of Appeal Against Reparations, ICC-01/12-01/18-2786; LRVs Notice of Appeal against Reparations Order, ICC-01/12-01/18-2785.
[33] Registry submissions on outreach, identification and eligibility process for reparations, ICC-01/12-01/18-2789-Red.
[34] LRVs response on outreach, identification and eligibility, ICC-01/12-01/18-2791.
[35] OPCV response on outreach, identification and eligibility, ICC-01/12-01/18-2792.
[36] *Lubanga* Appeal Judgment on principles for reparations, ICC-01/04-01/06-3129, para. 99.

"in awarding reparations, a trial chamber must remain within the confines of the conviction and the sentencing decision."[37]

i. The controlling text in the context of a fragmented decision

30. The Reparations Chamber erred in its interpretation of the Trial Judgment against Mr Al Hassan and failed to properly apply the findings of the Trial Judgment, and in particular Judge Akane's Separate and Partly Dissenting opinion ("Judge Akane's Opinion") and Judge Mindua's full acquittal,[38] which together delineated and limited the scope of Mr Al Hassan's conviction and his contributions for the crime of persecution on religious grounds. As a result of applying an expanded scope of conviction, the Chamber erred in finding that every single member of the population of Timbuktu present or residing in the city during the charged period suffered harm as a result of the crime of persecution. The Reparations Chamber impermissibly made Mr Al Hassan liable for harm that he was not found criminally responsible for.

31. Ensuring clarity regarding the scope of Mr Al Hassan's conviction of persecution within the context of a Trial Judgment with three Separate and Partially Dissenting Opinions is critical. While the Chamber stated that it would "rely on the findings adopted unanimously or by Majority in the Trial Judgment and Sentencing Decision and will consider reparations only for crimes of which Mr Al Hassan was convicted,"[39] these decisions must also be read alongside the Separate Opinions to accurately capture the contours of Mr Al Hassan's conviction for the crime of persecution for the purposes of reparations.

32. In circumstances where there are multiple competing opinions, as is the case here, it is imperative to assess where agreement between judges overlaps to determine the operative findings. Fragmented decisions are a challenge in terms of drawing out the intersecting parts that forms the Majority of a conviction. Domestic courts have established legal approaches to decipher and give application to these decisions.

33. As Justice Michael Kirby observed of Australian jurisprudence, "when multiple concurring reasons are published by several judges in a single case, the ratio must be drawn from the essential areas of agreement found within the reasons of the judges in the Majority".[40] As an illustration, "if judge A decides for the plaintiff for reasons x, y and z, and judge B decides

[37] *Lubanga* Appeals Judgement on the Reparations Award, ICC-01/04-01/06-3466-Red, para. 311 (emphasis added).
[38] Reparations Order, ICC-01/12-01/18-2782, paras 56-62; Judge Akane's Opinion, ICC-01/12-01/18-2594-OPI; Judge Mindua's Opinion, ICC-01/12-01/18-2594-OPI3-tENG.
[39] Reparations Order, ICC-01/12-01/18-2782, para. 44.
[40] *Kirby*, Chapter 3, precedent – report on Australia, (Annex B, p. 5-right).

for the plaintiff for reasons p, q and x, and if judge C decides for the defendant, then the *ratio decidendi* is x, the reason (and the only reason) shared by a majority of judges."[41]

34. This interpretation is consistent with well-established practice in other common law jurisdictions. In case of a fragmented decision, as it is the case here, the binding principle must be drawn from the narrowest common denomination upon which the members of the Majority agree.[42] The broader reasoning of any individual judge, not shared by the others in the Majority, cannot constitute the binding basis of the decision as it is a single opinion.

35. A 'plurality' decision, whereby a decision is appended with other opinions which may agree in the result, but not the method by which the result is reached, cannot be considered Majority reasons.[43] Vasiliev also provides an informative example which is applicable to the current circumstances: where two judges arrive at the same verdict via separate reasoning routes and form the Majority in respect of a verdict, whilst a third judge has voted in favour of another verdict, this will result in three separate opinions but no 'majority decision' within the meaning of Article 74(3).[44]

36. In prior ICC decisions where the Majority agreed on a result but issued separate opinions, the Court has relied on the narrowest common ground test, being an agreement "in essence", to determine the binding rationale and identify the common denominator among Majority judges that establishes the operative legal basis.[45] Applying the same logic, the binding legal basis for Mr Al Hassan's conviction of persecution can only be the factual and legal findings for which both Judge Prost and Judge Akane converge, given that Judge Mindua excused Mr Al Hassan from individual responsibility on all charged crimes, which means that his views must be set aside for the purpose of reparations. Doing otherwise would amount to finding Mr Al Hassan liable to repair harm caused on the basis of factual findings supported by Judge Mindua in the Trial Judgment, despite ultimately finding Mr Al Hassan not criminally

[41] *Schauer*, Thinking Like a Lawyer, p. 53. *See* also, *Kirby*, Chapter 3, precedent – report on Australia, (Annex B, p. 5-right).
[42] For the **USA**, *see Marks v. United States*, 430 U.S. 188 (1977). *See* also, *Stearns*, Modeling Narrowest Grounds, pp. 497-512, particularly p. 507. For **Canada**, *see R. v. Ibanescu*, 2013 SCC 3, para. 1. For **Australia**, *see Kirby*, Chapter 3, precedent – report on Australia, (Annex B, p. 5-right); *Kirby*, Comparative Law Conference, p. 4. *See* further, *Schauer*, Thinking Like a Lawyer, p. 53.
[43] *L'Heureux-Dube*, The Dissenting Opinion, fn.2.
[44] *Klamberg* Commentary on the Law (2017), fn. 616; *Klamberg* Commentary on the Law (2023), p. 439.
[45] *Ambos*, The Rome Statute : A Commentary (2022), pp. 2230-2231; *Bemba* Appeal Judgment, ICC-01/05-01/08-3636-Red, para. 33; *Al Bashir* Judgment in the Jordan Referral, ICC-02/05-01/09-397-Corr, para. 216. *See* also *Al Bashir* Judge Ibáñez Carranza Judge Bossa's Opinion, ICC-02/05-01/09-397-Anx2, para. 12.

responsible for those actions.[46] It is not possible to separate factual findings from judicial dispositive especially in case of an acquittal.[47]

37. For our purposes, in relation to the scope of the crime of persecution on religious ground, Judge Akane's Opinion is significantly narrower in scope than Judge Prost's broad approach which is reflected in the Judgment. The common ground is therefore defined by Judge Akane's narrower interpretation. The Chamber acknowledged in the Reparations Order that Judge Akane expressed "a limited agreement to paragraphs 1727 to 1736" of the Trial Judgment,[48] which related to the Majority's understanding of Mr Al Hassan's culpability for the crime of persecution. Those paragraphs of the Judgment must then be read in conjunction with Judge Akane's views on Mr Al Hassan's contribution to persecution,[49] for the purposes of assessing Mr Al Hassan's liability for reparations. Any reasoning broader than that of Judge Akane's formulation of Mr Al Hassan's conduct with respect to persecution would exceed what the Majority actually agreed upon, as it would only reflect Judge Prost's opinion and not shared by Judge Akane.

38. Should any doubt remain as to where the common ground between the two opinions lies, it should be resolved in favour of the accused, a principle followed by other reparations chambers.[50] This is consistent with the fact that a trial chamber must take into account the rights of the convicted person in determining appropriate reparations .[51] Altogether, this reinforces the conclusion that only the narrowest interpretation, that of Judge Akane, can form the Majority basis for conviction-dependent liability.

39. This interpretation is further supported by the fact that when the Prosecution filed its notice of appeal against the Trial Judgment, it recognised that Judge Mindua's full acquittal of

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[46] Prosecution notice of appeal, ICC-01/12-01/18-2649, para. 4. *See* further *Lubanga* Appeal Judgment on principles for reparations, ICC-01/04-01/06-3129, para. 99; *Katanga* Reparations Order, ICC-01/04-01/07-3728-tENG, para. 31(4), para. 257 "Accordingly, the Chamber will proceed to examine the factual and legal elements of that participation, as determined by Trial Chamber II, sitting in its previous composition, in the Judgment Handing Down Conviction, so as to set the reparations award for which he is liable"; *Ntaganda* Reparations Order, ICC-01/04-02/06-2659, para. 107.

[47] *ICJ* Cambodia v. Thailand, Order of 18 July 2011, para. 1 "while in principle any request for interpretation must relate to the operative part of the judgment, it can also relate to those reasons for the judgment which are inseparable from the operative part." *See* also para. 23.

[48] Reparations Order, ICC-01/12-01/18-2782, para. 57 (emphasis added).

[49] *See* Trial Judgment, ICC-01/12-01/18-2594-Red, fn. 5231.

[50] *Lubanga* Appeals Judgement on the Reparations Award, ICC-01/04-01/06-3466-Red, para. 90; *Ongwen* Reparations Order, ICC-02/04-01/15-2074, para. 18; *Ntaganda* Reparations Order, ICC-01/04-02/06-2659, para. 230; *Ntaganda* Reparations Order Addendum, ICC-01/04-02/06-2858-Red, paras 297, 318, 320, 351. *See also* Article 22(2).

[51] *Lubanga* Appeals Judgement on the Reparations Award, ICC-01/04-01/06-3466-Red, para. 90.

Mr Al Hassan for all persecutory acts and incidents resulted in Judge Akane's approach to the connection element being the controlling opinion.[52]

40. While Mr Al Hassan's criminal responsibility has indeed been adjudicated before the commencement of the reparations phase,[53] the Chamber still had to examine and analyse the issues arising from the differences of views in the Trial Judgment and Separate Opinions described above. Merely relying on "findings adopted unanimously or by majority in the Trial Judgment"[54] do not, in of itself, delineate the proper contoursof Mr Al Hassan's participation in the crime of persecution on religious grounds. The Chamber was required to undertake this analysis in order to accurately determine the scope of Mr Al Hassan's liability for the crime of persecution within the Reparations Order, and determine the harm stemming from his conviction to establish the proportional and fair costs of repair. [55]

41. The approach adopted in *Ntaganda* further illustrates the importance of this exercise. In this case, and for the purposes of reparations, the Chamber expressly delineated in an annex the "crimes and underlying acts included in the conviction per location as well as recalling the negative findings in relation to the underlying incidents and locations that, although included in the charges brought against Mr Ntaganda, were dismissed for lack of sufficient evidence."[56] Such an approach reflects that the identification of eligible victims must strictly follow the scope of the conviction and the underlying acts encompassed therein.

ii. Judge Akane's interpretation of the 'connecting element' of the crime of persecution

42. Pursuant to Judge Akane's Opinion, Mr Al Hassan's conviction of persecution is restricted to the acts which sustained the convictions under Counts 1-5 and 14, pursuant to her interpretation of the fourth element of this crime under Article 7(1)(h) of the Rome Statute, namely "connection requirement".[57] This is of particular importance in the context of reparations since, as mentioned above, this is the basis for the rationale that supported the contours of Mr Al Hassan's conviction. Judge Akane's views on the connection requirement are essential to have the full picture and understanding of which acts falls under Mr Al Hassan's conviction, without which it was not possible for the Reparations Chamber to determine

[52] Prosecution notice of appeal, ICC-01/12-01/18-2649, para. 4.
[53] Reparations Order, ICC-01/12-01/18-2782, para. 58.
[54] Reparations Order, ICC-01/12-01/18-2782, para. 44.
[55] *Katanga* Reparations Appeal Judgment, ICC-01/04-01/07-3778-Red, paras 177-178; *Ongwen* Reparations Order, ICC-02/04-01/15-2074, para. 626.
[56] *Ntaganda* Reparations Order Addendum, ICC-01/04-02/06-2858-Red, para. 18 *referring* to Annex 1 to the Addendum.
[57] Judge Akane's Opinion, ICC-01/12-01/18-2594-OPI, paras 99-100. Judge Akane specified that this excluded acts "falling outside the common purpose."

adequately the appropriate amount of the liability. In her opinion, this element of the crime necessitates establishing beyond a reasonable doubt that the alleged conduct was committed "with any act referred to in article 7(1) of the Statute or any crime within the Court's jurisdiction".[58]

43. By contrast, the Trial Chamber defined the scope of the acts and conduct constituting the crime of persecution on the basis that "there is no requirement that the act of persecution equates to an act under Article 7(1) of the Statute or any other crime under the jurisdiction of the Court. By the plain language of the Statute, there need only be a 'connection' in the sense of link to, or interrelated with."[59] The Chamber further held that "the underlying acts of persecution need not constitute crimes, there is a requirement that they be connected with acts listed under Article 7(1) of the Statute or any crime within the jurisdiction of the Court, and that it is the persecution as a whole which must be connected in such way, rather than each individual act underlying the same"[60] and that "it is the persecution which must be connected with a crime – not acts underlying the same".[61]

44. The Trial Chamber justified this broad interpretation of the 'connection requirement' by relying on its finding that the alleged conduct occurred in the context of a "series of crimes against humanity involving different acts under Article 7(1) perpetrated against the population of Timbuktu."[62] It therefore concluded that the crime of persecution was established on the basis of "the above-mentioned acts assessed cumulatively."[63]

45. Significantly, the Trial Chamber's interpretation rests on the Confirmation Decision in *Al Hassan*,[64] which itself relied on jurisprudence of the ECCC and the ICTY,[65] as well as the *Burundi Investigation* Decision.[66] The Trial Chamber also based its reasoning concerning the 'connection requirement' on ICTY jurisprudence that supports to a certain extent its broad approach.[67] However, citing to ICTY jurisprudence in support of the Chamber's analysis of the 'connection requirement' falls short of being helpful, since the ICTY statute did not contain

[58] Judge Akane's Opinion, ICC-01/12-01/18-2594-OPI, para. 95.
[59] Trial Judgment, ICC-01/12-01/18-2594-Red, para. 1210.
[60] Trial Judgment, ICC-01/12-01/18-2594-Red, para. 1575.
[61] Trial Judgment, ICC-01/12-01/18-2594-Red, para. 1210.
[62] Trial Judgment, ICC-01/12-01/18-2594-Red, para. 1576.
[63] Trial Judgment, ICC-01/12-01/18-2594-Red, para. 1579.
[64] Trial Judgment, ICC-01/12-01/18-2594-Red, para. 1210, fn. 3974 *referring* to Decision on Confirmation of Charges, ICC-01/12-01/18-461-Corr-Red-tENG, paras 668-669.
[65] Decision on Confirmation of Charges, ICC-01/12-01/18-461-Corr-Red-tENG, paras 668-669, fns 1829, 1830.
[66] Trial Judgment, ICC-01/12-01/18-2594-Red, para. 1210, fn. 3974 *referring* to *Burundi* Investigation Decision, ICC-01/17-9-Red, paras 131-132.
[67] *Kordić & Čerkez* Judgment, IT-95-14/2-T, para. 192, *referring* to *Tadić* Trial Judgement, IT-94-1-T, para. 694; *Kupreškic et al.* Judgement, IT-95-16-T, para. 567; *Blaškic* Judgement, IT-95-14-T, para. 219.

such a requirement, as Chambers have indicated.[68] For her part, Judge Akane comprehensively explains that her interpretation of the 'connection requirement' under Article 7(1)(h) of the Statute was aligned with the rationale underlying the International Law Commission's ("ILC") approach to crimes against humanity, namely to address "a concern that otherwise the text would bring within the definition of crimes against humanity a wide range of discriminatory practices that do not necessarily amount to crimes against humanity".[69] Indeed, Robinson observes that, during the preparatory negotiations leading to the Rome Conference, several delegations were concerned that a definition of persecution based on discrimination, without an additional limiting criterion, could bring nearly any discriminatory practice within the ambit of crimes against humanity. [70]

46. Following this demonstration, Judge Akane explains that she "would have assessed *in concreto* whether each of the underlying acts of persecution were committed 'in connection with' any act under Article 7(1) of the Statute or any crime within the Court's jurisdiction."[71] Judge Akane continues: "[s]uch an assessment is necessary as the crime of persecution, notwithstanding its nebulous character, cannot be used as a catch-all charge."[72] As a result of this analysis, Judge Akane explains that her findings are restricted to the underlying acts, which sustained the convictions under Counts 1-5 and 14.[73] For Judge Akane, the underlying acts of persecution were comprised of those expressly enunciated and charged in these counts, which she also reviewed for the purpose of confirming that Mr Al Hassan's right to adequate notice was fulfilled[74] and to avoid the crime of persecution to become a 'catch-all' crime. Any acts/incidents that were not pleaded and found to satisfy the threshold of beyond reasonable doubt in these counts fall outside the scope of her Opinion. Contrary to the finding of the Trial Judgment, the crime of persecution cannot be established on a cumulation of acts, or the

[68] *Kupreškic et al.* Judgement, IT-95-16-T, paras 579-581. *See* also, *Mettraux*, International Crimes: Law and Practice, pp. 670-675; Observations of the United Nations OHCHR, A/CN.4/726, pp. 137-138; *Werle*, Principles of International Criminal Law, p. 426, para. 1111. *Trifterrer*, The Rome Statute : A Commentary (2016), pp. 219-220, 226; *Ambos*, *Treatise on International Criminal Law* (2014), pp. 105-106; *Witschel and Rückert*, Article 7(1)(h) – Crime Against Humanity of Persecution, pp. 94-95 (Annex B, pp. 16-17) *referring* to *Robinson*, Defining "Crimes Against Humanity" at the Rome Conference, pp. 53-55; Cryer, An Introduction to International Criminal Law and Procedure, pp. 257-258 (Annex B, p. 11-right, 12-left).
[69] Judge Akane's Opinion, ICC-01/12-01/18-2594-OPI, para. 98, *referring* to Report of the International Law Commission on its 71st session, A/74/10, p. 44.
[70] *Witschel and Rückert*, Article 7(1)(h) – Crime Against Humanity of Persecution, p. 95 (Annex B, p. 17) *referring* to *Robinson*, Defining "Crimes Against Humanity" at the Rome Conference, pp. 53-55; *Lafuente* The Connection Requirement, pp. 7, 29.
[71] Judge Akane's Opinion, ICC-01/12-01/18-2594-OPI, para. 99.
[72] Judge Akane's Opinion, ICC-01/12-01/18-2594-OPI, para. 99.
[73] Judge Akane's Opinion, ICC-01/12-01/18-2594-OPI, paras 99-100.
[74] Judge Akane's Opinion, ICC-01/12-01/18-2594-OPI, para. 93, fn. 167.

persecutory policy in general. The Reparations Order was mandated to reflect this, and failed to do so.

47. As a result, the scope of the conviction of Mr Al Hassan, including his participation in the crime of persecution on religious grounds, is limited to the intersection of agreed factual and legal findings between Judge Prost and Judge Akane, which is limited to the acts and conduct that fall within his convictions under Counts 1-5 and 14.

48. The aforementioned discussion illustrates the underlying basis of Judge Akane's findings relating to the crime of persecution. It is clear that Judge Akane considered that this could only extend to acts and conduct of Mr Al Hassan within Counts 1-5 and 14. These matters were essential in order for the Chamber to identify the harm caused by Mr Al Hassan in undertaking these acts, the direct victims of the harm suffered, and the amount of liability to be attributed to Mr Al Hassan.

iii. Judge Akane's factual findings on the impact of the Ansar Dine/AQIM's persecutory policy

49. The Reparations Chamber considered that "the Trial Judgment and Sentencing Decision found that Ansar Dine/AQIM targeted the population in its entirety,"[75] and thus "members of the population of the city of Timbuktu were the targets of the crime of persecution on religious grounds."[76] The Chamber erred in conflating the population of Timbuktu as a targeted group with each individual member of that population as direct victims of persecution, as a result of the general imposition of Ansar Dine/AQIM's persecutory policy. Although the Trial Chamber reached agreement as concerns specific typologies of violations of human rights committed by AD/AQIM rules and prohibitions for the purposes of persecution,[77] these violations do not provide a sufficiently certain or fair basis for determining additional 'direct victims' of persecution in the context of reparations proceedings as against Mr Al Hassan.

50. *First*, Judge Akane, in her separate Opinion, agreed that the conduct set out in paragraphs 1530-1532, 1562-1565, 1567-1570 of the Trial Judgment constituted sufficiently severe deprivations of fundamental rights targeting the civilian population of Timbuktu on religious grounds.[78] As such, Judge Akane agreed on the existence of certain rules and prohibitions imposed by Ansar Dine/AQIM and the discriminatory policy implemented the

[75] Reparations Order, ICC-01/12-01/18-2782, para. 59.
[76] Reparations Order, ICC-01/12-01/18-2782, para. 61.
[77] Trial Judgment, ICC-01/12-01/18-2594-Red, paras 1530-1532, 1562-1565, 1567-1570.
[78] Judge Akane's Opinion, ICC-01/12-01/18-2594-OPI, para. 100.

groups, and that as a result, people in Timbuktu saw their right to religious freedom encroached by virtue of the implementation of such policy. It was on this basis that Judge Akane found that Mr Al Hassan's actions were of a persecutory nature on religious grounds. However, this agreement does not reflect the number of victims arising from incidents for which Mr Al Hassan was ascribed criminal liability.

51. The Reparations Chamber therefore erred in stating that Judge Akane agreed to the Majority's findings on the scope of the crime of persecution on religious grounds on the basis of footnote 5231 of the Trial Judgment.[79] This footnote clearly reads that Judge Akane "disagrees with the Majority on the scope of the crime of persecution […]. To the extent related to acts which in her view comprise of the crime of persecution, Judge Akane agrees with the analysis in the present section", namely, Mr Al Hassan's culpability for the crime of persecution. As such, this section of the Trial Judgment must be read in light of her findings within her Opinion.[80] Thus these paragraphs as referred to in the Sentencing Decision do not, in of themselves, reflect blanket agreement on the scope of persecution,[81] as they must be read alongside Judge Akane's Opinion.

52. *Second*, in light of the above paragraph, relying on the Sentencing Decision as such resulted in the Reparations Chamber expanding Mr Al Hassan's scope of conviction for the purposes of reparations.[82] Reading Judge Akane's Opinion beside the relevant paragraphs of the Sentencing Judgment illustrates that Judge Akane merely agrees that the crime of persecution took place in the context of the imposition of a system of repression based on rules and prohibition that regulated the practice of religion by the people of Timbuktu, which violated fundamental rights of the targeted group.[83] These are elements of the crimes of persecution, not a *cheque en blanc* from Judge Akane that all practices, acts and conducts which may have fallen within the crime of persecution while Ansar Dine/AQIM's rules were imposed, were committed by Mr Al Hassan himself or attributable to him. Moreover, the Sentencing Judgment cannot be

[79] Reparations Order, ICC-01/12-01/18-2782, para. 57 *referring to* Trial Judgment, ICC-01/12-01/18-2594-Red, fn. 5231.
[80] Trial Judgment, ICC-01/12-01/18-2594-Red, paras 1727-1736, fn. 5231.
[81] Reparations Order, ICC-01/12-01/18-2782, para. 57; Sentencing Judgment, ICC-01/12-01/18-2662, para. 69, footnote 191.
[82] Reparations Order, ICC-01/12-01/18-2782, para. 57.
[83] Sentencing Judgment, ICC-01/12-01/18-2662, para. 69, fn. 191; Judge Akane's opinion, ICC-01/12-01/18-2594-OPI, para. 100.

used to expand the scope of the criminal responsibility defined in the Trial Judgment.[84] Mr Al Hassan's conviction for persecution rests firmly on his specific contributions thereto.

53. *Third*, the Reparations Chamber erred in relying on the Trial Judgment and Sentencing Judgment's findings that the population of Timbuktu was the group targeted by the persecutory campaign of Ansar Dine/AQIM, to conclude that every member of the population should then be considered a direct victim for purposes of reparations.[85] The existence of a targeted group does not automatically equate to each and every member of that group having suffered harm and should be considered as direct victims of the crime of persecution.

54. While the Rome Statute broadens this concept, this distinction between the identifiable group targeted by the persecutory policy and the persons subjected to the underlying persecutory conduct, is reflected in the structure of the Elements of Crimes themselves. The Elements of Crimes provide the alternative between the perpetrator targeting an individual or individuals by reason of the identity of a group or collectivity or targeted the group or collectivity as such.[86] The identification of the targeted group remains analytically distinct from the determination of the persons who were subjected to the underlying persecutory conduct.[87]

55. The Court's practice as to the treatment of persecution also affirms this interpretation. In *Ongwen* it is illustrated that victimhood in respect of persecution was anchored in the specific persecutory conduct encompassed by the conviction. The Chamber addressed persecution in relation to each of the four attacks and identified the underlying criminal conduct through which the relevant fundamental rights were severely deprived.[88]

56. Likewise, in *Ntaganda*, the Court reflected the same analytical distinction. Notwithstanding findings that the Lendu civilian population in particular locations formed an

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[84] *Abd-Al-Rahman* Sentencing Judgment, ICC-02/05-01/20-1281-Red, para. 23; *Bemba et al.* Sentencing Appeal, ICC-01/05-01/13-2276-Red, para. 113.
[85] Reparations Order, ICC-01/12-01/18-2782, para. 59, fn. 118 *referring* to Trial Judgment, ICC-01/12-01/18-2594-Red, paras 1560, 1565; Sentencing Judgment, ICC-01/12-01/18-2662, paras 69, 71.
[86] Elements of Crimes, Article 7(1)(h), Crime against humanity of persecution, elements 1–2. *See* also *Witschel and Rückert*, Article 7(1)(h) – Crime Against Humanity of Persecution, pp. 95-96 (Annex B, pp. 17-18).
[87] *Mettraux*, International Crimes: Law and Practice, pp. 572–575; pp. 573-574: persecution is generally understood as protecting persons in their individual capacity because of their relationship to a group, before distinguishing the broader formulation adopted by the Rome Statute. *Mettraux*, International Crimes: Law and Practice, p. 668, section 6.9.7.3.1.
[88] *Ongwen* Trial Judgment, ICC-02/04-01/15-1762-Red, paras 2846-2849, 2906-2908, 2959-2961, 3006-3008, 2874, 2927, 2973, 3020, and 3116-3119; *Ongwen* Reparations Order, ICC-02/04-01/15-2074, para. 55.

object of the UPC/FPLC attack, the reparations framework separately delineated the crimes and underlying acts included in the conviction by location.[89]

57. The Defence does not dispute that the Trial Judgment and Sentencing Judgement identified the population of Timbuktu as the relevant identifiable group for the purpose of Article 7(1)(h) of the Statute. The error lies in treating those findings as dispositive of the separate question whether every member of that population qualified as a direct victim of the crimes for which Mr Al Hassan was convicted, aside from the 49 named victims in the Trial Judgment as direct victims of Mr Al Hassan.[90]

58. Accordingly, when the Chamber found in the Trial Judgment that "the identifiable group was the population of Timbuktu […] and because it was perceived as (not belonging to) a certain religious group by Ansar Dine/AQIM and/or because of gender grounds, was impermissibly targeted",[91] this finding identifies the relevant protected group for the purpose of establishing the discriminatory basis of the persecution, as required by the Elements of Crimes.[92] However, because of the scope of the crime of persecution has been established above, it was erroneous for the Reparations Chamber to find that Mr Al Hassan is liable to repair every individual forming the targeted community *as such*, rather than the individuals victims of the underlying acts for which he was found guilty beyond a reasonable doubt.[93]

59. Moreover, the collective dimension of the persecutory policy must equally be distinguished from the scope of the individual accused's responsibility for that campaign. As Ambos explains, "[t]he discriminatory intent must be present in every single individual perpetrator and with regard to the persecutory conduct, not just with regard to a possibly discriminatory policy within the framework of the context element. Otherwise the persecution's distinguishing feature with regard to the other crimes against humanity and its particular gravity would disappear".[94] Accordingly, the Trial Judgment's finding that Ansar Dine/AQIM directed a persecutory campaign against the population of Timbuktu as a whole cannot, without more, establish either that every manifestation of that campaign fell within Mr Al Hassan's individual

[89] *Ntaganda* Judgment, ICC-01/04-02/06-2359, para. 923 ; *Ntaganda* Reparations Order Addendum, ICC-01/04-02/06-2858-Red, paras 17-18 and Annex thereto; *Ntaganda* Reparations Order, ICC-01/04-02/06-2659, paras 109-117.
[90] Trial Judgment, ICC-01/12-01/18-2594-Red, paras 1557-1560; Reparations Order, ICC-01/12-01/18-2782, paras 59-63.
[91] Trial Judgment, ICC-01/12-01/18-2594-Red, para. 1560.
[92] General requirements to identify a group. Elements of Crimes, Article 7(1)(h), Crime against humanity of persecution.
[93] Reparations Order, ICC-01/12-01/18-2782, paras 60-62, 83-84, 226.
[94] *Ambos*, *Treatise on International Criminal Law* (2014), pp. 107-108.

criminal responsibility, or that every member of the population suffered harm resulting from the persecutory conduct for which he was convicted.

60. While it is undisputed that a significant number of individuals suffered harm as a result of the events in Timbuktu and that many persons beyond the 49 identified victims may have suffered harm arising from the broader campaign of persecution, such harm falls outside the scope of Mr Al Hassan's convictions.

61. As a result, certain harms recognised by the Reparations Chamber, such as closing of the schools,[95] the destruction of the monuments of religious importance,[96] impositions of certain restriction on men appearances,[97] the imposition of certain prohibitions on women,[98] separation of families and disruption of the transmission of traditions,[99] reduced tourism to Timbuktu due to the groups' arrival,[100] were wrongly attributed to Mr Al Hassan and expand the scope of his conviction. He now finds himself liable to repair harm that he was not held criminally responsible for having caused.

iv. Acts explicitly excluded from the scope of Mr Al Hassan's conviction for the crime of persecution

62. Judge Akane's Opinion expressly excluded from the scope of Mr Al Hassan's culpability for persecution the following acts: the destruction of the mausoleums;[101] the imposition of a dress code on women;[102] and acts committed by the *Hesbah* against women, such as the forced marriages and the rapes in detention.[103] These acts therefore do not form part of the conduct for which Mr Al Hassan was found guilty of. The Reparations Chamber erred when finding that Mr Al Hassan was liable to repair the harm caused in relation to those acts committed as part of the persecutory policy of Ansar Dine/AQIM.

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[95] Reparations Order, ICC-01/12-01/18-2782, paras 102-104. As it is not connected to another crime for which Mr Al Hassan was convicted, *see* Judge Akane's opinion, ICC-01/12-01/18-2594-OPI, para. 100.
[96] Reparations Order, ICC-01/12-01/18-2782, paras 94-96, 121.
[97] Reparations Order, ICC-01/12-01/18-2782, para. 124 *in principio*. As it is not connected to another crime for which Mr Al Hassan was convicted, *see* Judge Akane's opinion, ICC-01/12-01/18-2594-OPI, para. 100.
[98] Reparations Order, ICC-01/12-01/18-2782, paras 112, 124 *in fine*. As Mr Al Hassan was acquitted on gender based crimes, it cannot be connected to a crime for which he was convicted, *see* Judge Akane's opinion, ICC-01/12-01/18-2594-OPI.
[99] Reparations Order, ICC-01/12-01/18-2782, paras 119-120.
[100] Reparations Order, ICC-01/12-01/18-2782, para. 109.
[101] Judge Akane's opinion, ICC-01/12-01/18-2594-OPI, fn. 178.
[102] Judge Akane's opinion, ICC-01/12-01/18-2594-OPI, para. 102.
[103] Judge Akane's opinion, ICC-01/12-01/18-2594-OPI, para. 101.

a. Destruction of mausoleums

63. The Trial Chamber found that the evidence was insufficient to establish that Mr Al Hassan had any contribution in the destruction of the mausoleums and therefore acquitted him of Count 7.[104] For this reason, Judge Akane specifically mentioned in her Opinion that the facts related to the destruction of the mausoleums could not form part of her assessment of the underlying acts of the crime of persecution.[105]

64. As the destruction of the mausoleums did not give rise to any conviction under either Article 8(2)(e)(iv) or Article 7(1)(h) of the Statute, any harm resulting from their destruction cannot be attributed to conduct for which Mr Al Hassan was convicted. Consequently, he cannot be held liable to provide reparations for such harm.

65. By holding Mr Al Hassan liable for harm arising from the destruction of the mausoleums notwithstanding the absence of a related conviction,[106] the Reparations Chamber erroneously exceeded the scope of the conviction and the legal basis for reparations and erred in law in finding Mr Al Hassan liable for such harm.[107]

b. The imposition of a dress code on women

66. The Trial Judgment found that Ansar Dine/AQIM "prohibited women from wearing clothing that showed the shape of the body or was see-through, as well as from using hair extensions or certain beauty products. Women were forbidden from leaving their home without wearing a veil and covering their body, and could be arrested for going outside alone after a certain time at night".[108] On this basis, the Chamber found in the Reparations Order that Mr Al Hassan was liable to repair the harm experienced as a result of those controlling acts against women and girls, including that any violation to Ansar Dine/AQIM's rules' was repressed with especially harsh punishments and detention conditions, involving gender-specific violence.[109]

67. While Judge Akane was in agreement with the factual findings in paragraphs 1569 of the Trial Judgment,[110] the rules on a dress code for women were found to fall outside of the

[104] Trial Judgment, ICC-01/12-01/18-2594-Red, para. 1055; Trial Judgment, ICC-01/12-01/18-2594-Red, Disposition.
[105] Judge Akane's opinion, ICC-01/12-01/18-2594-OPI, fn. 178.
[106] Reparations Order, ICC-01/12-01/18-2782, para. 95, fn. 215. For the absence of a connection to another crime for which Mr Al Hassan was convicted, *see* Judge Akane's opinion, ICC-01/12-01/18-2594-OPI, para. 100.
[107] Reparations Order, ICC-01/12-01/18-2782, paras 94-96, 121.
[108] Trial Judgment, ICC-01/12-01/18-2594-Red, para. 1533.
[109] Reparations Order, ICC-01/12-01/18-2782, para. 123.
[110] Judge Akane's Opinion, ICC-01/12-01/18-2594-OPI, para. 100.

scope of Mr Al Hassan's conviction as it had no connection with the crimes under Article 7(1)(h).[111] Indeed, Judge Akane specifically excluded the rules related to the dress code as, in her opinion, those rules "were not committed 'in connection' with a crime or an Article 7(1) act for which Mr Al Hassan is responsible."[112] This is also reflected by the fact that Judge Akane did not encompass paragraph 1566 of the Trial Judgment, regarding the targeting of "local women and girls by reasons of their gender, depriving them of some of their fundamental rights because of the particular roles, expectations and conduct Ansar Dine/AQIM assigned to their gender"[113] and paragraph 1533 of the Trial Judgement, in paragraph 100 of her Opinion.

68. Once again, the Reparations Chamber erred in finding that Mr Al Hassan was liable to repair these harms,[114] as these fell explicitly outside of the scope of his conviction.[115] This was an error.

c. Acts committed by the Hesbah against women, such as the forced marriages and the rapes in detention

69. For similar reasons, Judge Akane also considered that acts committed by the *Hesbah*, under Mohammed Moussa, do not form part of the scope of Mr Al Hassan's conviction for the crime of persecution. This includes the detention of women for not having respected the dress code imposed by the rules, sexual violence while in detention, and forced marriage. Importantly, Judge Akane found that those acts were contradicted by instructions that were given to and by the group.[116]

70. Judge Akane also did not consider that the detention,[117] and subsequent act of rape those witnesses suffered in detention,[118] were part of the common purpose. Indeed, Judge Akane considered that the "evidence does not demonstrate that the *Hesbah* under *Al Mahdi* or other institutions such as the Islamic Police detained women in prison for breaching the dress code imposed by Ansar Dine/AQIM."[119] The same is true for the crime of forced marriage.[120]

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[111] Judge Akane's Opinion, ICC-01/12-01/18-2594-OPI, para. 102.
[112] Judge Akane's Opinion, ICC-01/12-01/18-2594-OPI, para. 102.
[113] Trial Judgment, ICC-01/12-01/18-2594-Red, para. 1566.
[114] Reparations Order, ICC-01/12-01/18-2782, paras 123, 126.
[115] Judge Akane's Opinion, ICC-01/12-01/18-2594-OPI, para. 16.
[116] Judge Akane's Opinion, ICC-01/12-01/18-2594-OPI, paras 16, 21; Reparations Order, ICC-01/12-01/18-2782, paras 123, 126.
[117] Judge Akane's Opinion, ICC-01/12-01/18-2594-OPI, para. 17.
[118] Judge Akane's Opinion, ICC-01/12-01/18-2594-OPI, para. 25.
[119] Judge Akane's Opinion, ICC-01/12-01/18-2594-OPI, paras 17, 20.
[120] Judge Akane's Opinion, ICC-01/12-01/18-2594-OPI, para. 34.

71. The Chamber erred in finding that Mr Al Hassan was liable to repair certain harms associated with gender specific violence while in detention,[121] as these explicitly fell outside of the scope of his conviction.

v. The Reparations Order erred in adopting specific reparations for the "similarly situated" victims of persecution

72. While the Reparations Chamber found that an individualised component of collective reparations was the appropriate modality to repair the harms experienced by the 49 direct victims of Counts 1-6 and 14, it also found that the "similarly situated victims of persecution" warranted the same.[122]

73. By placing individuals in the same category than the 49 victims on the basis of a 'similar harm' suffered, the Reparations Chamber, through the backdoor, is extending the number of direct victims to incidents that did not form the scope of the charges and/or were not proven to the requisite standard of beyond reasonable doubt.

74. Judge Akane's Opinion should not retrospectively be interpreted to refer to 'types' of conduct in lieu of the specific incidents as convicted.[123] Such an interpretation could lead to arbitrary results and inequality *vis-à-vis* direct victims who satisfied the threshold of beyond reasonable doubt, as compared to those satisfying the much lower threshold for reparations. The legitimacy of the reparations process would be undermined if individuals obtain the status of direct victim based purely on a similarity of facts, rather than the quality of evidence.

75. Since any deprivation of rights must also be sufficiently severe and recognised by international law to fall within the scope of Article 7(1)(h), and that "not every violation of fundamental rights will amount to persecution",[124] an assessment of eligibility based on proof that the victim's suffered a deprivation of rights during the relevant time period is likely to give rise to complex factual adjudications concerning the existence and hierarchy of such rights violations. Where many people are eligible for reparations, implementing individual forms of reparations based on the specific harm suffered has the potential to create a "hierarchy of victimhood" and create tensions and jealousy within the community. As such, individual

[121] Reparations Order, ICC-01/12-01/18-2782, para. 123.
[122] Reparations Order, ICC-01/12-01/18-2782, paras 187, 195.
[123] For instance, Judge Akane rejected certain incidents on the basis of a lack of evidence, Trial Judgment, ICC-01/12-01/18-2594-Red, paras 1017, 1021, 1024, 1025, 1026, 1027.
[124] Trial Judgment, ICC-01/12-01/18-2594-Red, para. 1203.

reparations based on typology of rights violations would be "contrary to the principle that all victims are to be treated equally".[125]

76. As a result, the Reparations Chamber erred in law in extending reparations to victims based on the type of violation they suffered, rather than the actual conviction of Mr Al Hassan.

vi. Material impact

77. The Appeals Chamber may intervene only if it "finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error".[126] The Appeals Chamber has considered that "[a] judgment is 'materially affected by an error of law' if the Trial Chamber 'would have rendered a judgment that is substantially different from the decision that was affected by the error, if it had not made the error'".[127]

78. These errors materially affected the Reparations Order. The Reparations Chamber failed to properly apply Mr Al Hassan's conviction as found within the Trial Judgment and Separate Opinions, and therefore erred in law and/or fact by expanding the scope of Mr Al Hassan's conviction of persecution on religious grounds in its determination of appropriate reparations. The Chamber erred by attributing to Mr Al Hassan harms that resulted from acts that fall outside the scope of his criminal responsibility for persecution, for instance, the emotional and community harm for the destruction of monuments of religious importance,[128] the loss of schooling and education due to measures imposed on public schools,[129] the social impact of the imposition of gender-specific rules on clothing,[130] and "similarly situated victims" who suffered harm other than the 49 victims.[131] Consequently, the Chamber committed an error in finding that every member of the population of the city of Timbuktu was a direct victim of Mr Al Hassan for the crime of persecution on religious ground within the meaning of Rule 85 of the Rules.[132]

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[125] Reparations Order, ICC-01/12-01/18-2782, para. 194. *See* further, *Ongwen* Reparations Order, ICC-02/04-01/15-2074, para. 584; *Ntaganda* Reparations Order, ICC-01/04-02/06-2659, paras 41-44; *Ntaganda* First DIP Decision, ICC-01/04-02/06-2860-Red, para. 94.
[126] Article 83(2) (emphasis added). *See* also, *Ongwen* Appeal Judgment on Reparations, ICC-02/04-01/15-2108, para. 26; *Ongwen* Appeal Judgment, ICC-02/04-01/15-2022-Red, para. 76; *Ntaganda* Appeal Judgment, ICC-01/04-02/06-2666-Red, para. 35; *Lubanga* Second Appeal Judgment, ICC-01/04-01/06-3121-Red, para. 43; *Bemba* Appeal Judgment, ICC-01/05-01/08-3636-Red, para. 35.
[127] *Lubanga* Second Appeal Judgment, ICC-01/04-01/06-3121-Red, para. 19; *Ngudjolo* Appeal Judgment, ICC-01/04-02/12-271-Corr, para. 20.
[128] Reparations Order, ICC-01/12-01/18-2782, paras 94-96.
[129] Reparations Order, ICC-01/12-01/18-2782, paras 102-104.
[130] Reparations Order, ICC-01/12-01/18-2782, paras 121, 123.
[131] Reparations Order, ICC-01/12-01/18-2782, paras 187, 195.
[132] Reparations Order, ICC-01/12-01/18-2782, paras 52-61. *See* further paras 221-226.

This in turn caused a considerable increase in the amount of reparations owed by Mr Al Hassan.[133]

79. Utilising the term 'direct victim' for any person falling outside the scope of conviction decided by a Trial Chamber bears a further consequence of generating a public perception of criminal culpability for acts that a convicted person may have been acquitted for or was simply not charged for. By deciding that the 65,202 inhabitants of Timbuktu are 'direct victims' of Mr Al Hassan for the crime of persecution imputes guilt of causing harm to every single individual in Timbuktu in 2012.

80. The reality is that the Trial Chamber found that 49 victims suffered harm as a result of acts underpinning Mr Al Hassan's conviction under Counts 1-6 and 14. For the Count 13 (crime of persecution), Mr Al Hassan was found guilty of persecution on religious ground for the underlying acts contained in Counts 1-5 and 14. The Reparations Order should reflect that.

B. Ground 2: The Reparations Chamber failed to properly assess the participation and contribution of Mr Al Hassan in the commission of the crime of persecution when determining the proportional and adequate award against him

i. Failure to provide sufficient reasons regarding proportional personal liability

81. The Chamber erred by failing to provide sufficient reasons as to why or how Mr Al Hassan's personal liability, and subsequent financial award, was proportional to the harm caused by him in light of his specific participation in the commission of the crime of persecution and the scope of his conviction. The determination of personal liability, of which proportionality forms part thereof, is a fundamental component of any reparations order. Consequently, the Reparations Order lacks reasoning on an essential component, which makes it impossible to assess the reasonableness of the Chamber's decision regarding Mr Al Hassan's personal liability.

82. The Appeals Chamber has held that the obligation to ensure a reasoned decision equally applies to reparations orders.[134] In this respect, the Appeals Chamber considered that a trial chamber has "a degree of discretion as to what to address and what not to address in its reasoning", nevertheless "it is essential that it indicates with sufficient clarity the basis of the decision".[135] Insufficient reasoning otherwise generally constitutes a procedural error or

[133] Reparations Order, ICC-01/12-01/18-2782, para. 241.
[134] *Ntaganda* Reparations Appeal Judgment, ICC-01/04-02/06-2782, para. 60.
[135] *Ntaganda* Reparations Appeal Judgment, ICC-01/04-02/06-2782, paras 58-59 *referring to Lubanga* Appeal Judgment, ICC-01/04-01/06-773, para. 20; *Bemba* Appeal Judgment, ICC-01/05-01/08-3636-Red, paras 51-53.

indicates the Chamber's failure to take into account relevant considerations.[136] The right to adequate reasons has otherwise consistently be found to form an essential component of the right to a fair trial and, more broadly, of the right to fair and impartial judicial proceedings.[137] Rule 97(3) of the Rules explicitly mandates that the Court shall respect the rights of the convicted person "in all cases". It has been subsequently reiterated by the Appeals Chamber that trial chambers must consider the rights of the convicted person within reparations proceedings.[138]

83. The Appeals Chamber must reverse where a Trial Chamber's decision is "so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion."[139] The Appeals Chamber may intervene on this basis, "[e]ven if an error of law or of fact has not been identified."[140] An unreasonable decision may be found "if the supporting evidence appears weak, or if there are significant contradictions in the evidence, [or] deficiencies in the trial chamber's reasoning as to why it found that evidence persuasive".[141]

84. It is uncontroversial that a reparations order must, as an "essential element",[142] establish and inform the convicted person of the amount of his or her liability with respect to the reparations awarded in the order.[143] As a corollary to this principle, the Appeals Chamber has stated that "a convicted person's liability for reparations must be proportionate to the harm caused and, *inter alia*, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case."[144] This proportionality assessment has a direct impact on the final award determined in a reparations order. Indeed, the

[136] *Ambos*, The Rome Statute : A Commentary (2022), p. 2233; *Lubanga* Appeal Judgment, ICC-01/04-01/06-773, para. 20 (*referring* to ICTR and ICTY precedents) ; *Bemba et al*. Appeal Judgment, ICC-01/05-01/13-2275-Red, paras 102-105; *Bemba* Appeal Judgment, ICC-01/05-01/08-3636-Red, paras 50-55 ; *Ntaganda* Judgment, ICC-01/04-02/06-2359, para. 52.
[137] *Lubanga* Appeal Judgment, ICC-01/04-01/06-773, para. 20.
[138] *Lubanga* Appeals Judgement on the Reparations Award, ICC-01/04-01/06-3466-Red, paras 3, 90; *Katanga* Reparations Appeal Judgment, ICC-01/04-01/07-3778-Red, para. 190.
[139] *See Kony et al.* Appeal Judgment on Admissibility, ICC-02/04-01/05-408, para. 81, *referring* to ICTY and ICTR jurisprudence.
[140] *Kenyatta* Appeal Judgment on non-compliance, ICC-01/09-02/11-1032, para. 25. *See* also, *Bemba et al*. Appeal Judgment, ICC-01/05-01/13-2275-Red, para. 101.
[141] *Ntaganda* Appeal Judgment, ICC-01/04-02/06-2666-Red, paras 42, 46.
[142] Reparations Order, ICC-01/12-01/18-2782, para. 18.
[143] Reparations Order, ICC-01/12-01/18-2782, para. 18(v); *Lubanga* Appeal Judgment on principles for reparations, ICC-01/04-01/06-3129, para. 32; *Katanga* Reparations Order, ICC-01/04-01/07-3728-tENG, para. 31; *Al Mahdi* Reparations Order, ICC-01/12-01/15-236, para. 38.
[144] *Lubanga* Appeal Judgment on principles for reparations, ICC-01/04-01/06-3129, para. 118 (emphasis added).

Appeals Chamber held that "[t]he awards ought to be proportionate to the harm, injury, loss and damage as established by the Court".[145]

85. The Appeals Chamber has further clarified that "when determining the amount a convicted person is liable to pay for reparations, the primary consideration is the extent of the harm and cost it takes to repair that harm."[146] As such, "the focus is on the repair of the harm and not on the mode of liability."[147] However, the amount to be awarded has to be 'fair'.[148]

86. This is consistent with the principle articulated by the Appeals Chamber that "whether other individuals may also have contributed to the harm resulting from the crimes for which the person has been convicted is irrelevant to the convicted person's liability to repair that harm."[149] Further, "[e]ven in cases where other individuals may also have contributed to the harm, 'it is not *per se,* inappropriate to hold the person liable for the full amount necessary to repair the harm'".[150]

87. However, in fixing the amount of reparations, "the goal is to set an amount that is fair and properly reflect the rights of the victims, bearing in mind the rights of the convicted person".[151] It was on this basis that the Appeals Chamber in *Lubanga* considered that:

> […] in order to protect the rights of the convicted person and ensure that reparations are not awarded to remedy harms that are not the result of the crimes for which he or she was convicted and to also protect the right of the victims to appeal the exclusion of any harms that they consider have been shown to be caused by these crimes, the Trial Chamber must clearly *define* the harms that result from the crimes for which the person was convicted, the extent of which may then be *assessed* by the Trust Fund for purposes of determining the size and nature of reparation awards.[152]

88. In this case, the Reparations Chamber recalled "that Mr Al Hassan was convicted under several modes of liability, i.e. specifically as a direct perpetrator, a facilitator of and a contributor to the crimes under Article 25(3)(a), (c) and (d) of the Statute. The Chamber

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[145] *Lubanga* Amended Reparations Order, ICC-01/04-01/06-3129-AnxA, para. 45. *See* also para. 40.
[146] *Katanga* Reparations Appeal Judgment, ICC-01/04-01/07-3778-Red, para. 184 (emphasis added).
[147] *Katanga* Reparations Appeal Judgment, ICC-01/04-01/07-3778-Red, para. 182.
[148] *Katanga* Reparations Appeal Judgment, ICC-01/04-01/07-3778-Red, paras 177-178; *Ongwen* Reparations Order, ICC-02/04-01/15-2074, para. 626.
[149] *Katanga* Reparations Appeal Judgment, ICC-01/04-01/07-3778-Red, para. 178.
[150] *Ongwen* Appeal Judgment on Reparations, ICC-02/04-01/15-2108, para. 68. *See* also, *Katanga* Reparations Appeal Judgment, ICC-01/04-01/07-3778-Red, para. 6.
[151] *Lubanga* Appeals Judgement on the Reparations Award, ICC-01/04-01/06-3466-Red, para. 108.
[152] *Lubanga* Appeal Judgment on principles for reparations, ICC-01/04-01/06-3129, para. 184 (emphasis added).

considers that the participation of other persons in the commission of the crimes does not diminish Mr Al Hassan's liability to repair, in full, the harm caused to all the victims of the crimes of which he was convicted".[153] The Chamber reiterates that Mr Al Hassan was responsible for the harms caused by the crimes he was convicted of.[154] Despite these statements, the Chamber was legally obliged to ensure that the final financial award actually corresponded to the harm caused by Mr Al Hassan's actions in the commission of the crimes in order for the award to be proportional. As outlined below, it fails to do so.

89. Given that the Reparations Order is devoid of this analysis, it is not possible to assess the reasonableness of the Chamber's decision in this respect. This results in Mr Al Hassan's personal liability being insufficiently reasoned, and therefore an error of law and/or procedure. In the alternative, it was an abuse of the Chamber's discretion. This had the material impact of inflating the total financial liability attributable to Mr Al Hassan. Had the Chamber properly determined his liability proportionally to his actions, the Reparations Order would have been substantially different, namely, resulting in a smaller award against Mr Al Hassan.

ii. The Chamber incorrectly assessed the harm as attributable to Mr Al Hassan

90. The Court's reparations jurisprudence clearly provides that the primary focus when determining monetary liability should be the harm caused by the crimes and the costs to repair it.[155] It is not contested that the objective of reparation proceedings is remedial and not punitive.[156] It is for this reason that a trial chamber must accurately define the harm caused by the convicted person in carrying out the crimes he was convicted for,[157] and establish the causal link between the crime and the harm, in order to subsequently determine a proportional award to repair the said harm. Although the mode of liability of the conviction is a relevant consideration, the Court's jurisprudence has indicated that this is not exclusively determinative for the purposes of assessing reparations.[158] As such, the harm which was attributable to Mr Al Hassan's actions in carrying out the specific crime of persecution on religious grounds should have been the focal point of the Reparations Chamber's assessment.

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[153] Reparations Order, ICC-01/12-01/18-2782, para. 221.
[154] *See* Reparations Order, ICC-01/12-01/18-2782, paras 47, 49-50 (Part V.A. "Personal Liability").
[155] *See Ntaganda* Reparations Order, ICC-01/04-02/06-2659, para. 98.
[156] *Ntaganda* Reparations Order, ICC-01/04-02/06-2659, para. 224; *Katanga* Reparations Appeal Judgment, ICC-01/04-01/07-3778-Red, paras 184-185.
[157] *Lubanga* Appeal Judgment on principles for reparations, ICC-01/04-01/06-3129, para. 184; *Ntaganda* Reparations Order, ICC-01/04-02/06-2659, para. 98; *Ntaganda* Reparations Appeal Judgment, ICC-01/04-02/06-2782, para. 531.
[158] *Katanga* Reparations Appeal Judgment, ICC-01/04-01/07-3778-Red, paras 179, 182; *Lubanga* Appeal Judgment on principles for reparations, ICC-01/04-01/06-3129, para. 118.

91. The Reparations Chamber considered that the participation of other persons in the commission of the crimes did not diminish Mr Al Hassan's liability to repair, in full, the harm caused to all the victims of the crimes of which he was convicted.[159] This principle stated by the Chamber is correct when undertaking an accurate analysis of the harm caused by the convicted person. However, the jurisprudence cited by the Chamber in making this finding with respect to Mr Al Hassan is inapposite for the present case, because of the particular circumstances of this case.

iii. Application of joint and several liability in reparations proceedings

92. The Reparations Chamber primarily refers to the reparations orders of *Ongwen* and *Ntaganda* in support of this principle.[160] These cases related to situations where both accused were convicted for crimes committed jointly with others, including as co-perpetrators under Article 25(3)(a).[161] The *Ntaganda* Trial Chamber considered that, in circumstances where Lubanga and Ntaganda were both convicted of the same crimes, namely conscription of children under the age of 15, "they are jointly liable *in solidum* to repair the full extent of the harm caused to the victims."[162] However, this did not discharge Mr Ntaganda's liability "to repair the full extent of the harm caused to the direct and indirect victims of all crimes for which he was convicted" regardless of the different modes of liability and whether others may have contributed to the harm.[163] In making this finding the Trial Chamber relied upon "the very important military functions and determinative role of Mr Ntaganda in the UPC/FPLC and the key and active role played by him in the commission of the crimes" as a relevant factor.[164]

93. In those circumstances, where multiple persons provided a direct and/or an essential contribution to exert joint control over the crime being committed, it is wholly appropriate to apportion liability *in solidum.* Indeed, the Appeals Chamber in *Ntaganda* explicitly stated with approval that the Trial Chamber accurately imposed joint and several liability in that case.[165] This corresponds with the fact that Mr Ntaganda was responsible equally with his co-perpetrators for the total harm sustained as a result of the commission of their crimes, and thus

[159] Reparations Order, ICC-01/12-01/18-2782, para. 221, fn. 573 *referring* to *Ongwen* Reparations Order, ICC-02/04-01/15-2074, para. 667; *Ntaganda* Reparations Order, ICC-01/04-02/06-2659, para. 221. *See* also *Katanga* Reparations Appeal Judgment, ICC-01/04-01/07-3778-Red, para. 178; *Lubanga* Appeals Judgment on the Reparations Award, ICC-01/04-01/06-3466-Red, para. 308.
[160] Reparations Order, ICC-01/12-01/18-2782, para. 221, fn. 573.
[161] *Ongwen* Reparations Order, ICC-02/04-01/15-2074, paras 666-667; *Ntaganda* Reparations Order, ICC-01/04-02/06-2659, para. 219.
[162] *Ntaganda* Reparations Order, ICC-01/04-02/06-2659, para. 219.
[163] *Ntaganda* Reparations Order, ICC-01/04-02/06-2659, para. 218.
[164] *Ntaganda* Reparations Order, ICC-01/04-02/06-2659, fn. 580.
[165] *Ntaganda* Reparations Appeal Judgment, ICC-01/04-02/06-2782, para. 271.

the division of liability is neither possible nor appropriate.[166] The same applied for Mr Ongwen, where the Chamber considered that Mr Ongwen and his co-perpetrators were "all jointly liable *in solidum* to repair the full extent of the harm caused to the victims" and further clarified that they were "jointly and severally liable to repair in full the harm suffered by the overlapping victims".[167] This is despite the fact that Mr Ongwen's co-perpetrators have not been convicted before this Court.[168]

94. This outcome is the result of the application of individual criminal responsibility as a direct or indirect co-perpetrator under Article 25(3)(a) of the Statute. Relevantly, the Court's jurisprudence has established that:

> […] the concept of co-perpetration is originally rooted in the idea that when the sum of co-ordinated individual contributions of a plurality of persons results in the realisation of all the objective elements of a crime, <u>any person making a contribution can be held vicariously responsible for the contributions of all the others</u> and, as a result, can be <u>considered as a principal to the whole crime</u>.[169]

95. The proper construction of co-perpetration was then considered by the Court to be founded on a theory of joint control over the crime. Accordingly, "although none of the participants has overall control over the offence because they all depend on one another for its commission, they all share control because each of them could frustrate the commission of the crime by not carrying out his or her task."[170] In such circumstances, the contributions of co-perpetrators are interdependent and indivisible and the harm arising from the crime committed cannot be attributed to one perpetrator over another. This briefly highlights the legal recognition that interlinking and codependent contributions made by multiple perpetrators, which results in a crime, will incur vicarious and joint liability between them.

96. As a consequence, where the cause of the harm cannot be differentiated between multiple concurrent wrongdoers, such as those convicted as co-perpetrators under Article 25(3)(a), it is not possible to apportion liability. This is not necessarily due to the mode of liability as charged, but the actions of a convicted person underlying such including being part of the group enacting the common plan. It was their essential contribution to the common plan

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[166] *Ntaganda* Reparations Appeal Judgment, ICC-01/04-02/06-2782, para. 270 *referring* to *Ntaganda* Reparations Order, ICC-01/04-02/06-2659, paras 217-219.
[167] *Ongwen* Reparations Order, ICC-02/04-01/15-2074, para. 667.
[168] *Ongwen* Reparations Order, ICC-02/04-01/15-2074, para. 666, fns 2259-2262.
[169] *Lubanga* Decision on the Confirmation of Charges, ICC-01/04-01/06-803-tEN, para. 326; *Al Mahdi* Decision on the confirmation of charges, ICC-01/12-01/15-84-Red, para. 24.
[170] *Lubanga* Decision on the Confirmation of Charges, ICC-01/04-01/06-803-tEN, para. 342.

which resulted in a joint control over the commission of the crime and by extension, each of those perpetrators are responsible for the whole of the harm caused by the crime. Each of the co-perpetrator's contribution is essential to the commission of the crime, without which the common plan could have collapsed.[171]

97. As such, the *Ongwen* and *Ntaganda* reparations orders represent an appropriate application of joint and several liability to repair the full extent of the harm caused by the other co-perpetrators from the group acting pursuant to a common plan in those circumstances. The rationale for joint and several liability, however, cannot extend to the present case. This is not least because there are no other convicted persons for which Mr Al Hassan can be held to be jointly and/or severally liable with. Mr Al Hassan's conviction of persecution rests on his particular contribution pursuant to Article 25(3)(d), as opposed to having had control over the commission of this crime by himself or jointly with others. It is neither proportional nor fair for Mr Al Hassan to take on liability for the actions of others who have not been subjected to judicial proceedings to assess their involvement in the same crimes and harm sustained. Additionally, Mr Al Hassan is unable to seek recovery from other perpetrators for their proportionate share, as was pronounced in *Ntaganda*,[172] since no other persons have convictions or reparations orders issued against them.

iv. Application of proportional liability

98. The cases of *Ongwen* and *Ntaganda* can be clearly distinguished from the present case – Mr Al Hassan was not charged as either a direct perpetrator or co-perpetrator for the crime of persecution. However, these cases also reflect the application of proportional liability for which the Court has consistently asserted its application with approval. Proportional is defined as "corresponding in size, degree, or intensity".[173]

99. Whereas co-perpetration necessitates the participation of each individual for the success of the crime, this is not the case under Article 25(3)(d) which captures contributions to the crime "in any other way". Moreover, the ICC jurisprudence has specified that as the accused person's contribution should relate to the commission of a specific crime,[174] a person charged with

[171] *Ruto and Sang* Decision on Confirmation of Charges, ICC-01/09-01/11-373, para. 292; *Ntaganda* Decision on the Confirmation of charges, ICC-01/04-02/06-309, para. 104; *Katanga* Decision on Confirmation of Charges, ICC-01/04-01/07-717, para. 292; *Yekatom and Ngaïssona* Decision on the confirmation of charges, ICC-01/14-01/18-403-Corr-Red, para. 103.
[172] *Ntaganda* Reparations Order, ICC-01/04-02/06-2659, para. 219; *Ntaganda* Reparations Appeal Judgment, ICC-01/04-02/06-2782, para. 270.
[173] Merriam-Webser at https://www.merriam-webster.com/dictionary/proportional.
[174] *Katanga* Trial Judgment, ICC-01/04-01/07-3436-tENG, para. 1632.

Article 25(3)(d) can only be held accountable for crimes to which he/she contributed and is not automatically responsible for all crimes committed within the common purpose.[175]

100. In the particular case of Mr Al Hassan, the Trial Chamber explicitly acknowledged that, unlike Article 25(3)(a), "criminal responsibility under Article 25(3)(d) does not result in a reciprocal imputation of the acts of the members of the group."[176] Indeed, the Chamber considered this as a "residual form of accessorial liability"[177] which focuses on establishing what, if any, contribution the accused made to a crime within the common purpose.[178] However, the Chamber was clear that "a person will not incur individual criminal liability under Article 25(3)(d) of the Statute for all the crime(s) which form part of the common purpose."[179] The ability for the Trial Chamber to have determined the harm arising from Mr Al Hassan's actions in committing this crime was reasonably feasible, as his contributions were plainly and specifically outlined by the Trial Chamber in the Judgment and Separate Opinions.[180]

101. As such, Mr Al Hassan's actions in committing persecution can be disaggregated from others and therefore the harm arising could be reasonably determined. A proper application of the principle of proportional liability would have seen the Trial Chamber carve out Mr Al Hassan's actions within the broader context of Ansar Dine/AQIM's rules and prohibitions, in order to then identify the harm attributable to him for the crime of persecution on religious grounds. This is consistent with the Chamber's obligation to focus on the harm caused by the crimes committed by the convicted person, and to determine an appropriate award to repair such harm.

102. The approach in *Al Mahdi* reinforces this principle. While Mr Al Mahdi was convicted on Article 25(3)(a) for the war crime of attacking protected objects, the Trial Chamber had in its possession an expert opinion of the assessement for the entire cost of rebuilding all destroyed cultural sites, and other reparations measures.[181] However, the Chamber specifically determined that Mr Al Mahdi could only be responsible for a portion of this full amount for restoration – reflecting his individual responsibility for the destruction of specific buildings he was charged with, rather than the full cost of all harm suffered by the community of Timbuktu during the

[175] *Katanga* Trial Judgment, ICC-01/04-01/07-3436-tENG, paras 1619, 1632.
[176] Trial Judgment, ICC-01/12-01/18-2594-Red, paras 1235-1236.
[177] Trial Judgment, ICC-01/12-01/18-2594-Red, para. 1239.
[178] Trial Judgment, ICC-01/12-01/18-2594-Red, para. 1240.
[179] Trial Judgment, ICC-01/12-01/18-2594-Red, para. 1240.
[180] *See* above, Ground 1, paras 42-48.
[181] *Al Mahdi* Reparations Order, ICC-01/12-01/15-236, paras 116-117.

conflict (such as for the destruction of other buildings he was not found guilty of).[182] This demonstrates that the Court has been able to reasonably attribute the award to the scope of the convicted person's individual criminal conduct, even in the context of the broader community's suffering.

v. Accurately assessing Mr Al Hassan's contributions to the crime of persecution

103. The Appeals Chamber has considered that "in awarding reparations, a trial chamber must remain within the confines of the conviction and the sentencing decision."[183] Ensuring strict adherence to the scope of the conviction is fundamental to respecting the rights of the convicted person when determining an appropriate reparations award. Indeed, an order for reparations is intrinsically linked to the individual whose criminal responsibility is established in a conviction and whose culpability for those criminal acts is determined in a sentence.[184]

104. Although it is considered that Judge Akane's Opinion operates as the proper legal construction of Mr Al Hassan's conviction of persecution, for the purposes of reparations, paragraphs 1729 to 1736 of the Trial Judgment could serve as a guiding framework regarding the specific actions of Mr Al Hassan's participation in the crime of persecution. Those paragraphs address Mr Al Hassan's underlying acts relevant to Count 13, but must be construed strictly in light of the dispositive. Reparations must then remain precisely confined to Mr Al Hassan's actions as provided for by these paragraphs, to the extent it relates to persecution on religious grounds in order to comply with Judge Akane's Opinion.

105. Parapraphs 1729-1736 of the Trial Judgment informs us of the Chamber's "understanding of Mr Al Hassan's culpability for the crime of persecution."[185] It specifically outlines the following acts attributable to Mr Al Hassan in the context of this crime: his role in the Islamic Police;[186] organising and sometimes participating in patrols of the Police;[187] writing and signing numerous Islamic Police reports;[188] bringing certain persons to the Islamic Tribunal and punishment sites;[189] as well as generally speaking in support of Ansar Dine/AQIM.[190]

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[182] *Al Mahdi* Reparations Order, ICC-01/12-01/15-236, paras 116-134.
[183] *Lubanga* Appeals Judgement on the Reparations Award, ICC-01/04-01/06-3466-Red, para. 311.
[184] *Katanga* Reparations Order, ICC-01/04-01/07-3728-tENG, para. 251; *Lubanga* Appeal Judgment on principles for reparations, ICC-01/04-01/06-3129, para. 65.
[185] Trial Judgment, ICC-01/12-01/18-2594-Red, para. 1727.
[186] Trial Judgment, ICC-01/12-01/18-2594-Red, para. 1729.
[187] Trial Judgment, ICC-01/12-01/18-2594-Red, para. 1731.
[188] Trial Judgment, ICC-01/12-01/18-2594-Red, para. 1732-1733.
[189] Trial Judgment, ICC-01/12-01/18-2594-Red, para. 1733.
[190] Trial Judgment, ICC-01/12-01/18-2594-Red, paras 1730, 1735.

106. In addition, the Sentencing Judgment explicitly addressed Mr Al Hassan's contributions under Article 25(3)(d). The Trial Chamber acknowledged that Mr Al Hassan's role within the Islamic Police sat within the wider "repressive systems created by Ansar Dine/AQIM" and that he "carr[ied] out his duties and responsibilities therein."[191] At the same time, the Chamber noted that "Mr Al Hassan was not a central figure in the Ansar Dine/AQIM leadership apparatus and that, while he contributed to the commission of the crimes, he was not among the persons within Ansar Dine/AQIM who designed the common purpose" and did not serve as the head of the Police.[192]

107. Specifically in relation to the crime of persecution, the Chamber was also clear that Mr Al Hassan's degree of participation and intent in relation to the crime of persecution must be read together with its general analysis of his role in the broader group, including the fact that he did not form part of the Ansar Dine/AQIM leadership.[193]

108. While the community of Timbuktu, as a targeted group, may have indeed suffered under Ansar Dine/AQIM in the way that the Trial Chamber outlined in the Sentencing Decision,[194] the Appeals Chamber has held that "[c]riteria such as the gravity of the crimes or mitigating factors such as characteristics personal to the convicted person are not relevant to this question [of reparations]. The goal of reparations is not to punish the person but indeed to repair the harm caused to others."[195]As such, the gravity analysis provided by the Chamber in the Sentencing Decision is not necessarily a relevant factor at the reparations stage, given the purpose of the Sentencing Decision is to determine the appropriate culpability for the crimes committed. This notwithstanding, a sentencing decision by its nature, i.e. of the determination of a sentence which must be individualised to the convicted person, notably by taking into consideration his/her participation in the commission of the crime, is relevant to consider in the context of the reparations proceedings to understand the scope of the participation of the accused in the commission of the crimes.

109. It is clear from both the Trial Judgment and the Sentencing Decision that Mr Al Hassan's contribution to the crime of persecution was considered to be limited in scope within the broader context of Ansar Dine/AQIM's rules and prohibitions imposed on Timbuktu. Indeed, the correct position that the Reparations Chamber ought to have considered in

[191] Sentencing Judgment, ICC-01/12-01/18-2662, para. 35.
[192] Sentencing Judgment, ICC-01/12-01/18-2662, para. 37.
[193] Sentencing Judgment, ICC-01/12-01/18-2662, para. 78.
[194] Sentencing Judgment, ICC-01/12-01/18-2662, paras 70-77.
[195] *Katanga* Reparations Appeal Judgment, ICC-01/04-01/07-3778-Red, para. 184.

determining the harm caused by Mr Al Hassan in committing persecution, was the harm sustained by the direct victims of the underlying acts which constituted this crime, as per Ground 1. His contributions to the crime of persecution and the harm suffered as a result of his conviction do not extend further than these victims. This notwithstanding, for the purposes of reparations, the Reparations Chamber was reasonably capable of determining the harm attributable to Mr Al Hassan as a result of his actions as outlined by the Trial Judgment, Separate Opinions, and Sentencing Decision.

vi. Accurately defining the harm attributable to Mr Al Hassan was essential to determine the total award

110. The Reparations Chamber was obliged to accurately define the harm arising from Mr Al Hassan's individual actions in committing the crime of persecution to determine a proportional award which would repair those harms.[196] Instead, the Chamber's analysis concerning the harms suffered by direct victims of persecution primarily focuses on the actions of Ansar Dine/AQIM as a group and suffering caused to Timbuktu at large. In doing so, the Reparations Chamber unlawfully imputed the global harms suffered by the community of Timbuktu as a result of the imposition of Ansar Dine/AQIM's set of rules and prohibitions, to Mr Al Hassan in his individual capacity. This resulted in his personal liability being insufficiently reasoned and/or a represents an abuse of the Reparations Chamber's discretion and therefore an error.

111. With respect to the physical harm experienced by the victims in connection with persecution, the Reparations Chamber generally referred to the fact that "Ansar Dine/AQIM's rules and prohibitions were imposed through the implementation of a system of surveillance and punishment, which relied on acts of violence, force, intimidation, and threat."[197] Those who were punished, "could be detained under dire conditions".[198] While Mr Al Hassan had a "leadership role in [Islamic] police operations",[199] there was no finding that his functions extended to overseeing detention conditions,[200] or that such conditions impacted each and every resident of Timbuktu as suggested in the Reparations Order.[201] While Mr Al Hassan had *a* role in enforcing Ansar Dine/AQIM's rules and prohibitions, he was not in a leadership role

[196] *Lubanga* Appeal Judgment on principles for reparations, ICC-01/04-01/06-3129, para. 184.
[197] Reparations Order, ICC-01/12-01/18-2782, para. 81.
[198] Reparations Order, ICC-01/12-01/18-2782, para. 81; Judge Akane's opinion, ICC-01/12-01/18-2594-OPI, paras 17, 30, 50.
[199] Trial Judgment, ICC-01/12-01/18-2594-Red, para. 1063.
[200] *See* Trial Judgment, ICC-01/12-01/18-2594-Red, Part III(F)(3).
[201] Reparations Order, ICC-01/12-01/18-2782, paras 81-82.

responsible for architecting its systems of surveillance and punishment. As elaborated above, he did not have the control over all crimes within the common plan of Ansar Dine/AQIM.

112. Further, "aside from these 14 direct victims [of public mutilation or flogging], it is clear from the Trial Judgment that Ansar Dine/AQIM's rules and prohibitions, as well as associated punishments, were imposed 'on the population of Timbuktu as a whole'."[202] In addition, "other members of the population, beyond those named in the Trial Judgment, were physically punished, by the imposition of a *hadd* or a *ta'zir* punishment, for having allegedly breached Ansar Dine/AQIM's rules and prohibitions."[203] Here, the Reparations Chamber explicitly goes beyond the findings of the Trial Judgment to attribute harm experienced by unknown persons to Mr Al Hassan. Aside from the 14 direct victims, there were no findings entered beyond a reasonable doubt that Mr Al Hassan's duties and responsibilities included generally imposing the *hadd* or a *ta'zir* on members of the population in his role in the Islamic Police,[204] or that he did in fact carry out the *hadd* or *ta'zir* on a frequent or regular basis.[205]

113. With respect to moral harm, the Reparations Chamber simply refers to Ansar Dine/AQIM's rules and prohibitions which resulted in members of Timbuktu suffering from: the imposition of a system of repression that instilled fear in the population;[206] the humiliation and loss of dignity due to the imposition of a 'proper Islam';[207] the moral impact caused as a result of the destruction of monuments of religious importance;[208] the loss of schooling and education due to measures imposed on public schools;[209] and the long-lasting psychological impact of persecution.[210] These findings of harm have no discernible link to Mr Al Hassan's individual actions in committing persecution, or any analysis concerning the extent (if any) to which he contributed to these harms. Indeed, Mr Al Hassan was not convicted for the

[202] Reparations Order, ICC-01/12-01/18-2782, para. 83.
[203] Reparations Order, ICC-01/12-01/18-2782, para. 83.
[204] Trial Judgment, ICC-01/12-01/18-2594-Red, paras 1078-1079.
[205] Trial Judgment, ICC-01/12-01/18-2594-Red, paras 657-664, 1729-1736.
[206] Reparations Order, ICC-01/12-01/18-2782, para. 90: "The Chamber finds that Timbuktu's entire population experienced moral harm through the permanent fear of being punished by Ansar Dine/AQIM's system of repression […]".
[207] Reparations Order, ICC-01/12-01/18-2782, para. 93: "The Chamber considers that the imposition of Ansar Dine/AQIM's own interpretation of *Sharia* and the disregard of other Islamic belief caused Timbuktu's Muslim population moral harm[…]".
[208] Reparations Order, ICC-01/12-01/18-2782, para. 95: "The imposition of Ansar Dine/AQIM's interpretation of the *Sharia* meant putting an end to all anti-monotheistic manifestations and, therefore, the destruction of monuments of religious importance for the Timbuktu community."
[209] Reparations Order, ICC-01/12-01/18-2782, para. 103: "The Chamber recalls that one of Ansar Dine/AQIM's persecutory measures was the imposition of rules on education, as the group did not accept the form of education taught in public schools […]".
[210] Reparations Order, ICC-01/12-01/18-2782, para. 106: "the Chamber recalls that the Sentencing Decision recognised the long lasting effects of Ansar Dine/AQIM's persecutory measures when finding that 'the regime that was imposed remains present in the mind of victims as a deep-seated trauma'".

destruction of monuments of religious importance (such as the mausoleums),[211] nor are there any findings within the Judgment regarding his participation in closing the public schools or implementing any specific rules on education.[212] There is no reasonable basis to suggest that Mr Al Hassan contributed to these harms himself.

114. With respect to material harm, the Reparations Chamber further considered that due to "Ansar Dine/AQIM's persecution of the population, Timbuktu's 'local economy was impacted, with some jobs and activities [being] unable to continue'.[213] Additionally, the Reparations Chamber "noted the evidence in the case record as to the economic hardship Timbuktu's society experienced during Ansar Dine/AQIM's presence."[214] Again, these harms have no discernible links to Mr Al Hassan's individual actions in committing persecution, or any analysis concerning the extent (if any) to which he contributed to these harms. Indeed, there appears to be 4 charged incidents involving Mr Al Hassan that may have resulted in material harm, but the total financial losses were not quantified by the Chamber in the Judgment and there is no evidence supporting that the fines imposed were in fact paid.[215] Mr Al Hassan's actions cannot then be said to have resulted in widespread economic harm and material losses as provided by the Reparations Order. The Chamber also noted that "[…] Timbuktu's economy relies primarily on commerce and tourism. With the coming of Islamist groups, there was no tourism".[216] It is notable that in *Al Mahdi,* the Trial Chamber also considered the overall economic effects on Timbuktu following the arrival of the groups, including reduced tourism, however considered that Mr Al Mahdi was liable for only a portion of the economic harm sustained, namely 2.12 million euros out of a total of 44.6 millions euros.[217] No similar proportional analysis was taken by the Chamber with respect to Mr Al Hassan's liability in this case.

115. Finally, with respect to community harm, the Chamber, again, focuses on the effects caused by the rules and prohibitions of Ansar Dine/AQIM including: i) alteration of the social

[211] Trial Judgment, ICC-01/12-01/18-2594-Red, para. 1055 and Disposition (Count 7).
[212] Trial Judgment, ICC-01/12-01/18-2594-Red, paras 726-731.
[213] Reparations Order, ICC-01/12-01/18-2782, para. 109.
[214] Reparations Order, ICC-01/12-01/18-2782, para. 109.
[215] Trial Judgment, ICC-01/12-01/18-2594-Red, paras 765-768 (In the Case of Ibrahim bin Al-Husayn, material harm may include the fine and the loss of earnings while his shop was closed); para. 845 (In the Case of Madou Traoré, material harm may include the fine imposed); paras 987-989 (In the Case of Abdelkarim Ascofare or 'Abd-al-Karim Iskufari, material harm may include the fine imposed); para. 996 (In the Case of Yahya Bin-Muhammad, material harm may include the fine imposed).
[216] Reparations Order, ICC-01/12-01/18-2782, para. 109.
[217] *Al Mahdi* Reparations Order, ICC-01/12-01/15-236, paras 119-128.

structure of the city of Timbuktu;[218] ii) social impact of the closing of public schools;[219] iii) separation of families and disruption of the transmission of traditions;[220] iv) destruction of cultural and religious heritage;[221] v) social impact of the gender aspect of religious persecution;[222] and vi) Religious groups specially impacted.[223] While the Defence does not contest the fact that persons fled Timbuktu due to the presence of the groups, the Judgment contains no findings concerning Mr Al Hassan's individual efforts or actions which led to the separation of families and disruption of the transmission of traditions.[224] There are also no findings that Mr Al Hassan specially targeted other religious groups in the course of his duties, such as Christians.[225] Given the fact that Mr Al Hassan was not found to be part of the Ansar Dine/AQIM leadership, and also not found responsible for designing the common purpose imposed on Timbuktu at large,[226] it was incumbent on the Chamber to identify how Mr Al Hassan's specific actions impacted the wider "structure and functioning of the community" or undermined its "cohesion, security, cultural continuity and social structure".[227] Not only do certain community harms overlap with moral harm relating to acts for which he was not convicted, there is, again, no discernible causal link to these harms with Mr Al Hassan's individual actions, or any analysis concerning the extent (if any) to which he contributed to these harms.

116. The effects of Ansar Dine/AQIM's rules and prohibitions on the residents of Timbuktu at large is the clear focus of the Chamber in its identification of the harm suffered. It is not contested that Mr Al Hassan played a role in enforcing Ansar Dine/AQIM's general rules and prohibitions. However, simply because Mr Al Hassan was convicted of persecution does not, in of itself, enable the Reparations Chamber to disregard the contours of his contribution to this crime. The Chamber was obliged to ensure that the harms identified accurately reflected his contributions, in order to determine a proportional award. The Chamber's discussion of the

[218] Reparations Order, ICC-01/12-01/18-2782, para. 116 ("The Chamber recalls that Ansar Dine/AQIM's rules and prohibitions altered the social structure of the city of Timbuktu […] Ansar Dine/AQIM notably prohibited the local population from practising or taking part in certain religious and traditional customs").
[219] Reparations Order, ICC-01/12-01/18-2782, para. 118 (relying upon paras 102-104).
[220] Reparations Order, ICC-01/12-01/18-2782, para. 120 ("[…] many inhabitants of Timbuktu left the city because of the violence or because they did not want to submit themselves to Ansar Dine/AQIM's rules and prohibitions.").
[221] Reparations Order, ICC-01/12-01/18-2782, para. 121 ("The Chamber recalls its previous finding that Ansar Dine/AQIM damaged and destroyed monuments of historical value to the population of Timbuktu […]").
[222] Reparations Order, ICC-01/12-01/18-2782, para. 123 ("[…] 'the behaviour of women and girls was particularly controlled' by Ansar Dine/AQIM's rules and prohibitions.")
[223] Reparations Order, ICC-01/12-01/18-2782, para. 125 ("[…] Ansar Dine/AQIM did not allow for any faith other than the Muslim faith and forbade the showing of any sign of another faith'.")
[224] Trial Judgment, ICC-01/12-01/18-2594-Red, paras 740-741; Part III(F).
[225] Trial Judgment, ICC-01/12-01/18-2594-Red, para. 713; Part III(F).
[226] Sentencing Judgment, ICC-01/12-01/18-2662, para. 37.
[227] Reparations Order, ICC-01/12-01/18-2782, para. 72 (definition of "community harm").

harm suffered provides no analysis of the extent of Mr Al Hassan's contribution to these harms and therefore insufficiently reasoned.

117. Had the Reparations Chamber properly undertaken this analysis, the harm attributable to Mr Al Hassan would have been solely limited to the harm arising from his specific contributions to the crime of persecution on religious grounds. His participation to this crime was plainly defined by the Trial Chamber, and these actions could not reasonably be found to have impacted each and every individual of Timbuktu and the entire community at large. The harm sustained by Mr Al Hassan would have been discernibly narrower than the community-wide moral, material, and physical harm caused by the totality of Ansar Dine/AQIM's rules and prohibitions, including the destruction of monuments, the closure of schools, the economic collapse of the city, and the system of surveillance and punishment imposed by the group as a whole, which fall outside of Mr Al Hassan's scope of the clearly delineated conviction. The Reparations Chamber was required to isolate the harm caused by Mr Al Hassan's conduct from the broader harm caused by Ansar Dine/AQIM's collective campaign, and to assess his liability solely on that basis. In failing to undertake this analysis, the Reparations Order lacks reasoning on an essential component and thus conclusions are insufficiently clear as to Mr Al Hassan's personal liability.

118. The correct position that the Reparations Chamber ought to have taken in defining the harm caused by Mr Al Hassan in committing persecution, was harm sustained by the direct victims of the underlying acts which constituted this crime. Once again, his contributions to the crime of persecution and the harm suffered as a consequence do not extend further than these victims. The global harms that the Chamber has said to have occurred have no discernible causal link to Mr Al Hassan's specific contribution to the crime of persecution nor to his conviction.

vii. The Reparations Chamber's failure to apply any standard of causation

119. These global harms as identified by the Reparations Chamber also cannot be attributed to Mr Al Hassan as the Reparations Chamber failed to apply any standard of causation to establish this. Without applying any causal link between the acts Mr Al Hassan was found guilty of beyond a reasonable doubt, and those harms suffered, it is not possible to impose liability on Mr Al Hassan to repair those harms. The Reparations Chamber erred in law by failing to establish that such harms were caused by Mr Al Hassan pursuant to the applicable legal standard.

120. The Chamber states that "there must be sufficient proof of the causal link between the crime and the harm suffered, based on the specific circumstances of the case", and the standard of proof of a 'balance of probabilities' shall apply.[228] It is not contested that the balance of probabilities is the applicable standard of proof applied in reparations proceedings.

121. However, the Reparations Chamber fails to state, consider, or apply the relevant standard of causation, namely the "but/for" test,[229] to establish the relationship between the crimes and the harm suffered, as has been consistent practice in reparations proceedings. "Moreover, it is required that the crimes for which a person was convicted were the 'proximate cause' of the harm for which reparations are sought".[230] It must also have been reasonably foreseeable to the convicted person that the acts and conduct underlying the conviction would cause the resulting harm, in order to result in liability be ascribed.[231]

122. Considering the narrow contours of Mr Al Hassan's role in committing the crime of persecution,[232] applying the 'but/for' causation test to the harms identified by the Chamber to Mr Al Hassan, would fail. It is recalled that Mr Al Hassan was found to generally contribute in the following ways: his role in the Islamic Police;[233] organising and sometimes participating in patrols of the Police;[234] writing and signing numerous Islamic Police reports;[235] bringing certain persons to the Islamic Tribunal and punishment sites;[236] as well as generally speaking out in support of Ansar Dine/AQIM.[237] Given the accessorial nature of Mr Al Hassan's contributions to the crime of persecution, the global impact of the rules and prohibitions imposed by Ansar Dine/AQIM on the community of Timbuktu at large would have occurred even without Mr Al Hassan's contributions to persecution on religious grounds. The very nature of accessorial liability suggests a weaker link to Mr Al Hassan's bearing on the totality of harm as described by the Reparations Chamber. Mr Al Hassan's contributions could also not be considered the proximate cause to such harms due to the number of other different actors involved in contributing to these harms.

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[228] Reparations Order, ICC-01/12-01/18-2782, para. 20.
[229] *Ntaganda* Reparations Order, ICC-01/04-02/06-2659, paras 132-133; *referring* to *Lubanga* Amended Reparations Order, ICC-01/04-01/06-3129-AnxA, para. 59.
[230] *Ntaganda* Reparations Order, ICC-01/04-02/06-2659, para. 132; *referring* to *Lubanga* Amended Reparations Order, ICC-01/04-01/06-3129-AnxA, para. 59.
[231] *Ntaganda* Reparations Order, ICC-01/04-02/06-2659, para. 133.
[232] *See* above, Ground 1, paras 42-48 and Ground 2, paras 104-108.
[233] Trial Judgment, ICC-01/12-01/18-2594-Red, para. 1729.
[234] Trial Judgment, ICC-01/12-01/18-2594-Red, para. 1731.
[235] Trial Judgment, ICC-01/12-01/18-2594-Red, paras 1732-1733.
[236] Trial Judgment, ICC-01/12-01/18-2594-Red, para. 1733.
[237] Trial Judgment, ICC-01/12-01/18-2594-Red, paras 1730, 1735.

123. It was insufficient for the Reparations Chamber to simply state that the moral and community harm suffered was "established on the balance of probabilities" given that Mr Al Hassan was convicted of the crime of persecution.[238] The Reparations Chamber was required to establish that, **but for** Mr Al Hassan's contributions to the crime of persecution, all residents of Timbuktu would have suffered "moral harm, including psychological and emotional impacts, terror, isolation, fear of being reprimanded or brutalised, trauma, discrimination, the tarnishing of the victims' dignity, humiliation, feelings of shame, stigma and impact on morale";[239] as well as having "eroded the city's historical foundation of religious tolerance and pluralism; undermined the community's long-standing bonds and traditional mutual aid systems; fostered deep suspicion and mistrust within and between ethnic and social groups; contributed to the widespread fragmentation of Timbuktu's social fabric, negatively impacting the spiritual, cultural, social cohesion and collective identity of the population as a whole".[240] Both the moral and community harm as expressed clearly fail the causation test when analysed against Mr Al Hassan's limited contributions to the overall common purpose, resulting in an unreasonable conclusion.

124. It was similarly insufficient for the Chamber to state that it was established "on the balance of probabilities" that many of the victims of the crime of persecution suffered material harm.[241] Again, the Chamber was required to establish that **but for** Mr Al Hassan's contributions, residents of Timbuktu suffered "loss of income, destruction or loss of property, poverty in connection with displacement or resettlement; and loss of economic opportunities" as well as "long-lasting effects due to the general impact on the city's economy".[242] This causation test would again fail given Mr Al Hassan's limited contributions, and could also not establish that Mr Al Hassan had a destructive impact on Timbuktu's entire local economy or sufficient control over the crime to do so.

125. Finally, with respect to physical harm, while the Defence does not contest that the 14 direct victims suffered physical harm, that it was established "on the balance of probabilities" that unidentified persons "experienced physical harm in a similar form" as the 14 direct victims,[243] cannot satisfy the causation test either. These apparent incidents of physical

[238] Reparations Order, ICC-01/12-01/18-2782, paras 107, 127.
[239] Reparations Order, ICC-01/12-01/18-2782, para. 107.
[240] Reparations Order, ICC-01/12-01/18-2782, para. 127.
[241] Reparations Order, ICC-01/12-01/18-2782, para. 113.
[242] Reparations Order, ICC-01/12-01/18-2782, para. 113.
[243] Reparations Order, ICC-01/12-01/18-2782, paras 83-84.

punishments are unknown to Mr Al Hassan and do not form the scope of his conviction, and therefore cannot be said to have occurred but for his contribution.

126. The above harms were also required to be reasonably foreseeable to Mr Al Hassan. This is an objective test and requires consideration as to whether such harms could have been foreseeable to a reasonable person in the convicted person's position.[244] Given the nebulous and all-encompassing harms as expressed by the Chamber, the entirety of these harms could not have been reasonably foreseeable to Mr Al Hassan. His ability to have reasonably foreseen certain outcomes was firmly dependent on his role, position and functions within Ansar Dine/AQIM and his actual actions and participation therein.

127. The impact of failing to apply the causation test resulted in a disproportionate award being issued against Mr Al Hassan, as the Chamber failed to ensure that the harms satisfied the appropriate legal test to support the basis that they were in fact caused by him. This represents a reversible error of law. Had the Reparations Chamber accurately applied this test it would have materially affected the outcome of the Reparations Order as the harms could not have been found to have been caused by Mr Al Hassan.

128. The causation analysis and the proportionality assessment are thus inextricably linked: proportionality presupposes that the harm for which the convicted person is held liable was in fact caused by his conduct. Without a proper causation analysis, no proportionality assessment can be sound, as Mr Al Hassan can only be held personally liable for the amount of reparations which repair the harm he actually caused. The failure to apply either analysis compounds the error: the Chamber did not establish that the harm was caused by Mr Al Hassan, and it did not assess whether the award was proportionate to whatever harm was in fact attributable to him.

viii. Material impact

129. As a result of the above cumulative errors committed by the Reparations Chamber, the Reparations Order fails to respect Mr Al Hassan's individual criminal responsibility and is not proportional in the circumstances. The Chamber failed to define the harm as caused by Mr Al Hassan in the commission of persecution on religious grounds, and also fails to apply his actions to any standard of causation in order to sufficiently base their reasoning to ascribe him liability. Both errors caused a disproportional financial award against Mr Al Hassan, as he

[244] *Ntaganda* Reparations Order, ICC-01/04-02/06-2659, paras 131-135, especially paras 133-134; *Al Mahdi* Reparations Order, ICC-01/12-01/15-236, para. 44; *Ongwen* Reparations Order, ICC-02/04-01/15-2074, para. 205. *Ntaganda* Reparations Appeal Judgment, ICC-01/04-02/06-2782, paras 566-569; *Lubanga* Amended Reparations Order, ICC-01/04-01/06-3129-AnxA, para. 59.

is made to pay reparations for harms that have not been established to be caused by him. The Reparations Order should be amended in a way that provides a reasoned opinion reflecting Mr Al Hassan contribution to the harm of the victims for which he was convicted for, and a subsequent amendment of the total amount of liability that would reflect this.

C. Ground 3: The Chamber erred in setting the number of direct victims at 65,202 individuals for the crime of persecution

i. The Trial Chamber impermissibly adopted a presumption of victimhood for the inhabitants of Timbuktu during the period of the charges

130. The Reparations Chamber erroneously found that Mr Al Hassan's direct victims of the crime of persecution consists of the entire population of Timbuktu present or residing in the city during the charged period, namely **65,202** individuals. The Chamber impermissibly based Mr Al Hassan's liability for these 65,202 individuals on the determination of harms for acts that did not fall within the scope of his conviction and/or for acts which he was not convicted of beyond a reasonable doubt and/or for harms which were not established to have been caused by him.

131. As such, this present ground directly stems from and reflects the material impact of the errors identified in Grounds 1 and 2. Accordingly, in the interests of avoiding unnecessary repetition, the Defence relies on and incorporates the submissions made under those grounds, referring to them where relevant rather than restating them in full.

132. As a result of the errors committed in Grounds 1 and 2, it follows that the Reparations Chamber erred in adopting a presumption of victimhood for the entire population of Timbuktu during the temporal scope of the charges.[245] The Chamber considered that this presumption could be proved on the basis of either a proof of presence or residence in the city of Timbuktu at the time of the charged period for the crime of persecution.[246] In the context of its observations on reparations, the Defence supported the adoption of any presumption of law and/or facts that would facilitate the process of reparations, as long as presumption would respect Mr Al Hassan's acquittal and scope of conviction, as per the Court's jurisprudence.[247] The Chamber clearly committed an error of law by adopting this presumption of victimhood for the population of Timbuktu.

[245] Reparations Order, ICC-01/12-01/18-2782, paras 61, 63.
[246] Reparations Order, ICC-01/12-01/18-2782, paras 252-253.
[247] Defence Observations on Reparations, ICC-01/12-01/18-2729, para. 3; Defence Response to VPRS Request for Guidance, ICC-01/12-01/18-2687, paras 14-15.

133. As elaborated above, although the crime of persecution must be found to be against a group or collective, Mr Al Hassan was only convicted for the crime of persecution for specific acts captured under Counts 1-5 and 14.[248] Thus, it was legally and factually erroneous for the Chamber to adopt a presumption of victimhood on the basis that:

> [g]iven that the various types of harm arising from this crime affected the entirety of the local population, the Chamber finds it appropriate to presume that persons who can demonstrate, to the required standard of proof, that they were present or residing in the city of Timbuktu during the temporal scope of the crime of persecution committed by Mr Al Hassan, that is, from early May 2012 to 29 January 2013, are direct victims of the crime of persecution on religious grounds. […][249]

134. Any presumption adopted at the reparations stage must remain reasonable, be firmly grounded in the evidentiary record and the circumstances of the case, and strike a fair balance between the interests of victims and the rights of the convicted person.[250]

135. The Appeals Chamber has held that "bearing in mind the standard of review, a party challenging a factual presumption must demonstrate that no reasonable trier of fact could have formulated the presumption in question in light of the particular set of circumstances in that case."[251] Otherwise, this may be considered an unreasonable decision.[252] The question, therefore, is whether the Chamber's presumption was one that a reasonable trier of fact could have drawn from the findings contained in the Trial Judgment, in the circumstances of this particular case. This assessment necessarily requires consideration of whether the presumption remained within the factual and legal parameters of the conviction and was supported by a sufficient evidentiary basis.

136. The Reparations Chamber's reliance on the broader acts and conducts of Ansar Dine/AQIM to justify the adoption of this presumption of victimhood was unreasonable. In doing so, the Chamber impermissibly exceeded the scope of Mr Al Hassan's conviction by attributing to him harms that was neither caused by, nor sufficiently linked to, the criminal conduct for which he was found guilty. Such an approach disregards the principle that

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[248] *See* above, Ground 1, paras 42-48 and Ground 2, paras 104-108.
[249] Reparations Order, ICC-01/12-01/18-2782, para. 63.
[250] *Katanga* Reparations Appeal Judgment, ICC-01/04-01/07-3778-Red, paras 75-77.
[251] *Ongwen* Appeal Judgment on Reparations, ICC-02/04-01/15-2108, para. 84; *Katanga* Reparations Appeal Judgment, ICC-01/04-01/07-3778-Red, para. 77; *Ntaganda* Reparations Appeal Judgment, ICC-01/04-02/06-2782, paras 32, 696.
[252] *See Kony et al.* Appeal Judgment on Admissibility, ICC-02/04-01/05-408, para. 81, *referring* to ICTY and ICTR jurisprudence.

reparations must be grounded in the convicted person's individual criminal responsibility and results in liability being imposed for harm falling outside the ambit of the conviction.

137. There is otherwise no sufficient or reliable basis to support a presumption that each and every individual in Timbuktu was a victim of Mr Al Hassan's contributions to the crime of persecution. Indeed, there was credible information to suggest that not all persons in Timbuktu considered themselves a victim or otherwise deemed themselves unaffected by the rules and prohibitions imposed by the groups. In the TFV's *Voices That Count* report, the TFV estimated, based on their representative sample of the study undertaken, that [REDACTED].[253] This was a weighted median percentage of a range between 12.5%-19.5% of the population of Timbuktu. There is no indication in the Reparations Order that these findings were taken into account when the Chamber considered applying the presumption of victimhood to all members of the Timbuktu community. This is despite the Chamber relying on the TFV's same study to make other findings relating to victims, such as the number of 9,677 persons in Timbuktu who suffered physical harm as a result of the crimes.[254] The Chamber clearly disregarded the TFV's relevant evidence indicating the existence of [REDACTED].[255] As such, the presumption of victimhood of all individuals in Timbuktu was unreasonable.[256]

138. Moreover, the adoption of such a presumption of victimhood would equate to retroactively interpreting Judge Akane's Opinion to refer to 'types' of conduct in lieu of the specific incidents pleaded in the charges and for Mr Al Hassan to be convicted of those acts beyond a reasonable doubt. Such an interpretation could lead to arbitrary and unfair results towards Mr Al Hassan. The legitimacy of the reparations process would be undermined if individuals were able to obtain the status of direct victim based purely on a similarity of facts, rather than the quality of evidence.

139. Trial Chambers have considered it impermissible to adopt presumptions of victimhood in circumstances where it could result in "undue prejudice to the convicted person by requiring him to pay reparations for individuals who have not established, on a balance of probabilities,

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[253] Voices that Counts, ICC-01/12-01/18-2737-Conf-AnxC, pp. 9-10.
[254] Reparations Order, ICC-01/12-01/18-2782, para. 237, fn. 617.
[255] *See further* Reparations Order, ICC-01/12-01/18-2782, para. 226, fn. 594 *referring to* Registry Submissions on Reparations, ICC-01/12-01/18-2733-Red, para. 8 ("[…] the estimated number of people who are currently living in Timbuktu city and that suffered and experienced some form of harm from the imposed new rules and prohibitions by force during the time that Ansar Dine and Al Qaeda groups ruled Timbuktu in 2012-2013 (of which Mr. Al Hassan contributed to) is appr. 30,240 people, which is 84% of the appr. 36,000 inhabitants.") (emphasis added).
[256] TFV Observations relevant to Reparations, ICC-01/12-01/18-2737, para. 46; Registry Submissions on Reparations, ICC-01/12-01/18-2733-Red, paras 8, 25.

to be victims of the crimes for which he was convicted."[257] In *Ongwen,* the Trial Chamber refused to adopt a presumption of victimhood on the basis of certain lists of potential beneficiaries put forward by the TFV, which were also submitted at trial and thus "largely reliable", as it considered the records to be "incomplete or overinclusive" and therefore have "undesired repercussions in the context of […] reparations proceedings."[258] Factual matters and evidence that may have been relevant at trial are not necessarily directly relevant for the purposes of determining appropriate reparations. Given the universal presumption for all individuals in Timbuktu, no assurance was given by the Chamber that all those victims could reasonably have been considered direct victims of Mr Al Hassan's individual conduct, and runs the risk of being overinclusive. Individuals may unduly receive the status of direct victim and increase the amount of liability to Mr Al Hassan.

140. The Appeals Chamber has recognised that presumptions may serve, in part, to address "the difficulties victims may face in obtaining evidence in support of their claims", reflecting the Trial Chamber's discretion to assess evidence of harm at a lower evidentiary standard than that imposed at trial.[259] However, while the adoption of presumptions may seek to ensure efficiency of reparations, the Appeals Chamber has equally emphasised that this discretion is not unfettered, warning that "[a] trial chamber must respect the rights of victims as well as the convicted person when resorting to presumptions".[260]

141. The Defence understands that the presumption of victimhood does not necessarily equates to a presumption of harm, and potential beneficiaries will still need to establish that they have suffered individual harm to be eligible for reparations.[261] This notwithstanding, the impact of establishing this presumption of victimhood remains, as it directly impacted the cost of reparations the Chamber considered necessary to be implemented. Indeed the Chamber considered that, *inter alia,* 'the large victim population' resulted in collective community-based reparations, with an individualised component, being the most effective award.[262] With respect to rehabilitation measures, the Chamber clarified that it would "focus on the global costs for

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[257] *Ongwen* Reparations Order, ICC-02/04-01/15-2074, para. 158.
[258] *Ongwen* Reparations Order, ICC-02/04-01/15-2074, para. 157.
[259] *Katanga* Reparations Appeal Judgment, ICC-01/04-01/07-3778-Red, para. 75.
[260] *Katanga* Reparations Appeal Judgment, ICC-01/04-01/07-3778-Red, paras 4, 75 (emphasis added); *Katanga* Reparations Order, ICC-01/04-01/07-3728-tENG, para. 18, fn. 32; *referring* to *Lubanga* Amended Reparations Order, ICC-01/04-01/06-3129-AnxA, paras 20-22, 45; *Lubanga* Appeals Judgement on the Reparations Award, ICC-01/04-01/06-3466-Red, para. 90, paras 107-108; Rule 97(3).
[261] Reparations Order, ICC-01/12-01/18-2782, para. 253 ("[…] once a person has demonstrated their identity as well as their residency in Timbuktu city during the temporal scope of the conviction, their victimhood for the crime of persecution shall be presumed, and their moral and community harm should be established.") (emphasis added). *See* also *Ongwen* Appeal Judgment on Reparations, ICC-02/04-01/15-2108, paras 89-90.
[262] Reparations Order, ICC-01/12-01/18-2782, para. 193.

establishing and running rehabilitation programmes and the cost to implement symbolic and satisfaction measures".[263] All reparations, save from the individualised component, can be understood as benefitting the community of Timbuktu. The total amount of these reparations measures then equates to the total financial award against Mr Al Hassan, namely, 7,250,000 euros.[264] Nevertheless, it is also the very fact that these persons will qualify as a direct victim which encroaches on Mr Al Hassan's rights, as it does not respect the scope of his conviction.

142. Since not every individual who was present in, or resided in, Timbuktu during the charged period suffered harm as a result of the crime of persecution on religious grounds for which Mr Al Hassan was convicted, or can actually be considered as a direct victim of Mr Al Hassan, the Chamber's presumption is not one that could reasonably be drawn from the Trial Judgment or other evidence before the Chamber for the purposes of reparations. By presuming victim status on that basis, the Reparations Chamber infringed Mr Al Hassan's rights and abused its discretion in adopting such a presumption of victimhood.

ii. The Reparations Chamber failed to engage with the Defence argument that the commity of Timbuktu itself could be a beneficiary for reparations

143. The Reparations Chamber's error in identifying the eligible victims of the crime of persecution is compounded by its failure to provide a reasoned decision on a key legal argument advanced by the Defence: that the community of Timbuktu itself should have been recognised as beneficiary of reparations, rather than every single member of the population of Timbuktu. As developed below, the Defence's alternative of designating the community of Timbuktu as a beneficiary for reparations would have enabled the Chamber to remain within the lawful confines of Mr Al Hassan's conviction, while also acknowledging the broader victimisation of the Timbuktu community.

a. Failure to provide a reasoned opinion in relation to a key Defence submission

144. A judicial decision must be reasoned on all key elements that determine the outcome of a case.[265] While Chambers are not required to engage with every single argument advanced by a party, they must nonetheless address the key issues presented that go to the heart of the case.[266] The identification of victims eligible to benefit from reparations forms an essential component

[263] Reparations Order, ICC-01/12-01/18-2782, para. 229.
[264] Reparations Order, ICC-01/12-01/18-2782, para. 241.
[265] *See* above, Ground 2, paras 82-84.
[266] *Ntaganda* Reparations Appeal Judgment, ICC-01/04-02/06-2782, paras 59-60.

of a reparations order in this case,[267] therefore the Chamber was bound to provide a fully reasoned opinion on the Defence's submission of designating the community of Timbuktu as a beneficiary for reparations. This was particularly necessary given the importance the Trial Judgment and Sentencing Judgment attached to the harm experienced by the entire community of Timbuktu as a result of the acts and conduct of Ansar Dine/AQIM.

145. The Reparations Chamber focused on the harm to the community of Timbuktu as the main harm caused by the crime of persecution for which Mr Al Hassan was convicted, as well as the long-term impact of this harm on the community.[268] Notwithstanding its recognition of the significant collective harm suffered, the Reparations Chamber did not award collective reparations to the community as a whole, but to the 65,202 residents of Timbuktu during the period covered by the charges, treating each and every person as a direct victim of the crime of persecution.

146. In doing so, the Reparations Chamber failed to address a key submission advanced by the Defence despite the extensive litigation concerning the legal premise underpinning that submission, and as a result failed to provide a sufficiently reasoned opinion supporting its dismissal. In the alternative, the Chamber's conclusion was unreasonable and failed in the exercise of its discretion,[269] as it does not reflect the Chamber's own analysis of the harm suffered by Timbuktu and also did not to take relevant factors in to account. This constitutes an error of law and/or procedure that materially affected the Reparations Order, as it directly impacted the Chamber's conclusion regarding the total number of direct victims in this case. This determination expanded the number of victims for whom Mr Al Hassan bears liability, which directly increased the total amount of liability for which he was ascribed.

b. The Chamber's extensive findings of community harm

147. The Reparations Chamber placed significant emphasis on the collective nature of the harm suffered by the Timbuktu community. It found that:

> the crime of persecution, for which Mr Al Hassan was convicted, eroded the city's historical foundation of religious tolerance and pluralism; undermined the community's long-standing bonds and traditional mutual aid systems; fostered deep suspicion and

[267] *Lubanga* Appeal Judgment on principles for reparations, ICC-01/04-01/06-3129, para. 32.
[268] *See* Reparations Order, ICC-01/12-01/18-2782, paras 59-61, 75, 88-90, 112-113, 118, 127, 225.
[269] *See Kony et al.* Appeal Judgment on Admissibility, ICC-02/04-01/05-408, para. 81, *referring* to ICTY and ICTR jurisprudence; *Kenyatta* Appeal Judgment on non-compliance, ICC-01/09-02/11-1032, para. 25. *See* also, *Bemba et al*. Appeal Judgment, ICC-01/05-01/13-2275-Red, paras 101-102; *Ntaganda* Appeal Judgment, ICC-01/04-02/06-2666-Red, paras 42, 46.

> mistrust within and between ethnic and social groups; contributed to the widespread fragmentation of Timbuktu's social fabric, negatively impacting the spiritual, cultural, social cohesion and collective identity of the population as a whole.[270]

148. The Chamber adopted the TFV's definition of community harm, recognising it as harm "suffered by persons as members of a group, family and/or community"[271] that "includes the harm to the collective identity, structure and functioning of the community."[272]

149. Additionally, the Reparations Chamber relied on the Sentencing Judgment to justify its conclusion that "the number of victims of the crime of persecution is therefore very high: the entire population of the city of Timbuktu was targeted and was the subject of the deprivation of fundamental rights."[273] It further recalled that the Sentencing Decision found that "the population of Timbuktu experienced fear of being reprimanded or brutalised," which "eventually forced members of the community to conform their lives and systems of living to the interpretation of Sharia that was being imposed in the city through force."[274] The Reparations Chamber additionally found that "the rules and prohibitions imposed on the population impacted the community and its cultural, religious and social traditions."[275] These findings, which are consistently referred to throughout the Reparations Order, describe the harm in collective terms as the harm to the community's identity, structure, traditions, and social fabric of the community of Timbuktu.[276]

150. Given this recognition of the centrality of community harm to the persecution conviction, and given that Mr Al Hassan was convicted for specific acts of persecution against a targeted group, the Reparations Chamber had an obligation to reason why this collective harm should translate into individual direct victim status for approximately 65,202 people, rather than collective victim designation for the community itself, as this was a key argument put forward by the Defence. This was particularly important as collective reparations for the community would have addressed the harm of the targeted group as a whole without broadening the scope of Mr Al Hassan's conviction.

c. The legal framework available to identify the community of Timbuktu itself as a

[270] Reparations Order, ICC-01/12-01/18-2782, para. 127.
[271] Reparations Order, ICC-01/12-01/18-2782, para. 72.
[272] Reparations Order, ICC-01/12-01/18-2782, para. 72.
[273] Reparations Order, ICC-01/12-01/18-2782, paras 56, 225, *referring* to Sentencing Judgment, ICC-01/12-01/18-2662, para. 71.
[274] Reparations Order, ICC-01/12-01/18-2782, para. 88.
[275] Reparations Order, ICC-01/12-01/18-2782, para. 117.
[276] Reparations Order, ICC-01/12-01/18-2782, paras 115-117, 120, 127, 185, 203. *See* also, T-219, p. 8, lns 4-9, p. 2, ln. 21-p. 28, ln. 5.

beneficiary for reparations

151. The Defence's Reparations Observations drew on relevant legal principles articulated by Judge Ibáñez Carranza in her Separate Opinion in *Lubanga* as an appropriate way for the Chamber to address this issue. Namely, that designating Timbuktu's community itself as a beneficiary would allow to redress the harm suffered by the targeted group without expanding Mr Al Hassan's scope of criminal responsibility. Judge Ibáñez Carranza explained that when the perpetrator harms members of a community, the harm extends to the community itself, affecting its "role, identity and cohesion"[277] and that "[the Trial Chamber can find] community itself as a collective victim […] in the current stage of the proceedings, taking into account the definitions of collective victims."[278] Her reasoning is transferable here: persecution inherently targets victims through their membership to a group, and it could have effectively redressed harm beyond the direct victims of Mr Al Hassan's crimes to the community at large without going beyond the scope of his conviction.[279] This approach is also consistent with practices from other regional and international bodies.[280] This recognition would also have symbolic impact as powerful as designating each member of the community as a direct victim.

152. The Chamber's own findings mirror this logic, it found that the crime "undermined the community's long-standing bonds,"[281] "fostered deep suspicion and mistrust within and between ethnic and social groups,"[282] and "contributed to the widespread fragmentation of Timbuktu's social fabric."[283] Yet the Chamber did not address nor engage with the Defence's argument regarding Judge Ibáñez's framework.[284] Indeed, no single reference to this key Defence legal argument is made in the Reparations Order.[285] The Reparations Chamber also failed to articulate how each and every victim suffered personally from Mr Al Hassan's actions

[277] *Lubanga* Separate opinion of Judge Ibáñez Carranza, ICC-01/04-01/06-3466-AnxII, para. 143.
[278] *Lubanga* Separate opinion of Judge Ibáñez Carranza, ICC-01/04-01/06-3466-AnxII, para. 144.
[279] *See* further, Defence Observations on Reparations, ICC-01/12-01/18-2729, para. 17, *referring* to *Lubanga* Separate opinion of Judge Ibáñez Carranza, ICC-01/04-01/06-3466-AnxII, paras 143-144 and *Ntaganda* Appeal Judgment of Reparations Order Addendum, ICC-01/04-02/06-2908-Red, para. 4.
[280] *See* further *Ntaganda* Appeal Judgment of Reparations Order Addendum, ICC-01/04-02/06-2908-Red, para. 4; *Kaing Guek Eav (Duch)* Appeal Judgment, 001/18-07-2007-ECCC/SC F28, paras 659-660. *Yakye Axa Indigenous Community v. Paraguay* Judgment, Series C No. 125, paras 188, 205; *Kichwa Indigenous People of Sarayaku v. Ecuador*, Series C No. 245, para. 145; *See Kevin Mgwanga Gunme v. Cameroon* Decision, Comm. 266/2003, paras 169-179.
[281] Reparations Order, ICC-01/12-01/18-2782, para. 127.
[282] Reparations Order, ICC-01/12-01/18-2782, para. 127.
[283] Reparations Order, ICC-01/12-01/18-2782, para. 127.
[284] This falls precisely under the type of omission that the Rome Statute and Chambers Practice Manual identifies as inconsistent with the obligation to address "the key submissions of parties" as part of full reasoning. *See* Article 74(5); Guideline for ICC Judgment Drafting, para. 78.
[285] Reparations Order, ICC-01/12-01/18-2782. *See* further, Defence Observations on Reparations, ICC-01/12-01/18-2729, para. 17.

relating to persecution,[286] why this approach was necessary,[287] or why Judge Ibáñez's framework for collective victim designation was rejected despite aligning with the Chamber's own findings on community harm.

d. Designating the community of Timbuktu as a victim would serve the victims' interests

153. Adopting collective victim designation for the Timbuktu community would benefit the victims and the community by recognising the harm experienced by the community while respecting Mr Al Hassan's scope of conviction. This aligns with the Chamber's consideration that collective community-based reparations, with an individualised component, was the most effective modality in the circumstances of this case.[288]

154. As demonstrated by the TFV, through the *Voices That Count* report, community-level needs and individual needs substantially overlap.[289] Economic support, psychosocial assistance, and restoration of social cohesion benefit both the community as a whole and individuals within it. The report concludes that "[REDACTED]" and that "[REDACTED]."[290] The TFV further notes that "[REDACTED]"[291] with effects representing "[REDACTED]."[292] This supports the Defence's submission that collective reparations targeting community-level harm would effectively address the population's needs without expanding the scope of Mr Al Hassan's conviction.

155. Moreover, the *Al Mahdi* precedent demonstrates that collective reparations for the Timbuktu community can be implemented efficiently and successfully, without affording a status of direct victims to every member of the affected group.[293] Indeed, Trial Chamber VIII similarly dealt with harm to the Timbuktu community during the same conflict. The Chamber identified four concentric groups of victims, with the community of Timbuktu recognised as a victim suffering mental pain, anguish, and disruption of culture.[294] It found that the destruction

[286] *See* above, Ground 1.
[287] Reparations Order, ICC-01/12-01/18-2782, para. 236.
[288] Reparations Order, ICC-01/12-01/18-2782, para. 193.
[289] On that, the main challenge for victims, both at community level and individually is the economic situation, followed by health (including mental health problems), social reconciliation and community development. These issues, are the same issue as the one put forward for individual reparations. *See* Voices that Counts, ICC-01/12-01/18-2737-Conf-AnxC, slides 47-49, 54-56 regarding community reparations – 61, 62, 68, 69 for the same request for individuals.
[290] *See* Voices that Counts, ICC-01/12-01/18-2737-Conf-AnxC, slides 55.
[291] *See* Voices that Counts, ICC-01/12-01/18-2737-Conf-AnxC, slides 47, *see* also slides 61, 68, 69.
[292] *See* Voices that Counts, ICC-01/12-01/18-2737-Conf-AnxC, slides 47, *see* also slides 65, 69.
[293] Reparations Order, ICC-01/12-01/18-2782, para. 190; *see* also TFV Completes Reparations Programme in Mali in relation to the Al Mahdi Case.
[294] *Al Mahdi* Reparations Order, ICC-01/12-01/15-236, paras 51-55, 81.

of cultural sites "affected the entire community of Timbuktu"[295] and that the harm was "primarily collective in character."[296] The Chamber noted "that the number of victims and the scope of the consequential economic loss make a collective award more appropriate for those beyond this identified group."[297] It, thus, ordered collective reparations aimed at "rehabilitating the community of Timbuktu,"[298] including symbolic measures "to give public recognition of the moral harm suffered by the Timbuktu community and those within it."[299] The harm identified in the *Al Mahdi* case is tantamount to the findings of the Reparations Chamber in the present case.

156. At the same time, individual reparations were awarded only to a narrowly defined group: "those whose livelihoods *exclusively* depended upon the Protected Buildings"[300] and the direct descendants of the Saints buried in the mausoleums.[301] The Chamber explicitly refused to expand individual victim status to claims that could not be causally linked to Mr Al Mahdi's specific conduct – many victims alleged bodily harm or property damage but the Chamber declined liability where harm could have resulted from other events during the occupation.[302] As the Chamber reminded, victims must be "confined solely to the victims who suffered from the crime of which Mr Al Mahdi was found guilty."[303] The Trial Chamber was careful to limit individual compensation to those who had suffered a more acute level of economic or moral harm, distinct from the collective harm experienced by the community at large.[304]

157. This stands in stark contrast to the present case, where the Chamber designated all 65,202 residents as direct victims without identifying any specific connection between each individual and Mr Al Hassan's criminal conduct.

158. Although, the Reparations Chamber discussed the *Al Mahdi* case, it did not justify why this approach of treating the community of Timbuktu itself as a victim and a beneficiary of reparations, with individual reparations reserved for a narrowly identified subset of persons bearing a specific connection to the crimes, was not considered an adequate approach here.[305] The *Al Mahdi* precedent thus illustrates what the alternative approach would look like in

[295] *Al Mahdi* Reparations Order, ICC-01/12-01/15-236, para. 62.
[296] *Al Mahdi* Reparations Order, ICC-01/12-01/15-236, paras 67, 76.
[297] *Al Mahdi* Reparations Order, ICC-01/12-01/15-236, para. 82.
[298] *Al Mahdi* Reparations Order, ICC-01/12-01/15-236, para. 83.
[299] *Al Mahdi* Reparations Order, ICC-01/12-01/15-236, para. 90.
[300] *Al Mahdi* Reparations Order, ICC-01/12-01/15-236, para. 81, *see* also, paras 83, 104, 145.
[301] *Al Mahdi* Reparations Order, ICC-01/12-01/15-236, paras 81, 89-90.
[302] *Al Mahdi* Reparations Order, ICC-01/12-01/15-236, paras 97-98, 102-103.
[303] *Al Mahdi* Reparations Order, ICC-01/12-01/15-236, para. 98.
[304] *Al Mahdi* Reparations Order, ICC-01/12-01/15-236, para. 81.
[305] Reparations Order, ICC-01/12-01/18-2782, para. 190.

practice: a unified collective award that treats the Timbuktu community as the beneficiary while preserving individual reparations for the limited number of persons whose personal harm can be specifically attributed to the convicted person's conduct.

159. Similarly, on the basis of the *Al Mahdi* precedent, the VPRS in the *Abd-al-Rahman* case made the same suggestion, submitting that recognising the community itself as a potential beneficiairy would "ensure that reparations respond to the full scope of harm established, including harm to identity, dignity, and social cohesion, while complementing, and not displacing, the eligibility of individually identified direct and indirect victims."[306] It is noted that no Reparations Order has been pronounced yet.[307]

160. While the Chamber discussed the substance of the Defence's argument (acknowledging the collective harm to the community) it failed to engage with the legal proposition that the community itself should be designated as a victim. Where the Chamber examines the community harm in depth yet declines to apply the corresponding legal designation, it creates a disconnect between its factual findings and legal conclusions, thereby undermining the internal coherence of the Reparations Order. The Chamber offered no reasoning for rejecting this alternative.

e. The approach to the 65,202 individuals instead of community itself was unreasonable

161. A reasonable trier of fact or law would have concluded that the community as a whole, and not 65,202 individuals, was the victim. Considerations relating to the scope of the conviction, as well as other factors including the feasibility of implementing reparations to such a large victim population, particularly in light of the current political and security context of Northern Mali, were reasonable factors that the Chamber failed to consider. The Appeals Chamber must reverse where a Trial Chamber's decision is "so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion."[308]

162. *First,* as addressed in Ground 1, it is imperative that the Reparations Order reflects the proper scope of the crime of persecution on religious grounds as found against Mr Al Hassan. This error by the Reparations Chamber vitiated its conclusion to label 65,202 individuals as direct victims of the crime of persecution. Qualifying the community as a beneficiary for

[306] *Abd-Al-Rahman* Registry Observations on Reparations, ICC-02/05-01/20-1343-Red, para. 157.
[307] *Abd-Al-Rahman* Registry Observations on Reparations, ICC-02/05-01/20-1343-Red, para. 156, fn. 111.
[308] *See Kony et al.* Appeal Judgment on Admissibility, ICC-02/04-01/05-408, para. 81, *referring* to ICTY and ICTR jurisprudence.

reparations itself would have recognised the collectively shared harm, while also respecting Mr Al Hassan's conviction.

163. *Second*, recognising the community of Timbuktu as a victim itself and awarding collective reparations on this basis avoids the very real practical and logistical difficulties of ensuring the identification and assessment of eligibility for tens of thousands of persons, who are also located in an extremely insecure environment.[309] Hence, resulting in a more efficient and expeditious reparations implementation.

164. *Third*, by designating 65,202 individuals as direct victims of Mr Al Hassan's crimes, the Chamber effectively attributes his conduct to their victimisation, despite the fact that the scope of his conviction was defined. This could disincentivise national or international authorities from carrying out further steps to identify the actual perpetrators of the crimes in question, and may undermine the victims' ability to obtain reparations as direct victims in future proceedings. The personal recourse will be extinguished by the recognition of the status of direct victim. It may also undermine or reduce the victims' ability to obtain reparations as direct victims in future proceedings directed against such perpetrators.[310] Conversely, awarding collective reparations to the community of Timbuktu leaves intact the right of such individuals to obtain individual reparations as direct victims in future proceedings or through the TFV's other assistance program.

165. *Fourth,* since any deprivation of rights must also be sufficiently severe to fall within the scope of Article 7(1)(h), an assessment of eligibility based on proof that the victims suffered a deprivation of rights during the relevant time period is likely to give rise to complex factual adjudications concerning the existence and a hierarchy of such rights violations. Since there are no presumptions of harm for the crime of persecution,[311] individuals still must establish on a balance of probabilities that they have suffered a harm resulting from a sufficient violation of a

[309] TFV response on outreach, identification and eligibility, ICC-01/12-01/18-2794-Conf, paras 11-15, 18; LRVs response on outreach, identification and eligibility, ICC-01/12-01/18-2791, paras 21-22, where the LRVs requests the Registry to reassess the rejected forms. OPCV response on outreach, identification and eligibility, ICC-01/12-01/18-2792, para. 13.
[310] Defence Observations on Reparations, ICC-01/12-01/18-2729, paras 15, 17. *See* also, *Ntaganda* Reparations Order, ICC-01/04-02/06-2659, paras 99-100; *Ongwen* Reparations Order, ICC-02/04-01/15-2074, para. 57, fns 205, 287.
[311] Reparations Order, ICC-01/12-01/18-2782, para. 253.

fundamental rights,[312] which therefore has the potential to create a "hierarchy of victimhood" and create tensions and jealousy within the community.[313]

166. Creating potential distinctions among community members risks fracturing the very social fabric that the reparations are meant to restore.[314] The community's collective identity, which the Chamber itself found was undermined by the commission of the crime,[315] would be further eroded by a reparations scheme that divides rather than unites. Treating the community of Timbuktu as a beneficiary itself would ensure that reparations contribute to rebuilding cohesion rather than undermining it.

167. In the same vein, awarding reparations for the victims 'similarly situated' will create arbitrary and unmanageable divisions. This is particularly problematic in the context of persecution, where severe deprivation of fundamental rights is a high threshold. Where no presumption of harm exists and each person must establish on a balance of probabilities that they suffered harm resulting from a sufficient violation of fundamental rights, the task becomes one of complex factual adjudication that risks creating hierarchies among victims.

168. It is already visible from the LRVs, TFV and OPCV responses to the VPRS filing on eligibility that there are disagreements on how the threshold for 'similarly situated' victims should be interpreted.[316] This demonstrates that the Chamber's approach has not only created legal uncertainty but has also already generated potential divisions within the victims' representation, precisely the fragmentation that could have been avoided should the Reparations Chamber had followed the Defence's proposal.

169. For these reasons, the Reparations Chamber's failure to adopt the Defence's proposal to designate the community of Timbuktu as a victim itself when this proposal directly aligned with

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[312] Reparations Order, ICC-01/12-01/18-2782, para. 247.
[313] Defence Observations on Reparations, ICC-01/12-01/18-2729, para. 14. *See* further TFV Response to Registry on outreach, identification and eligibility, ICC-01/12-01/18-2794-Conf, para. 16. *See* also, LRVs response on outreach, identification and eligibility, ICC-01/12-01/18-2791, paras 21-22. OPCV response on outreach, identification and eligibility, ICC-01/12-01/18-2792, para. 15 "Counsel understands that the Registry intends to carry out a census of the population of Timbuktu, to detect those potentially eligible" and paras 19-20 "It is therefore to be expected that upon review of the totality of potentially eligible victims, the number of individuals similarly situated than the 49 would be around 29,125."
[314] *Ongwen* Reparations Order, ICC-02/04-01/15-2074, para. 584.
[315] Reparations Order, ICC-01/12-01/18-2782, paras 72, 115, 121, 127.
[316] TFV Response to Registry on outreach, identification and eligibility, ICC-01/12-01/18-2794-Conf, para. 25 "It must therefore be established, in the individual case, that the person suffered such an act, that it caused the relevant harm and, insofar as the Chamber considers it relevant, that the harm persists." Further considering that, para. 27 "VPRS's assessments may, where appropriate and with due regard to victims' circumstances, be informed by the opinion of qualified medical and psychological professionals. Such assessments may assist in determining the existence and extent of any continuing physical or psychological harm, its relationship to the crimes for which Mr Al Hassan was convicted, and the form of rehabilitation support that is most appropriate"; LRVs response on outreach, identification and eligibility, ICC-01/12-01/18-2791, para. 28.

the Chamber's own findings on collective harm and offered the only option that was legally coherent to Mr Al Hassan's conviction was plainly unreasonable. The Appeals Chamber should therefore reverse the determination that 65,202 individuals are direct victims and instead designate the community of Timbuktu as a victim itself.

f. Material impact

170. The Reparations Order fails to satisfy the requirement that judicial decisions be adequately reasoned on key elements affecting the rights of the parties, namely, the identification of the community of Timbuktu as a beneficiary itself. The Chamber failed to properly consider a central Defence submission on this matter without sufficient reasoning. In the alternative, the Chamber's decision was unreasonable, as its own analysis of the harm suffered supported the designation of Timbuktu as a victim. The determination of the direct victim of Mr Al Hassan's crime of persecution should be amended and replaced by the adoption of the Defence's suggestion that the community of Timbuktu suffered a shared harm that warrants recognition as a victim itself.

iii. In any event, the Chamber failed to provide sufficient reasons for selecting 65,202 as the number of direct victims

171. In the alternative, even assuming that the Chamber was entitled to estimate the number of direct victims of persecution by reference to the population of Timbuktu, it failed to provide sufficient reasons for selecting 65,202 as the operative figure. The Appeals Chamber has held that, where a chamber resorts to an estimated number of victims, that estimate must be as concrete as possible, rest on a sufficiently strong evidential basis, and be accompanied by reasoning addressing any material uncertainties; any residual uncertainty must operate in favour of the convicted person.[317] The Reparations Chamber itself recalled these requirements immediately before determining the number of victims,[318] however did not apply those principles properly.

172. An Appeals Chamber can consider whether a Chamber "gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion."[319] The Defence acknowledges that the Reparations Chamber did

[317] *Ntaganda* Reparations Appeal Judgment, ICC-01/04-02/06-2782, paras 153, 165, 168, 171-172, 235; *Lubanga* Appeals Judgement on the Reparations Award, ICC-01/04-01/06-3466-Red, paras 90, 108, 223-224.
[318] Reparations Order, ICC-01/12-01/18-2782, para. 224.
[319] *Ongwen* Appeal Judgment on Reparations, ICC-02/04-01/15-2108, para. 30 *referring* to *Ntaganda* Appeal Judgment of Reparations Order Addendum, ICC-01/04-02/06-2908-Red, para. 19.

not adopt the figure of 65,202 without any explanation whatsoever. At paragraph 226 of the Reparations Order, the Chamber stated that: (i) a Government of Mali report based on the 2009 census recorded 54,629 inhabitants of "Tombouctou urbain"; (ii) the Registry reported that, according to local authorities and information gathered by the *Direction régionale de la planification et statistique de Tombouctou*, the population of the "Tombouctou commune" in 2012 was approximately 65,202; (iii) it was reasonable to assume that the population had grown between 2009 and 2012; and (iv) the figure of 65,202 had been provided by local authorities on the basis of information originating from a regional entity.[320] That reasoning explains the provenance of the selected figure and why the Reparations Chamber did not regard the increase from 54,629 to 65,202 as inherently implausible. It does not, however, explain why the figure of 65,202 was more reliable than the materially different figures and methodologies placed before the Chamber. This deficiency in the Chamber's reasoning lead to an unreasonable finding that should be amended and rectified accordingly.[321]

a. The Chamber failed to establish that the figure of 65,202 corresponded to the relevant geographical scope and population

173. The Reparations Chamber did not sufficiently address whether the geographical unit represented by the figure of 65,202, i.e. "Timbuktu Commune" corresponded to the geographical scope relevant to its determination of direct victimhood, i.e. the city of Timbuktu. The Registry identified the official administrative divisions of the "Commune Tombouctou" as Abaradjou, Badjendé, Bellafaradi, Djingareyber, Hamabangou, Kabara, Sankoré and Sareikaina, and attributed the figure of 65,202 to the population of the "Timbuktu Commune (urban area) in 2012".[322] However, the Prosecution had already underlined that "Tombouctou Urbain" may refer to different urban areas within Timbuktu region, rather than Timbuktu city alone,[323] which is a significantly larger territory encompassing multiple other villages.[324] The Trial Judgment described Timbuktu by reference to the medina and identified neighbourhoods,[325] but did not provide a definition for the term Commune.[326] It was therefore

[320] Reparations Order, ICC-01/12-01/18-2782, para. 226.
[321] *Ntaganda* Appeal Judgment, ICC-01/04-02/06-2666-Red, paras 42, 46.
[322] Registry Submissions on Reparations, ICC-01/12-01/18-2733-Red, para. 6, fns 13-14.
[323] Prosecution Submissions on Reparations, ICC-01/12-01/18-2734-Red, para. 12.
[324] MLI-OTP-0009-1754; Registry Submissions on Reparations, ICC-01/12-01/18-2733-Red, para. 6 and fn. 17: "In the 2022 census, the population of the Timbuktu region was recorded at 148,962 inhabitants (including 75,121 men and 72,817 women)." *Referring* to the 2022 Malian General Population and Housing Census (RGPH 2022), specifically the document identified by the Registry as rapport-etat-structure-population-rgph5-rgph.pdf, pp. 28–29 (slides 59–60).
[325] i.e. Trial Judgment, ICC-01/12-01/18-2594-Red, paras 398, 469, 470, 608, 755, 784, 818, 1040, 1312.
[326] Trial Judgment, ICC-01/12-01/18-2594-Red, paras 1528-1543, 1559-1560, 1562-1565, and fn. 922.

incumbent on the Reparations Chamber to ensure that the reference to Timbuktu Commune was limited to the city of Timbuktu, and not the broader region. The Sentencing Judgment recalled that "the scope of the crime of persecution was limited in the Trial Judgment to the city of Timbuktu", rejecting in that respect the Prosecution's broader reference to Timbuktu "and its region".[327]

174. Ensuring that Timbuktu city and "Tombouctou Commune" corresponded with each other could not simply be assumed from the fact that the Registry identified the administrative divisions of Tombouctou Commune. Indeed, during the reparations proceedings, clarification was specifically sought as to whether Kabara, although an official neighbourhood of the Commune, fell within the geographical scope of the case because it had not been explicitly identified in the Trial Judgment.[328] Although the Chamber subsequently determined that Kabara fell within the geographical scope of the city of Timbuktu,[329] this illustrates that the relationship between the administrative boundaries of the Commune and the judicial geographical scope of the "city of Timbuktu" required determination rather than assumption.

175. This omission was particularly significant given the inconsistent geographical terminology in the statistical material before the Chamber. The Prosecution expressly cautioned that "Tombouctou Urbain" might refer to different urban areas within the Timbuktu region rather than Timbuktu city alone, while separately identifying a figure of 54,629 for the urban commune of Timbuktu.[330] Yet paragraph 226 of the Reparations Order understood the 54,629 inhabitants recorded for "Tombouctou urbain" to refer to the "city of Timbuktu", before relying on the materially higher figure of 65,202 for the "Tombouctou commune" as an estimate of that same population.[331] The Chamber did not reconcile these different geographical designations or explain on what basis it concluded that the populations considered were geographically equivalent for the purpose of estimating the number of direct victims.[332]

176. Against this background, the Chamber was required to explain why the population estimate attributed to the "Tombouctou commune" could be treated as measuring the same

[327] Sentencing Judgment, ICC-01/12-01/18-2662, para. 71 and fns 198-199.
[328] Registry Submission on Implementation, ICC-01/12-01/18-2684, para. 13.
[329] Decision on the LRVs' and Registry's requests for clarification, ICC-01/12-01/18-2699, para. 17.
[330] Prosecution Submissions on Reparations, ICC-01/12-01/18-2734-Red, paras 11-13, in particular para. 12 and fn. 22.
[331] Reparations Order, ICC-01/12-01/18-2782, para. 226 and fns 592-594.
[332] *See* Reparations Order, ICC-01/12-01/18-2782, para. 226 and fns 592-594; Prosecution Submissions, ICC-01/12-01/18-2734-Red, para. 12.

geographical population as the "city of Timbuktu" relevant to its determination of direct victimhood.[333]

b. The Chamber failed to adequately assess the materially divergent population estimates before it

177. In considering the most reliable evidence of a population estimate, the Chamber was not presented with a choice between an official figure and unsupported speculation. Rather, the parties and participants placed before it several materially divergent estimates, including figures originating from governmental statistics, local authorities, persons with direct knowledge of Timbuktu, victim consultations, and empirical research conducted during the reparations proceedings.[334] The Chamber itself expressly acknowledged that the parties and participants had provided "different approximations" of Timbuktu's population during the relevant period,[335] and as such, material uncertainties existed between these estimates. Despite this, the Chamber failed to sufficiently address these uncertainties and did not base its conclusion on a sufficiently strong evidential basis, as it was legally required.

178. This constituted an error of fact. With respect to errors of fact, the Appeals Chamber has previously recalled that it "will not interfere with factual findings of the first-instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts, or failed to take into account relevant facts."[336] As to the "misappreciation of facts", the Appeals Chamber has also stated that "it will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it".[337]

179. The existence of an acknowledged divergence in estimates required the Chamber to undertake a comparative assessment of the respective sources, geographical units, temporal reference points, and methodologies, rather than a statement merely identifying the institutional

[333] Reparations Order, ICC-01/12-01/18-2782, paras 225-226 and fns 591-594; Sentencing Judgment, ICC-01/12-01/18-2662, para. 71, fn. 199; Registry Submissions, ICC-01/12-01/18-2733-Red, para. 6 and fns 13-14.
[334] Registry Submissions on Reparations, ICC-01/12-01/18-2733-Red, paras 6-9; Prosecution Submissions on Reparations, ICC-01/12-01/18-2734-Conf, paras 10-15; LRVs Submissions on Reparations, ICC-01/12-01/18-2732-Red, para. 137; TFV Observations relevant to Reparations, ICC-01/12-01/18-2737, para. 42; Reparations Order, ICC-01/12-01/18-2782, para. 226, fn. 592.
[335] Reparations Order, ICC-01/12-01/18-2782, para. 226.
[336] *Lubanga* Second Appeal Judgment, ICC-01/04-01/06-3121-Red, paras 16-27.
[337] *Ongwen* Appeal Judgment on Reparations, ICC-02/04-01/15-2108, para. 27 *referring* to *Ntaganda* Appeal Judgment of Reparations Order Addendum, ICC-01/04-02/06-2908-Red, para. 15.

origin of the figure ultimately preferred.[338] In *Ntaganda*, the Appeals Chamber found an error where the Trial Chamber had set out materially divergent estimates before it but had neither expressly determined which estimates it found more persuasive nor analysed the submissions and the relative weight to be accorded to them. It held that, in such circumstances, the Trial Chamber was required to determine the issue on the basis of all the facts and information before it and/or which it deemed necessary to obtain.[339]

180. *First*, various official statistics were reasonably capable of supporting materially different figures, including a lower figure than 65,202. The Prosecution relied on Malian national statistics reporting 87,552 inhabitants in "Tombouctou urbain" in 2009, but cautioned that this designation might encompass urban areas beyond Timbuktu city – the same material recorded 54,629 inhabitants for the urban commune of Timbuktu for 2009.[340] The Prosecution had not identified an updated Malian government census for Timbuktu in 2012 likely due to the occupation and continuing hostilities at the relevant time.[341] The 65,202 figure was sourced from local authorities and a regional planning and statistics entity, however other official Malian statistical material illustrated that materially different population figures were associated with differently described geographical units. This required the Chamber to explain which of those units corresponded to the "city of Timbuktu" relevant to the conviction, and why the figure associated with that unit provided the most appropriate basis for estimating its population in 2012. The existence of materially different geograhical units, which corresponded to different population estimates, required the Chamber to determine which geographical unit and estimate actually corresponded to the city of Timbuktu. Although the Chamber identified the institutional provenance of the 65,202 estimate,[342] it did not identify the methodology by which that figure had been derived, or any demographic data, population-growth rate, or other evidentiary basis supporting the conclusion that the population had increased to approximately 65,202 by 2012.

181. *Second*, the Chamber did not sufficiently address whether the figure of 65,202 reflected the population actually relevant to the temporal scope of Mr Al Hassan's conviction, particularly in light of significant population movements before May 2012. Indeed, the case record contained evidence suggesting that the population actually present in Timbuktu during the relevant period may have been materially lower. [REDACTED] estimated that

[338] Reparations Order, ICC-01/12-01/18-2782, paras 225-226, fns 529-593.
[339] *Ntaganda* Reparations Appeal Judgment, ICC-01/04-02/06-2782, paras 168–169.
[340] Prosecution Submissions on Reparations, ICC-01/12-01/18-2734-Conf, paras 10-12; Reparations Order, ICC-01/12-01/18-2782, para. 226, fn. 592.
[341] Prosecution Submissions on Reparations, ICC-01/12-01/18-2734-Conf, para. 13.
[342] Reparations Order, ICC-01/12-01/18-2782, para. 226.

approximately 35,000 people lived in Timbuktu city in 2012 and that approximately 30% of the population had left following the arrival of the armed groups.[343] This must be considered against the rapidly evolving security situation surrounding the takeover of Timbuktu. Prior to Ansar Dine/AQIM establishing control over the city, the MNLA and other armed actors had entered in Timbuktu resulting in looting, appropriation of property and fears of intercommunal reprisals, as found by the Trial Chamber.[344] Timbuktu was 'chaotic'".[345] Against this background, population movements from this period cannot be assumed to correspond exclusively to displacement occurring within the temporal and factual scope relevant to Mr Al Hassan's conviction; and should have been taken into account when assessing whether the figure of 65,202 accurately reflected the population relevant after May 2012.[346] [REDACTED] also rejected the figure of 87,552 as an accurate estimate of the population of Timbuktu city.[347] The Prosecution accordingly recognised the difficulty of determining the number of persons who remained in or fled Timbuktu between May 2012 and January 2013.[348] This evidence was directly relevant because the Chamber's own victim eligibility criterion concerned persons who were present or residing in Timbuktu during the temporal scope of the crime, including persons who fled during that period, and excluded persons who had left before the arrival of Ansar Dine/AQIM or were not otherwise present when the crimes were committed.[349] Yet paragraph 226 did not address whether the figure of 65,202 represented the ordinarily resident population, the population physically present at any particular point during the occupation, or a projected administrative population that included persons who had already left before the relevant temporal period.

182. *Third*, the Registry's own submissions did not point uniformly to 65,202 as the sole reliable estimate. Although the Registry stated that local authorities placed the population of the Timbuktu Commune in 2012 at 65,202 and considered this figure corroborated by the 2009 census figure of 54,629,[350] it also presented evidence suggesting a figure between 35,000 and

[343] Prosecution Submissions on Reparations, ICC-01/12-01/18-2734-Conf, paras 14-15, in particular para. 15 and fn. 28.
[344] Trial Judgment, ICC-01/12-01/18-2594-Red, para. 451 and fns 1168–1173, fn. 2087 *referring* to V-0002: T-169-Conf, pp. 83-84, 86, who fled a week after the start of the occupation and only came back after the end of the occupation, which means that V-0002 was outside of Timbuktu during the temporal scope of the conviction of Mr Al Hassan.
[345] Trial Judgment, ICC-01/12-01/18-2594-Red, para. 451.
[346] Prosecution Submissions on Reparations, ICC-01/12-01/18-2734-Conf, paras 14-15, in particular para. 15 and fn. 28.
[347] Prosecution Submissions on Reparations, ICC-01/12-01/18-2734-Conf, para. 15.
[348] Prosecution Submissions on Reparations, ICC-01/12-01/18-2734-Conf, paras 14-15.
[349] Reparations Order, ICC-01/12-01/18-2782, paras 62-63.
[350] Registry Submissions on Reparations, ICC-01/12-01/18-2733-Red, para. 6 and fn. 14; para. 8.

40,000 inhabitants at the relevant time might be reasonable.[351] The Registry referred to the common project conducted with the TFV, *Voices That Count* report, which estimated that approximately 36,000 qualifying respondents or residents fell within the relevant parameters of eligibility and that approximately 30,240 persons had experienced some form of harm arising from the imposed rules and prohibitions.[352] The Registry expressly cautioned that these figures were derived through a different methodology and contained defined age and residence parameters:

> [e]stimated data set the population of Timbuktu city in 2012 has been given by local authorities and amounts to 65,202 inhabitants. In a common project, the TFV and the VPRS engaged a 'bureau d'étude' – Voices that count- for a comprehensive mapping exercise in the spring of 2025. Based on the representative sample of the study (655), on the estimated number of current inhabitants above 18 years old in Timbuktu city (approximately 36,000 inhabitants) and the intermediary findings of the study, the estimated number of people who are currently living in Timbuktu city and that suffered and experienced some form of harm from the imposed new rules and prohibitions by force during the time that Ansar Dine and Al Qaeda groups ruled Timbuktu in 2012-2013 (of which Mr. Al Hassan contributed to) is appr. 30,240 people, which is 84% of the appr. 36,000 inhabitants.
>
> Extrapolating from the data collected above, and taking into consideration the margin error of 3.5% as well as the children who were between 0 and 5 years old at the time that Ansar Dine and Al Qaeda groups ruled Timbuktu city in 2012-2013 (of which Mr. Al Hassan contributed to), a figure between 35,000 and 40,000 inhabitants of Timbuktu city at the time may be a reasonable estimation, with a figure of approx. 30,000 of people (over 18) currently living in Timbuktu city and that suffered and experienced some form of harm from the imposed new rules and prohibitions by force during that time.[353]

183. The Chamber did not explain whether it accepted or rejected that methodology, why it preferred the Registry's local-authority figure over the Registry's own substantially lower empirical estimate, or how the different populations measured by those exercises related to direct victims defined in the Reparations Order.

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[351] Registry Submissions on Reparations, ICC-01/12-01/18-2733-Red, paras 7-9.
[352] Registry Submissions on Reparations, ICC-01/12-01/18-2733-Red, paras 8-9 and fns 23-25 *referring* to Voices that Counts, ICC-01/12-01/18-2737-Conf-AnxC.
[353] Registry Submissions on Reparations, ICC-01/12-01/18-2733-Red, paras 7-9 and fns 23-25.

184. *Fourth*, the LRVs estimated that the population during the relevant temporal period was approximately 55,000, while the Prosecution considered an estimate of approximately 50,000 was potentially conservative.[354] The Chamber discounted the LRVs' estimate in a footnote on the basis that it lacked a supporting citation, but it did not engage with the Prosecution's assessment that a figure in that range was plausible, nor with the evidence and official material underlying the Prosecution's broader analysis.[355] Although the TFV also supported the figure of 65,202, this did not resolve the discrepancies between the underlying sources or demonstrate that 65,202 corresponded to the number of persons satisfying the Chamber's legal criteria for direct victimhood as residents of Timbuktu.[356]

185. The Defence did not itself advance an alternative estimate figure in its reparations submissions. Its position was that the Chamber should address the harm suffered by the population of Timbuktu through collective and community-based reparations without expanding the category of direct victims beyond the scope of Mr Al Hassan's conviction.[357] The Defence nevertheless acknowledged the collective harm suffered by the population of Timbuktu, supported presumptions capable of facilitating an equitable and expeditious reparations process, and acknowledged that the entire population constituted the group targeted by the persecutory policy.[358] Those acknowledgements cannot reasonably be construed as acceptance that 65,202 was an established or sufficiently reliable count of direct victims, particularly where the Defence consistently distinguished between recognising community-wide harm and attributing the status of direct victim to every resident of Timbuktu.[359]

c. The Chamber failed to provide sufficient reasons for selecting 65,202 as the number of direct victims.

186. In these circumstances, the Chamber was required to reason with sufficient clarity why it considered the Registry's estimate based on local authority was sufficiently strong evidence

[354] LRVs Submissions on Reparations, ICC-01/12-01/18-2732-Red, para. 137; Prosecution Submissions on Reparations, ICC-01/12-01/18-2734-Conf, paras 10-15; Reparations Order, ICC-01/12-01/18-2782, para. 226, fn. 592.
[355] Reparations Order, ICC-01/12-01/18-2782, para. 226, fn. 592; Prosecution Submissions on Reparations, ICC-01/12-01/18-2734-Conf, paras 10-15.
[356] TFV Observations on Reparations, ICC-01/12-01/18-2737, para. 42; Reparations Order, ICC-01/12-01/18-2782, para. 226, fn. 592.
[357] Defence Observations on Reparations, ICC-01/12-01/18-2729, paras 11-17, 23; Defence Response to Reparations Submissions, ICC-01/12-01/18-2741-Red, paras 11-12.
[358] Defence Observations on Reparations, ICC-01/12-01/18-2729, paras 2-3, 16-19; Defence Response to Reparations Submissions, ICC-01/12-01/18-2741-Red, paras 2, 11-12.
[359] Defence Observations on Reparations, ICC-01/12-01/18-2729, paras 11-18, 23; Defence Response to Reparations Submissions, ICC-01/12-01/18-2741-Red, paras 11-12.

to rely upon, in the face of other credible, and in several instances, official, sources before it. A chamber is not required to address every item of evidence or every argument in detail, but its reasoning must disclose with sufficient clarity the basis of its decision, particularly where the finding is material to the scope of reparations and the convicted person's liability.[360] Paragraph 226 does not provide sufficient reasoning as to why this figure was more reliable in the circumstances, and fails to address matters such as the methodology by which the 2012 figure was produced; the date on which the underlying data was collected; whether the estimate was a projection from the 2009 census; whether it concerned the city, the commune, or another administrative unit; whether it accounted for displacement before the occupation; or why it was more reliable than the census-based, testimonial, and empirical estimates pointing to materially lower populations.[361] Nor does it explain how a general estimate of the population of an administrative unit was converted into an estimate of persons who met the Chamber's own eligibility requirements of presence or residence during the temporal scope of the crimes.[362]

187. This deficiency is not cured by the Chamber's general statement that it had considered all submissions and evidence and did not need to set out every detail of its evidentiary assessment.[363] The choice between figures ranging from approximately 35,000 to 65,202 was not a peripheral evidentiary matter. It was the dispositive basis for the Chamber's conclusion that approximately 65,202 persons were eligible for reparations as direct victims of persecution.[364] It formed the basis for the Chamber's determination of the number of direct victims of persecution and, in turn, materially informed the assessment of the monetary value of the harm for which Mr Al Hassan was held personally liable.[365] The Appeals Chamber in *Ntaganda* emphasized that establishing an actual or concretely estimated number of victims may be of fundamental importance to a reparations order, since an under-estimation may result in an award insufficient to meet victims' needs, while an over-estimation may result in an award that is unfair to the convicted person.[366] Therefore, without an explanation of why the competing credible estimates were rejected, the Appeals Chamber cannot determine whether the selected figure rested on a sufficiently strong evidential basis, reflected the legally relevant

[360] *Ntaganda* Reparations Appeal Judgment, ICC-01/04-02/06-2782, para. 239; *see* also *Bemba et al*. Appeal Judgment, ICC-01/05-01/13-2275-Red, paras 105-106; Reparations Order, ICC-01/12-01/18-2782, para. 30.
[361] Registry Submissions on Reparations, ICC-01/12-01/18-2733-Red, paras 6-9; Prosecution Submissions on Reparations, ICC-01/12-01/18-2734-Conf, paras 10-15; Reparations Order, ICC-01/12-01/18-2782, para. 226.
[362] Reparations Order, ICC-01/12-01/18-2782, paras 62-63, 188, 226.
[363] Reparations Order, ICC-01/12-01/18-2782, para. 30.
[364] Reparations Order, ICC-01/12-01/18-2782, paras 188, 225-226.
[365] Reparations Order, ICC-01/12-01/18-2782, paras 226, 241
[366] *Ntaganda* Reparations Appeal Judgment, ICC-01/04-02/06-2782, para. 164.

geographical and temporal population, or resulted from the unexamined adoption of the broadest estimate before the Chamber.

188. Alternatively, the finding was unreasonable. Provenance from a local or regional authority may support the reliability of an estimate, but it cannot by itself resolve material inconsistencies with other governmental statistics, the absence of a 2012 census, evidence of substantial displacement, or the Registry's own lower empirical estimate. The Chamber's observation that population growth between 2009 and 2012 was reasonable also does not establish that the population increased by the precise amount necessary to reach 65,202, particularly during a period marked by armed conflict and significant population movement.[367] In the absence of a comparative evaluation capable of establishing 65,202 on a sufficiently strong evidential basis, the Chamber was required to address the uncertainty expressly and resolve it in Mr Al Hassan's favour, including, as appropriate, by adopting a lower estimate or discounting the corresponding amount of liability.[368]

d. Material impact

189. This error materially affected the Reparations Order. The Chamber treated the unreliable estimate of Timbuktu's population of 65,202 persons as definitive evidence of the number of direct victims of persecution by Mr Al Hassan.[369] This was despite other credible evidence suggesting that the population of Timbuktu in 2012 could have been as low as 35,000. The Chamber's unsupported and unreasoned preference for the 65,202 figure erroneously inflated the number of potentially eligible direct victims for reparations and, by extension, the personal financial liability imposed on Mr Al Hassan.

V- CONCLUSION

190. The Trial Chamber erred in fact, law and/or procedure by issuing a Reparations Order that did not respect the strict scope of Mr Al Hassan's conviction of persecution on religious grounds, and which also failed to accurately reflect the harms actually caused by him in committing this crime. This in turn had the effect of inflating the number of direct victims that Mr Al Hassan is to pay reparations for, namely every member of the Timbuktu community that was present or resided in the city during the charged period, resulting in a financial award that

[367] Prosecution Submissions on Reparations, ICC-01/12-01/18-2734-Conf, paras 13-15; Reparations Order, ICC-01/12-01/18-2782, para. 226.
[368] *Ntaganda* Reparations Appeal Judgment, ICC-01/04-02/06-2782, paras 153, 165, 168, 171-172, 235; *Lubanga* Appeals Judgement on the Reparations Award, ICC-01/04-01/06-3466-Red, paras 90, 108, 223-224.
[369] Reparations Order, ICC-01/12-01/18-2782, paras 188, 225-226.

is wholly disproportionate to his participation in the commission of this crime. The Reparations Order must be either made anew, significantly amended, or replaced.

191. There appears to be no current prospects that any other person involved in the events of 2012-2013 in Timbuktu will soon be arrested and tried before this Court. However, it is not just, fair or proportional to Mr Al Hassan's conviction to hold him liable for the suffering of the entirety of Timbuktu in circumstances where his participation in the relevant crimes does not support this finding. Persecution is not a 'catch-all' crime in any sense, and should not have been treated as such. It is apt to reiterate former ICC Judge Van den Wyngaert and Judge Morrison's statement that: "It should never be forgotten that international criminal law is concerned with individual responsibility and culpability and not with righting socio-historical wrongs."[370] Respectfully, yet emphatically, this Court neither has the mandate nor the ability "to ensure compensation for all those who suffer harm as a result of international crimes."[371]

192. This concern has been raised repeatedly throughout the history of the ICC, as well as within contemporary jurisprudence. In 1994, the ILC decided to remove draft Article 47 on reparations on the ground that an international criminal jurisdiction such as the ICC was not the appropriate forum for effectively addressing reparations for potentially large victim populations. According to the ILC, such matters fell more appropriately within the competence of national jurisdictions and mechanisms of international cooperation.[372] Article 75 of the Statute was adopted in 1998, but only after pressure and criticisms from some governmental delegations, NGOs and academic.[373]

193. The ILC's concerns were echoed in an article by former ICC Judge Van den Wyngaert as early as 2011. She underscored the fact that "[p]rosecutors will never be able to bring charges in all the cases involving victims of human rights abuses that have come to their attention after investigating a given situation. Prosecutorial selectivity being inherent in criminal trials means that, inevitably, only a limited amount of victims will be able to participate and to receive reparations."[374]

194. Permitting reparations to extend beyond the scope of the conviction established at trial would fundamentally alter the architecture of the Rome Statute by exposing convicted persons to liability for conduct that was never adjudicated according to the criminal law standard of

[370] *Bemba* Separate Opinion, ICC-01/05-01/08-3636-Anx2, para. 74.
[371] *Bemba* Separate Opinion, ICC-01/05-01/08-3636-Anx2, para. 75.
[372] Report of the International Law Commission, A/49/10, p. 60.
[373] *Ambos*, The Rome Statute : A Commentary (2022), p. 2242.
[374] *Van den Wyngaert* Victims before International Criminal Courts, p. 491-492.

proof. Such an approach would collapse the distinction between criminal adjudication and collective redress of historical harm.

195. In this case, not every person in Timbuktu may receive reparations for crimes that might have been committed against them. It is imperative that the Reparations Order remains within the strict scope of Mr Al Hassan's conviction. The Defence suggested a path for the Reparations Chamber to respect Mr Al Hassan's conviction which would have also acknowledged the harm experienced by the broader community – the designation of the community of Timbuktu itself as a beneficiary of reparations. The Chamber's own analysis within the Reparations Order supported this finding. This designation would not only have respected the rights of Mr Al Hassan, but also would have reduced the risk of an unactionable reparations order and facilitated the ability for victims of Timbuktu to receive reparations. This would have also avoided the possibility of creating tension between persons within the affected community.

196. Mr Al Hassan has continuously voiced his strong support for victims to receive reparations for the crimes he has committed, but asks that any reparations order issued against him accurately reflects his conviction. To achieve restorative justice for the victims of the crime of persecution and in a manner consistent with Mr Al Hassan's statutory rights, the Defence seeks that the reparations order complies with the strict scope of Mr Al Hassan's contributions to the crime of persecution on religious grounds, and the harm actually attributable to him, and that a proportional amount of liability be entered against him as such.

VI- RELIEF SOUGHT

In light of the foregoing and as a result of Trial Chamber's errors of law, fact and procedure, as set out in this Defence Appeal Brief, the Defence respectfully requests the Appeals Chamber to:

GRANT Mr Al Hassan's appeal;

QUASH the Reparations Order; and

ISSUE a new or significantly amended reparations order which:

- does not exceed and correctly reflects the scope of Mr Al Hassan's conviction of persecution on religious grounds (Count 13) and his participation and contribution to this crime;
- limits the number of eligible direct victims to the 49 victims of the crimes

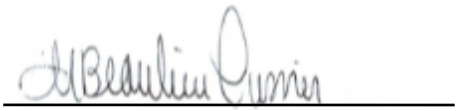
specified under Counts 1-6 and 14;

- designates the community of Timbuktu itself as a beneficiary for reparations, if deemed necessary; and
- proportionally reduces Mr Al Hassan's financial liability accordingly.

OR, IN THE ALTERNATIVE:

REMAND the Reparations Order to Trial Chamber X;

ORDER Trial Chamber X to issue a new or significantly amended reparations order in conformity with the findings of the Appeals Chamber in its Judgment on this appeal.



Mélissa Beaulieu Lussier
Counsel for Mr Al Hassan

Dated this 27th day of October 2026
At The Hague, The Netherlands