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PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Reine Alapini-Gansou

SITUATION IN THE REPUBLIC OF MALI

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

Public

**Public redacted version of the Defence's final submissions regarding the confirmation
of charges**

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

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

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I. Introduction

1. Since the Prosecution filed its Document Containing the Charges (DCC) in May 2019, the Prosecution has engaged in an extensive range of submissions and pleadings concerning the evidential foundation of its charges. The fact that so many hours, pages and filings were requested is testament to the stark fact that this case is not trial ready, by virtue of the fact that there are no allegations of serious criminality concerning Mr. Al Hassan which demand to be tried, or which can be tried under the Rome Statute.
2. This case has been brought against Mr. Al Hassan, and not Ansar Dine. And it has brought under the Rome Statute, and not human rights law, or domestic law. The question before this Chamber is not whether Ansar Dine engaged in practices that violate human rights or the domestic law of Mali, but whether Mr. Al Hassan himself intentionally engaged in conduct that would amount to crimes against humanity or war crimes.
3. The victims of Timbuktu have a right to justice, but that must occur within a just framework, prescribed by the principle of legality, and their claim might be brought against the perpetrators who bear responsibility for what occurred in Timbuktu.
4. And that is not Mr. Al Hassan. On the basis of the evidence tendered by the Prosecution, and the charges brought against him, the threshold for confirmation is not met. A trial would be unwarranted, and it would be unfair. It would raise expectations of justice that would be better met through other avenues or in proceedings concerning other individuals. Going to trial, on the basis of these legally flawed and evidentially unfounded charges, would cause further harm and injustice to Mr. Al Hassan. It would also irreversibly and irreparably deprive his family of a father, husband, son, and provider for the years to come.

II. Classification

5. In accordance with Regulation 23*bis*(2) of the Regulations of the Court, the present submissions are classified as confidential, as they refer to confidential evidence and relate to the Prosecution's confidential observations.

III. Submissions

1. Procedural Objections

6. For the sake of clarity, and without prejudice to the totality of objections that have been raised during the course of the proceedings, the Defence affirms that it objects to the following:
- a. The admissibility of all Prosecution evidence;
 - b. The inclusion of any acts that do not fall under Article 7, as proof of the contextual elements of crimes against humanity;
 - c. The inclusion of acts that do not fall under either Article 7 or 8, as the underlying crime concerning persecution as a crime against humanity;
 - d. The specific legal theories underpinning the Prosecution's modes of liability, insofar as they do not require either intent to commit the charged crimes or to engage in culpable conduct, or proof that Mr. Al Hassan's conduct made a culpable contribution to the charged crimes;
 - e. The reliance on any acts and conduct of Mr. Al Hassan that fall outside the time period of mid-May 2012 until February 2013;
 - f. Any allegations of inhumane treatment or forced marriage that fall outside the established definition under international criminal law, and which do not fulfil the gravity or nexus requirements of Articles 7 and 8; and
 - g. Any new material allegations/facts, which were not set out in the DCC.
7. Any 'visual aids' presented during the hearing are not evidence and cannot be relied upon as such. Similarly, the Legal Representatives of Victims (LRV) have no right to either tender evidence or to testify (which would in any case, be a violation of the Code of Conduct).¹ Any reliance on the factual elements of their submissions would fall outside the boundaries of Article 68(3) and the Decision on Victim Participation in this case.² It would also be contrary to the defendant's right to a fair and impartial trial.
8. Any allegations falling outside of the time period of April 2012 to January 2013 are outside of the scope of the charges. The only evidence relied upon as concerns events in

¹ The Defence notes that the Prosecution has attempted to transform unsworn testimonial argument from the LRV into 'evidence' (See ICC-01/12-01/18-430-Conf, footnote 25 they cite the LRV reference to the Bella-Farandi quarter and targeting of persons). This is inappropriate and highly prejudicial.

² ICC-01/12-01/18-289-Red-tENG-Corr.

2017 is the uncorroborated statements of Mr. Al Hassan himself.³ The alleged incidents are also not sufficiently similar or linked to the incidents in 2012 to be relevant to these charges.

9. Finally, given the deficiencies in the disclosure process, and the inequitable nature of the confirmation process as a whole,⁴ the Defence cannot be deemed to have waived its right to object to issues that might not be fully apparent, or the full implications of which might be obscured by a lack of full disclosure, and adequate Defence facilities. The fact that the Plenary has rejected the Defence request to recuse Judge Perrin de Brichambaut, and may reject the later request to recuse the Chamber also cannot preclude the Defence from raising, and seeking remedies, in relation to any prejudice caused by their involvement in this case, particularly, if such claims are based on issues that were not fully disclosed to the Defence.

2. The Prosecution's flawed attempt to eliminate the relevance of context and religious belief, from charges based on religious belief

10. Throughout the confirmation proceedings, both the Prosecution and the LRV attempted to efface the extent to which this case is predicated on a prosecution of Sharia law, and the relevance of religious belief.⁵
11. These claims are internally incoherent. The central premise of the common plan is that the charged crimes were a virtually certain consequence of the installation of Sharia law in Timbuktu. Religion and religious belief are the centre-pieces of the Prosecution's case. The Prosecution has relied on Mr. Al Hassan's statements of belief in order to demonstrate his adherence to this common plan.⁶ The centrality of Sharia law to the case is further reflected by the Prosecution's reliance on the mere existence of judgments from the Islamic Tribunal to demonstrate the existence of a wide-spread or systematic attack against a civilian population.⁷

³ DCC, paras. 29-36.

⁴ See ICC-01/12-01/18-426-Secret-Exp.

⁵ Regarding OTP, see ICC-01/12-01/18-T-003-ENG CT, p. 42, lns. 11-12; ICC-01/12-01/18-T-005-CONF-ENG CT, p. 52, lns. 19-22; p.71, lns. 4-9; ICC-01/12-01/18-430-Conf, para. 158 (The "*Prosecution final Brief*"). Regarding the LRVs: ICC-01/12-01/18-429, paras. 15-22.

⁶ DCC, paras. 240, 329, 342, 984; ICC-01/12-01/18-T-003-ENG CT, p. 60-61, lns. 25, 1-3.

⁷ DCC, paras 196, 202.

12. The Defence has no objection to Sharia law and religion being taken out of the picture, but then both must be taken fully out of the picture. If the case is stripped of its religious crutch (as it should be), the Prosecution would be compelled to specify, clearly:
- a. the contours of the common agreement that binds Mr. Al Hassan to the other identified perpetrators in this case;
 - b. how it was virtually certain that an agreement that Mr. Al Hassan was part of, would result in the charged crimes; and
 - c. the nature of Mr. Al Hassan's contributions to either the common plan or the charged crimes, and if the former, the linkage to the charged crimes, such that it can be concluded that Mr. Al Hassan knew and intended that his conduct would contribute to the realisation of the charged crimes, and that his conduct did in fact do so.
13. This clarity does not exist, either within the DCC or the Prosecution's pleadings. Rather, the labels 'Sharia' and 'religion' have been used as shorthand, to imply evidence and argument where none exists.
14. The Prosecution's case concerning persecution and inhumane treatment also centres (incorrectly) on alleged human rights violations, and the extent to which the implementation of Sharia law in Timbuktu gave rise to such human rights violations. But in the same manner that it is not possible to evaluate hate speech or incitement to violence without considering the content and limits to freedom of expression,⁸ it is also not possible to evaluate the allegations in this case without considering the right to protected religious belief and action, and the extent to which it may be permissible to curtail individual rights in order to enforce a social or community objective. For example, forcing women to comply with a dress code might be objectionable, but given the number of countries which do so (including France, The Netherlands, and Canada) and impose sanctions for violations, it is doubtful as to whether such dress codes constitute an internationally recognised human rights violation, let alone a serious violation entailing individual criminal responsibility. In the same way that the French

⁸ See for example, ICC-01/09-01/11-2027-Red-Corr, para. 130: "In addition, for negative language about the electorate of the opposing parties during election time – a time during which strong language is generally used to discredit other political parties and their voters – to amount to hate speech or calls for violence or crimes, it would need to be of a significantly different level and nature than the words the relevant witnesses attributed to Mr Ruto and Mr Sang".

and Dutch police who enforce the Burka and Burkini ban can't be brought before the ICC, neither should Mr. Al Hassan be charged in connection with similar allegations.

15. Context is also a crucial consideration as concerns the confirmation of charges. Context affects choices, the extent to which certain consequences were foreseeable to particular individuals, and the range of available actions and responses. A defendant cannot be judged in a vacuum; he must be judged in relation to what is possible and feasible within his environment.⁹ Given the importance of context:¹⁰

It is incumbent upon the party with the burden of proof to ensure that the Chamber has all the information it needs to put the incriminating evidence into its right context and give it the appropriate amount of evidentiary weight.

16. The crux of the Prosecution's case is that Ansar Dine imposed a particular system which was harsher and stricter than the system that preceded it. But at the same time, the Prosecution has provided no information about the system of law, security, and detention in Timbuktu prior to the charging period. It is not possible to assume that it was fairer, better, and more impartial and independent in the absence of objective evidence on this point. Similarly, the Prosecution has provided no evidence concerning the circumstances under which Ansar Dine established their administration in Timbuktu, and the extent to which local residents may have supported this option, as an alternative to an administration, which left Timbuktu in a state of abject neglect and poverty.¹¹
17. The Prosecution has also relied on incidents that concern the most extreme elements present in Timbuktu (acts committed by Mohamed Moussa in particular), and then asserted that these actions are representative of the conduct of all members of Ansar Dine, all the time.¹² In so doing, the Prosecution has ignored key segments of their own evidence, which clarifies that these acts were deprecated and punished by Ansar

⁹ See ICC-02/11-01/15-1263-AnxB-Red, paras. 67-68.

¹⁰ ICC-02/11-01/15-1263-AnxB-Red, para. 80.

¹¹ MLI-OTP-[REDACTED], from 00.00 to 01.06.

¹² ICC-01/12-01/18-394-Conf, para. 147 (the "*Defence Submissions for the Confirmation of charges*"); see also DCC, paras. 472, 473, 479.

Dine, and were not in line with the vision and objectives of the group.¹³ As noted by Judge Henderson in the *Gbagbo* case,¹⁴

Whereas patterns can provide very potent proof, this is only the case when they are genuine. In order to establish the true nature and extent of a pattern, it is indispensable for the party alleging it to demonstrate that the examples provided as proof of the pattern are representative samples of the totality of relevant events and not simply chosen because they fit a preconceived conception.

3. The Prosecution's flawed and erroneous attempt to charge Mr. Al Hassan for labels rather than criminal incidents and conduct

18. The DCC is the primary accusatory instrument within the Rome Statute framework; it defines the scope of the trial proceedings: “[i]f the charges are then confirmed, article 74(2) of the Statute and regulation 55 of the Regulations, as noted above, make clear that the factual subject matter of the case will be settled for the purposes of the trial in light of the confirmed charge(s) and, therefore, in light of the facts and circumstances described therein.”¹⁵ The Pre-Trial Chamber has no power to confirm charges, or formulations thereof, which are not set out in the DCC. As a result, the Pre-Trial Chamber may not re-characterise certain charges, or add additional charges, without following the explicit procedure set out in Article 61(7)(c).¹⁶
19. Although the degree of specificity required for each charge might vary depending on alleged role of the defendant, in this case, the Prosecution has argued that Mr. Al Hassan was a man of action, who had a key role in ‘enforcing’ the common plan;¹⁷ he is not a remote perpetrator, but one who was alleged to have been involved in specific operational matters. Given the directness of his role, there is a heightened duty to specify the material facts underpinning Mr. Al Hassan’s involvement in specific criminal act,¹⁸ and the basis for concluding that he was aware of the commission of these specific criminal acts.

¹³ [REDACTED].

¹⁴ ICC-02/11-01/15-1263-AnxB-Red, para. 80.

¹⁵ ICC-01/09-02/11-382-Red, paras. 59-60.

¹⁶ ICC-02/04-01/15-422-Red, para. 106: “The Chamber does not have the power to interfere with the Prosecutor’s selection of the charges brought against Dominic Ongwen, including as concerns the parameters of the charges pertaining to (P-214), (P-227), (P-235) and (P-236).” See also ICC-01/04-01/06-806, para. 14; ICC-01/09-01/11-522, para. 15; ICC-01/09-02/11-584, para. 19.

¹⁷ ICC-01/12-01/18-T-007-CONF-ENG, p. 5, lns 17-20.

¹⁸ ICTR, *Prosecutor v. Nahimana*, ICTR-99-52, Appeals Judgment, para. 324.

20. The degree of specificity must also be determined by reference to the ICC Appeals Chamber’s directive that “the investigation should largely be completed at the stage of the confirmation of charges hearing”.¹⁹ This stands in stark contrast to the situation at the *ad hoc* Tribunals, where the indictments were issued many years in advance of the trial, and were thus followed by lengthy pre-trial investigations. There is no basis to afford the Prosecution leeway to fill in the gaps of the case at a later stage; the parameters and content of the case should be known at this point in time, and if they are not, then it is not a case which is sufficiently reliable to confirm for trial. For this reason, ICC case law has consistently deprecated and excised open ended language, which would allow the Prosecution to introduce unknown incidents at trial.²⁰
21. It would appear that the Prosecutor has attempted to avoid these strictures by arguing that Mr. Al Hassan can be charged with general ‘crimes’, rather than specific criminal incidents.²¹ This argument is flawed and legally erroneous, for the following reasons.
22. *First*, when this issue arose in the *Bemba* case, the ICC Appeals Chamber affirmed, in the context of allegations concerning crimes committed by different perpetrators in a range of different locations and on different dates, that the defendant was charged and convicted for specific criminal incidents and not ‘crimes’ *per se*.²² This is consistent with previous ICC cases, which affirmed “the established jurisprudence of the Court to the extent that a case includes “specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects””.²³ In the *Ruto et al.* case, the Single Judge also rejected the Prosecution’s argument that the incidents set out in the charges were ‘indicative’, that is, illustrative examples of the crimes, rather than exhaustive allegations.²⁴

¹⁹ ICC-01/04-01/10-514, para. 44.

²⁰ ICC-01/05-01/08-836, para. 112; ICC-02/04-01/15-422-Red, para. 158; ICC-01/09-01/11-522, paras. 32-33; ICC-01/09-02/11-584, para. 53; ICC-02/04-01/15-422-Red, para. 158(iv): “in paragraphs 17, 29, 123 (former paragraph 133) and 129 (former paragraph 139), which list Dominic Ongwen’s contribution to some of the crimes charged, the words “inter alia” are removed, in order for the charges to exhaustively contain all the underlying material facts and circumstances alleged by the Prosecutor (see Transcript of the status conference of 19 May 2015, ICC-02/04-01/15-T-6-ENG, pp. 20- 22)”. See also ICC-01/09-01/11-373, para. 278.

²¹ *Prosecution Final Brief*, paras. 51-52.

²² ICC-01/05-01/08-3636-Red, para. 104.

²³ ICC-02/11-01/11-9-Red, para. 10, citing ICC002/05-01/07-1-Corr, para. 14, and ICC-01/04-01/06-8-Corr, para. 21.

²⁴ ICC-01/09-01/11-522, paras. 27-28.

23. *Second*, these precedents are also consistent with the definition of criminal conduct employed in the context of admissibility and *ne bis in idem* proceedings. Specifically, in order to assess whether domestic investigations encompass the same or substantially the same conduct as an ICC case, the definition of an ICC case is based on the same person/same conduct test. The latter is assessed by reference to incidents, which are “understood as referring to a historical event, defined in time and place, in the course of which crimes within the jurisdiction of the Court were allegedly committed by one or more direct perpetrators”.²⁵ As explained by the Prosecution:²⁶

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

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

24. Similarly, the ICC Presidency found that the DRC domestic proceedings against Germain Katanga did not fall foul of the provision concerning *ne bis in idem* because the DRC case did not encompass any crimes, arising from the massacre in Bogoro on 24 February 2003.²⁷ The defining feature of the ICC case was thus a specific event, circumscribed in time and space.
25. In line with these precedents, if Mr. Al Hassan were to be charged with general crimes in Timbuktu over the course of several months, rather than specific criminal incidents, it would be impossible to ascertain the scope of the ICC case for the purpose of key

²⁵ ICC-01/11-01/11-565, para. 99, citing para. 62 of ICC-01/11-01/11-344-Conf (Gaddafi Admissibility Appeals Judgment).

²⁶ ICC-01/11-01/11-321-Red, paras. 34-35.

²⁷ ICC-01/04-01/07-3679, para. 25.

provisions in the Rome Statute. It would also be impossible to assess gravity during the pre-confirmation proceedings, as the particular size of the case would not be known until the point at which the Trial Chamber issues a judgment. It would also be impossible for Mr. Al Hassan to enter an informed plea, or to defend himself in relation to his responsibility for incidents that have not been crystallised in the charges.

26. *Third*, the recently issued *Ntaganda* judgment affirms the continuing applicability of the above precedents, and further suggests that the particular charged crimes in this case are best expressed by reference to specific incidents (defined in time and location) for all allegations, except those concerning sexual slavery and forced marriage (which are of a continuous nature), and which should be expressed by reference to particular victims and a course of conduct concerning those victims.²⁸ Examples where charges have been expressed by reference to an event that occurred at a particular location and on a specific date, rather than specific incidents, include the aforementioned *Katanga* case, where the defendant was charged with crimes committed as a result of the attack on Bogoro on a particular date. The precise parameters of that case therefore ensured that the defendant had specific notice as concerns the particular crimes at play. In contrast, the charges in this case concern a much wider time frame, and a multitude of different transactions and events. The use of labels, and open-ended language, rather than concrete incidents, would therefore be incompatible with the degree of specificity required by Article 67(1)(a) of the Statute.
27. *Fourth*, the Prosecution's assertion that the particular crimes in this case are 'systemic' is unsupported and unsustainable. Apart from sexual slavery and forced marriage (which should be pleaded by reference to the identity of the victim), none of the charged crimes are continuous in nature. The different elements of the offences also require a case by case assessment of a range of different, incident specific factors, including, for example, whether the victim was a protected person, whether the offence being heard before the Tribunal was related to the armed conflict, and the degree and intensity of any punishments.
28. As concerns the crime of persecution, the Prosecution has also misstated the applicable law and misapplied the Court's legal framework. Article 7(1)(h) prescribes specific

²⁸ ICC-01/04-02/06-2359, para. 42.

criminal acts falling under Article 7(1) or other specific crimes under the Court's jurisdiction, which have been committed against an identifiable group or collectivity on discriminatory grounds, and where the commission of the crime in question also constitutes a severe and intentional deprivation of fundamental rights. It follows that the Prosecution must plead and prove the existence of the underlying criminal act, in addition to the discriminatory context. The Prosecution's case is, however, fundamentally defective as concerns these elements. Rather than first establishing specific crimes, and then demonstrating that their commission was discriminatory and violated international law, the Prosecution has set out a range of vague accusations concerning human rights violations, which it has pleaded as free-standing acts of persecution, and not as context, which demonstrated the discriminatory or illegal nature of the crimes pleaded elsewhere.²⁹

29. The Prosecution appears to have confused the ECCC for the ICC. The definition of persecution at the ECCC does not require the Prosecution to establish that the discriminatory conduct occurred within the context of an underlying crime against humanity (or war crime): it is open-ended, and includes conduct that reaches a similar gravity as other crimes against humanity.³⁰ In contrast, the drafters of the ICC Statute deliberately opted for a closed definition, in order to allay concerns that the Court could intrude into a range of domestic issues.³¹
30. The *Ntaganda* Trial Judgment confirms this linkage requirement.³² And, as acknowledged by the Prosecution, the Trial Chamber further affirmed that each underlying act of persecution must then be assessed either alone, or cumulatively, in order to determine whether the additional elements of persecution are fulfilled.³³ Accordingly, whilst it might be possible to rely on several acts together for the purpose of examining discriminatory intent, the judicial inquiry must start with the initial assessment that there is an underlying act, which fulfils the necessary elements of Articles 6, 7 of 8 of the Statute.

²⁹ DCC, para. 1092.

³⁰ See ECCC, *Prosecutor v. Duch*, Appeal Judgment, 3 February 2012, Case File/Dossier N°001/18-07-2007-ECCC/SC, paras. 261-262.

³¹ See D. Robinson, 'Defining Crimes against Humanity at the Rome Conference', *American Journal of International Law* Vol. 93, No. 1 (January 1999), pp. 43-57, at 54 -55.

³² ICC-01/04-02/06-2359, para. 745. See also para. 1024.

³³ ICC-01/04-02/06-2359, para. 992 (cf ICC-01/12-01/18-430-Conf, para. 129).

31. Given the critical distinction between the notion of persecution under the *ad hoc* Tribunals and special courts as compared to the ICC, the Prosecution's attempt to import allegations, that are based on different criminal definitions, must be rejected. And, in light of this underlying linkage requirement, there is also no basis for characterising persecution as a 'continuous crime', rather than a series of criminal incidents linked to underlying acts, which fall under either Article 7 or Article 8.
32. The special intent element for persecution also heightens the Prosecution's obligation to set out clearly the facts underpinning each incident, and the basis for ascertaining that Mr. Al Hassan knew and intended for these crimes to be committed on discriminatory grounds. This latter element is completely missing from the current formulation of the charges.
33. The charges, as currently pleaded, are therefore defective insofar as they include underlying acts, which fall outside the scope of the definition of persecution. The charges are also overly vague, due to the Prosecution's failure to set out specific information concerning the manner in which Mr. Al Hassan fulfils the special intent element for persecution.

4. The Prosecution's failure to establish the key contextual elements of war crimes and crimes against humanity

34. As set out in the pre-confirmation brief, and during the hearings themselves, the evidence filed in support of the DCC fails to establish, to the necessary evidential threshold, that the alleged offences fulfil the requisite *chapeau* elements for war crimes and crimes against humanity.³⁴ And, notwithstanding the significant amount of further time and opportunities that have been afforded to the Prosecution to establish its case, at the end of this confirmation process, there are still crucial lacunae as concerns the contextual elements of war crimes and crimes against humanity.
35. Indeed, rather than plugging the gaps with actual evidence, the Prosecution has attempted to stretch and contort the clear letter of the law, in order to support entirely new forms of liability. It has also attempted to import the laws of warfare into daily civilian life, in contravention of the defining purpose of international humanitarian law, and its internally logical limitations.

³⁴ ICC-01/12-01/18-394-Conf, Sections 3.1 and 3.2.

36. These argumentative fallacies are particularly evident as concerns:
- i. The Prosecution's failure to understand and apply the nexus element for non-international armed conflicts (NIACs) as concerns Article 8 allegations; and
 - ii. The Prosecution's failure to define and establish the chapeau elements for crimes against humanity.

4.1 The Prosecution's failure to understand and apply the nexus element for non-international armed conflicts (NIACs)

37. When the ICC Statute was adopted, the drafters decided to maintain the distinction between the laws applicable to an international armed conflict as compared to the laws governing non-international armed conflict. This decision was deliberate, and is reflected in the different content of the respective provisions. In line with the principle of legality, this distinction cannot be obliterated by judicial fiat. If State Parties wish to eliminate this distinction, then the only avenue, which is consistent with the principle of legality, would be to amend the Statute.
38. In with Article 31 of the Vienna Convention on the Law of Treaties, the notion of an 'attack' in Article 8(2)(e)(i), must therefore be construed through this lens: that the intention of this provision was to regulate the consequences caused by attacks that were committed within the framework of participation in a NIAC as opposed to an occupation or an IAC. Thus, in the same way that the threshold for establishing a NIAC places a greater emphasis on the degree and intensity of the hostilities,³⁵ the notion of an 'attack' within article 8(2)(e)(i) must be interpreted within the context of the heightened requirements of a NIAC. It is also notable that when the drafters wished to employ language that did not require a direct linkage to an armed attack (i.e. 'destroyed'), they did so. The express use of the term 'destroyed' in Article 8(2)(b)(xiii) and Article 8(2)(e)(xii) therefore excludes its implied inclusion in Article 8(2)(e)(i).³⁶

³⁵ See Article 8(2)(f) of the Statute.

³⁶ "The *expressio unius est exclusio alterius* rule", as a canon of interpretation, was endorsed by the ICTY in *Prosecutor v. Delalic*, Trial Judgment, para. 166. <http://www.icty.org/x/cases/mucic/tjug/en/cel-tj981116e-3.htm>

39. The distinction between the two bodies of law within the text of Article 8 also renders the *Strugar* decision inapposite.³⁷ The ICTY was mandated to apply customary international law, and in line with this mandate, decided to largely ignore the distinction between the applicable laws in international armed conflict versus internal armed conflicts.³⁸ The fact the ICTY applied the higher, Article 27 threshold within the context of an IAC,³⁹ also does not justify the application of a lower threshold within the context of a NIAC: the principle of legality favours a higher rather than a lower threshold, irrespective as to whether the conduct takes place in an IAC or a NIAC.
40. In contrast to the ICTY, the Rome Statute is a treaty. First and foremost, the Court must apply the text of the Statute itself, interpreted narrowly, to respect the principle of legality. In case of any ambiguity concerning the precise definition of the word ‘attack’ in article 8(2)(e)(i), Article 22(2) of the Rome Statute states that “[i]n case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted”.
41. The fact that some (and by no means the majority)⁴⁰ of commentators have opined that Article 8(2)(e)(i) derives from both Article 27 and Article 56 of the Hague Regulations is neither here nor there: the word ‘attack’ clearly comes from Article 27, whereas the influence of Article 56 (if any) appears to relate to the notion that the provision could entail individual responsibility (which is itself, a controversial notion for contraventions

³⁷ *Prosecution Final Brief*, para. 151.

³⁸ Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002), p. 387 : “Article 8 of the Statute is ancillary to these substantive provisions. Thus, an act which is not prohibited under the *ius in bello* cannot constitute a war crime. But not every act prohibited under the primary rules also constitute a war crime as the definitions contained in the various items in the catalogue are sometimes narrower than the primary norms. In this respect, the scope of criminal responsibility under the Rome Statute is more restricted than that under Article 3 of the ICTY Statute which establishes criminal responsibility for any violation of the ‘laws or customs of war’.”

³⁹ ICTY, *Prosecution v. Strugar*, IT-01-46-T, Trial Judgment, paras. 245, 317, cited at ICC-01/12-01/18-430, fn. 415.

⁴⁰ In addition to the Article 27 only commentators cited by the OTP, see Andrea Carcano, “The Criminalization and Prosecution of Attacks against Cultural Property”, in Fausto Pocar, Marco Pedrazzi, and Micaela Frulli (eds), *War Crimes and the Conduct of Hostilities* (Edward Elgar, 2013), p. 86; Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002), p. 409; Yaron Gottlieb, “Criminalizing Destruction of Cultural Property: A Proposal for Defining New Crimes under the Rome Statute of the ICC”, *Penn State International Law Review*, Vol. 23, Number 4, 2005, p. 865 and fn. 32; Christopher Keith Hall, “The Jurisdiction of the Permanent International Criminal Court over Violations of Humanitarian Law”, in Flavia Lattanzi (ed), *The International Criminal Court: Comments on the Draft Statute* (Editoriale Scientifica, 1998), p. 29.

occurring within a NIAC).⁴¹ The most logical conclusion is therefore that the States decided to counterbalance the intrusion into State sovereignty and individual responsibility by retaining the Article 27 language ('attack') as concerns the triggering element.

42. It also not feasible to ignore these critical distinctions between IACs and NIACs by applying the laws of occupation by analogy or for illustrative purposes. As explained by Carstens,⁴²

Unlike the negative rules of restraint against unnecessary destruction and seizure, several positive rules unequivocally attach only during international armed conflicts, and during occupation particularly. These protections never come into play during non-international armed conflicts based on a simple premise: A state of occupation does not exist in a non-international armed conflict.

43. The laws of occupation are tied to particular duties and powers of an occupying power, and to ensure no gaps in protection that might otherwise be caused by the fact that a particular territorial area is under the effective control of a hostile foreign State: "It is the essence of belligerent occupation that it is exercised over foreign, enemy territory".⁴³ Specifically, the law of occupation applies to stable situations, which are legally unstable due to the fact that a foreign power has completely seized the reins of power.⁴⁴ The rationale is therefore to preserve the *status quo* (which includes positive obligations preserve property) during this period. In contrast, during internal armed conflicts, jurisdiction remains with the State. The purpose of IHL in this setting is therefore to regulate hostilities (and to protect civilians from the direct effect of hostilities), with the understanding that domestic law continues to apply in full force to

⁴¹ Anne-Marie Carstens, "The Hostilities-Occupation Dichotomy and Cultural Property in Non-International Armed Conflicts", *Stanford Journal of International Law*, Vol. 52, Issue 1 (Winter 2016), p. 19: "To the extent that the international community readied itself to accept the extension of obligations to non-international armed conflicts, it proved willing to do so only in limited circumstances." See also Michael Cottier, "Elements of war crimes", in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edition, C.H. Beck, Hart, Nomos, 2016), p. 305: "IHL is the law applicable in situations of armed conflict. In contrast to what sometimes has been argued, not all violations of that law necessarily constitute war crimes. Only those violations of IHL that have been specifically 'criminalized', that is, for the perpetration of which customary or treaty international law establishes individual criminal responsibility, may qualify as war crimes."

⁴² Anne-Marie Carstens, "The Hostilities-Occupation Dichotomy and Cultural Property in Non-International Armed Conflicts", *Stanford Journal of International Law*, Vol. 52, Issue 1 (Winter 2016), p. 6.

⁴³ Y. Dinstein, *The International Law of Belligerent Occupation* (2009), at 34; See also H. Gasser, 'Protection of the Civilian Population', in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2008), at 272.

⁴⁴ See H. Gasser, 'Protection of the Civilian Population in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2008) p. 276.

all other matters. States were thus keen to preserve the distinction between the different bodies of law due to the concern that imposing positive obligations on non-State actors (to preserve and protect) as opposed to negative obligations (not to attack) would legitimise non-State actors, to the detriment of State sovereignty.⁴⁵

44. Thus, the role of IHL during a NIAC not to penalise or remedy each and every harm that occurs at the same time as an armed conflict, but to penalise acts that are committed in furtherance of, or in connection with the armed conflict itself. Internal crimes and acts of vandalism are governed by domestic law. There are no gaps, or need to import a particular legal framework which is ill-suited for such a context.

4.2 Chapeau elements for crimes against humanity

45. The *chapeau* elements for Article 7 offences are not an afterthought or window-dressing; they serve and operate as key elements of distinction between crimes that fall within the domestic realm, and those that trigger the power of an international court to intrude into the realm of State sovereignty.⁴⁶ For this reason, they must be construed in a manner that gives effect to this purpose.
46. A key example concerns the criterion of a widespread and systematic attack against the civilian population. As noted in the recent *Ntaganda* Trial Judgment, the “requirement

⁴⁵ Anne-Marie Carstens, “The Hostilities-Occupation Dichotomy and Cultural Property in Non-International Armed Conflicts”, *Stanford Journal of International Law*, Vol. 52, Issue 1 (Winter 2016), p. 18: “the 1949 Geneva Conventions reflected a somewhat paradoxical approach to protection by sharply restricting the body of rules applicable during non-international armed conflicts. This approach had two primary causes. First, the international community had long considered non-international armed conflicts to fall within the domestic affairs committed to individual states, and thus the law of armed conflict developed to govern international armed conflicts only. This distinction accorded with the bedrock principles of sovereignty, particularly the principles of territorial integrity and non-intervention. The international community therefore elected to hew as closely as possible to this traditional understanding in extending the law of armed conflict to non-international armed conflicts; it proved willing to provide only for the application of limited, firmly entrenched provisions. The second cause of the dual approach reflected a conscious decision to exclude those rules that applied during occupation. This decision accorded with the still-prevailing view that occupation cannot exist in a non-international armed conflict. Furthermore, it demonstrated a reluctance by states to recognize an occupation-like status in a non-international armed conflict, for fear of legitimating the status of armed groups opposing them or rebelling against their rule.” See also p. 23: “The 1954 Hague Convention thus rebuilt the traditional distinctions between stages of an armed conflict and between international and non-international armed conflicts. This rebuilding of the hostilities-occupation dichotomy can be seen in the juxtaposition of the duties to “safeguard” [positive duties] and to “respect,” the separate article applicable to occupation, and the extension only of the obligations of “respect [negative duties] to non-international armed conflicts”.

⁴⁶ *Gbagbo*, Separate Opinion of Judge Tarfusser, para. 46, ICC-02/11-01/15-1263-AnxA: “the case of crimes against humanity, the existence of an attack against a civilian population consisting of ‘a course of conduct involving the multiple commission of acts [...] pursuant to or in furtherance of a State or organisational policy to commit such attack’ is the very essence and heart of the crime; the one element singling out the acts listed in article 7 from the corresponding ordinary crimes and bringing them within the boundaries of the Court’s jurisdiction.”

that the acts form part of a ‘course of conduct’ indicates that Article 7 is meant to cover a series or overall flow of events, as opposed to a mere aggregate of random or isolated acts.”⁴⁷ The Trial Chamber further elaborated that:⁴⁸

In accordance with Article 7(2)(a), the course of conduct involving a multiplicity of acts must be committed ‘pursuant to or in furtherance of a State or organizational policy to commit such attack’, thus requiring a link to be established between the attack and the policy. The Elements of Crimes specify that the concept of ‘policy’ requires the active promotion or encouragement of an attack against a civilian population by a State or organisation. In exceptional circumstances, such a policy may be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attacks, but the existence of such a policy cannot be inferred solely from the absence of governmental or organisational action.

47. The DCC fails to set out a clear basis for concluding that the organisation intended to actively promote the commission of a course of conduct, falling under Article 7. For example, the hearsay news report that Iyad Ag Ghaly announced that they would use “all possible and **legitimate means**”(emphasis added) to promote virtue and prevent vice cannot, in any sense of the word, amount to active encouragement to commit crimes falling under Article 7.⁴⁹ The undated compilation of extracts from Sanda Ould Boumama⁵⁰ is evidentially unreliable, and incoherent; in the absence of the context in which he states certain things, no inferences can be safely drawn as concerns the active policy of the organisation as a whole. The specific factors delineated by the Prosecution at paragraphs 185 to 192 of the DCC also fail to concern:

- firstly, a course of conduct that is promoted by the organisation (as opposed to isolated acts, or acts committed by particular individuals that were acting outside the framework of organisation’s policy); and
- secondly, one that is directed towards committing widespread or systematic acts falling under Article 7 of the Statute, as opposed to Article 8 or conduct which falls outside the scope of Article 7.

48. Throughout the confirmation process, the Prosecution proceeded to dilute their common plan bit by bit, in order to make it easier to charge someone who was not a

⁴⁷ ICC-01/04-02/06-2359, para. 662

⁴⁸ ICC-01/04-02/06-2359, para. 673.

⁴⁹ Cf DCC, para. 185, fn. 482.

⁵⁰ DCC, para. 185, 2nd bullet point.

member of the common plan, and who had no nexus to the commission of the charged crimes. For example, the Prosecution clarified that the common plan did not itself concern the commission of crimes.⁵¹ The crimes were instead, either foreseeable consequences,⁵² or the means by which the common plan was implemented.⁵³ Nonetheless, due to the fact that criminality was airlifted out of the common plan, the charges no longer contain a coherent allegation that Ansar Dine as an organisation, actively promoted the commission of widespread or systematic Article 7 crimes.

5. The Prosecution's failure to plead and establish clear and coherent modes of liability that fall within the framework of Article 30 of the Statute

49. This Court cannot sit in judgment of domestic proceedings whilst failing to respect the same principles of legality as concerns its own proceedings. One such basic principle is the stipulation, set out in Article 6(2)(b) of APII, that “no one shall be convicted of an offence except on the basis of individual penal responsibility”. As set out in the ICRC commentary: “a corollary of this principle is that there can be no collective penal responsibility for acts committed by one or several members of a group”.⁵⁴
50. It follows from this requirement that Article 30 of the Statute must interpreted and applied in a manner that respects the overriding principle that a defendant can only be punished if he or she made culpable contributions to the charged crimes; their membership of a particular group (or ‘plan’) cannot be relied upon to erase these limits to liability, and protection against collective punishment. These limits would, however, be erased if the Chamber were to accept the Prosecution’s arguments concerning the scope of Article 25(3) of the Statute.
51. The established case law of the ICC refers to four different scenarios: perpetration, co-perpetration, indirect perpetration, and indirect co-perpetration. And yet, when the particular strands of argument are put together, it becomes clear that the Prosecution’s

⁵¹ ICC-01/12-01/18-T-007-CONF-ENG, pp. 8-9, lns 22-25, 1-3.

⁵² DCC paras. 347, 1076; *Prosecution Final Brief*, para. 8; ICC-01/12-01/18-T-005-CONF-ENG, p. 5, lns 5-8, pp. 14-15, lns 25, lns 1-2.

⁵³ “Rape, sexual enslavement, forced marriages, were, I would explain, although they were not part of the common plan, but they could have been foreseeable consequences flowing from the implementation of the common plan based on the ideology of the organisation, the composition of the organisation and the causative context of the time in Timbuktu.” ICC-01/12-01/18-T-005-CONF-ENG, p. 5, lns 5-8; “In armed conflicts, women are usually considered as compensation. Rape is a foreseeable consequence of war and men had the power to use women for sexual purposes”: ICC-01/12-01/18-T-005-CONF-ENG, pp. 14-15, lns 25, lns 1-2.

⁵⁴ ICRC Commentary, “Practice Relating to Rule 102. Individual Criminal Responsibility” (IHL Database, Customary IHL).

stance would result in a mode of liability that falls outside the established categories, and which excludes any form of culpable criminal conduct.

52. This exemplified by the following claims, advanced through the confirmation proceedings:

- That the common plan does not encompass all the charged crimes⁵⁵ – they are, rather, a foreseeable consequence of the common plan;⁵⁶
- That Mr. Al Hassan does not need to be a member of Ansar Dine,⁵⁷ even though they inferred his intent to contribute to the common plan from his alleged membership;⁵⁸
- That although “[w]hat is important here is what he actually did, his actions,”⁵⁹ Mr. Al Hassan does not need to make an essential contribution to each charged crime, or even make any contribution to each crime;⁶⁰ but
- They are not relying on indirect perpetration⁶¹ – that is, they are not alleging that Mr. Al Hassan committed the material elements *through* another person.

53. Whereas anyone of these claims might be acceptable if counter-balanced by other forms of control or culpable contribution, the conglomeration of all, when viewed in connection with the particular factual allegations concerning the role of Mr. Al Hassan, would fail to satisfy the basic requirements for liability set out in Article 30 of the Statute. This can be exemplified by contrasting the Prosecution’s description of Mr. Al Hassan’s personal responsibility, with the outer limits of indirect co-perpetration. According to Pre-Trial Chamber IX, the latter mode:⁶²

Combines the commission of a crime “jointly with another” (in which each of a plurality of persons has the capacity to frustrate the

⁵⁵ “But we do not have to prove - and our case is not - that the crimes were necessarily seen as part of the plan itself”: ICC-01/12-01/18-T-007-CONF-ENG, pp. 8-9, lns 22-25, 1-3.

⁵⁶ “Rape, sexual enslavement, forced marriages, were, I would explain, although they were not part of the common plan, but they could have been foreseeable consequences flowing from the implementation of the common plan based on the ideology of the organisation, the composition of the organisation and the causative context of the time in Timbuktu.” ICC-01/12-01/18-T-005-CONF-ENG, p. 5, lns 5-8; “In armed conflicts, women are usually considered as compensation. Rape is a foreseeable consequence of war and men had the power to use women for sexual purposes”: ICC-01/12-01/18-T-005-CONF-ENG, pp. 14-15, lns 25, lns 1-2.

⁵⁷ “Although there is evidence that Al Hassan was a member of Ansar Dine, it’s not actually necessary for the purposes of this case to prove his membership or allegiance to Ansar Dine to prove that he was a member of the common plan”: ICC-01/12-01/18-T-005-CONF-ENG, p. 73, lns 23-25. See also ICC-01/12-01/18-T-007-CONF-ENG, p. 5, lns 17-20.

⁵⁸ DCC, paras. 329, 358.

⁵⁹ ICC-01/12-01/18-T-007-CONF-ENG, p. 5, lns 17-20.

⁶⁰ “There is no requirement to prove that Al Hassan as a co-perpetrator implemented the crimes, executed or contributed to their realisations.” ICC-01/12-01/18-T-007-CONF-ENG, pp. 11-12, lns 22-25, 1.

⁶¹ *Prosecution Final Brief*, para. 55.

⁶² ICC-02/04-01/15-422-Red, para. 39.

commission of the crime in the way it is realised by not performing his or her coordinated contributive acts within the framework of an agreement among them) with the commission of a crime “through another person” (in which a person commits the crime by subjugating another person’s will, rather than personally and directly executing the objective elements of the crime).

54. This mode requires the Prosecution to establish that the defendant jointly controlled the physical perpetrators who executed the charged crimes. And yet, in the current case, the Prosecution has attempted to impute the actions of the (often unidentified) physical perpetrators to Mr. Al Hassan, without actually pleading or demonstrating that Mr. Al Hassan jointly exercised control over their actions. The Prosecution is attempting to cherry pick from the joint control theory: taking the mutual attribution elements whilst discarding the seminal requirement of control. And that is because it is impossible to demonstrate that Mr. Al Hassan exercised any control (subjugating of the will) over the physical perpetrators. Even if the question of his title is put aside:
- a. There is no evidence that Mr. Al Hassan gave orders to the physical perpetrators concerning the commission of crimes: i.e. he did not order or authorise members of the Islamic police to use coercive interrogation techniques, or to inflict corporal punishments on the citizens of Timbuktu;
 - b. There is no evidence that Mr. Al Hassan exercised any control or authority over the members of Hesbah, who were responsible for arresting persons, and enforcing moral codes; and
 - c. There is no evidence that Mr. Al Hassan exercised any authority or control over the Islamic Tribunal or the Shura Council as concerns the judgments and sentences issued by the Tribunal; and
 - d. There is no evidence that Mr. Al Hassan jointly controlled the physical perpetrators, by virtue of his relationships with other members of the common plan.
55. Put simply, legal theories based on joint control do not apply to a small fish at the bottom of the food chain. Crucially – the Prosecution has failed to establish that but for Mr. Al Hassan’s contributions, the crimes would not have occurred. There is, in this regard, a fundamental contradiction at the heart of the case. The Prosecution acknowledges that Mr. Al Hassan was not involved in devising the common plan, nor was its formulation in any way contingent on him; rather, the Prosecution alleges that

when he started to work with the Islamic Police, he knew that crimes would occur in the ordinary course of events. If this premise is accepted, then it suggests that the crimes would have occurred irrespective as to whether Mr. Al Hassan joined the Islamic Police or not. This is indeed reflected by the extent to which multiple incidents occurred without any involvement or contribution from Mr. Al Hassan.

56. Bearing in mind that the burden of proof fell on the Prosecution to establish that Mr. Al Hassan's role was essential, there is a dearth of information on this point: he had no specific military, police or religious training. Although Mr. Al Hassan spoke multiple languages, the Prosecution has not established that other individuals within Ansar Dine the police could not speak French or Songhai (languages spoken by most in Timbuktu).⁶³
57. Although the Prosecution has further claimed that the crimes would have occurred in a significantly different manner if Mr. Al Hassan had not contributed to the common plan,⁶⁴ they have not identified what these differences would have been, how they would have been 'significant', and the impact on the criminal nature of the acts in question (either by reference to quantity or severity). The Prosecution has not established any nexus between the act of interpreting or speaking to civilians, and the commission of crimes: this nexus is a fundamental element of the requirement that "the accused must carry out essential contributions in a coordinated manner which results in the fulfilment of the material elements of the crime".⁶⁵
58. This element of causation must also be accompanied by knowledge and intent as concerns the existence of a proximate link between the defendant's acts and the commission of crimes: that is, the Prosecution was required to establish that Mr. Al Hassan knew and intended that his contributions would play an essential role in the realisation of the charged crimes (not just that there was a chance that they might have some type of impact on hypothetical criminality).

⁶³ [REDACTED] spoke Songhai, [REDACTED]; Adama spoke French according to [REDACTED]; [REDACTED] spoke French, [REDACTED]; Abou Dhar spoke French, [REDACTED]; [REDACTED] spoke French and Arabic, [REDACTED]; Oumar Ould Hamaha (Barbe Rouge) spoke French and Arabic, [REDACTED]; Sanda Ould Boumama spoke French, Arabic and Songhai, [REDACTED]; Al Mahdi spoke Arabic, Tamasheq, Songhai, [REDACTED]; [REDACTED] spoke Tamasheq and Songhai, [REDACTED]; Talha spoke Arabic and Songhai, [REDACTED], p. 0132; Mohamed Moussa spoke Tamasheq, [REDACTED].

⁶⁴ *Prosecution Final Brief*, para. 44.

⁶⁵ ICC-01/05-01/08-424, para. 350.

59. The *Bemba et al.* Appeals Judgment does not eliminate or lessen the Prosecution’s duty to establish this knowledge and intention on the part of Mr. Al Hassan. In that case, both the Trial Chamber and the Appeals Chamber ultimately confirmed that Mr. Bemba made an essential contribution to each of the charged offences through his overall coordinating role as the defendant and architect of the plan.⁶⁶ Since the creation of the plan to interfere with witnesses was intrinsically tied to the commission of the charged offences of witness interference, his role in creating the plan constituted an essential and intention contribution to the resultant offences. The findings do not deviate from the fundamental principle that “a ‘joint criminal enterprise is simply a means of committing a crime; it is not a crime in itself’.”⁶⁷ This is further confirmed by the Appeals Chamber finding that, irrespective as to whether the contribution is made at the preparation or the execution stage, the ultimate litmus test is “whether the individual contribution of the accused within the framework of the agreement was such that without it, the crime could not have been committed or would have been committed in a significantly different way.”⁶⁸ This necessarily requires an assessment of the impact of the role of the defendant on each of the charged incidents.
60. Moreover, as underlined by Judge Henderson, the scenario in the *Bemba et al.* case is distinguishable from the *Gbagbo* case or current case, in that:

If the criminal conduct was indisputably part and parcel of the common plan, then it is indeed possible to attribute criminal responsibility to a member of such plan for making an essential contribution to it before the relevant conduct takes place. In such a scenario, the contributor would have known, when making his or her contribution, that he or she was contributing to a joint effort that included the relevant criminal conduct.

61. It follows, therefore, that the theoretical possibility that an accused can make an essential contribution to the common plan, rather than the charged crimes, is more likely to be feasible in circumstances where there is an intrinsic link between the common plan, and the commission of the charged crimes. In such a scenario, the defendant’s contributions to the common plan will necessarily contribute to the charged crimes (that is, the charged crimes are ‘part and parcel’ of the common plan). As a

⁶⁶ ICC-01/05-01/13-1989-Red, para. 816; ICC-01/05-01/13-2275-Red, para. 825.

⁶⁷ ICC-01/12-01/18-394-Conf, para. 219, citing ICTR, *Prosecutor v. Mpambara*, ICTR-01-65-T, Trial Chamber, Judgment, 11 September 2006, para. 14.

⁶⁸ ICC-01/05-01/13-2275-Red, para. 820.

result, the defendant is also in a position to foresee that the crimes in question will be the inevitable consequence of his or her actions. In contrast, where the crimes in question are not ‘part and parcel’ of the common plan, but rather a foreseeable consequence of a non-criminal common plan, Judge Henderson has emphasised that:⁶⁹

in order to avoid circularity it is indispensable to show that when Mr Blé Goudé [the defendant] made his contribution, he was conscious that he was also contributing to the crimes committed on 12 April 2011. It is not sufficient that the members of the common plan were able to foresee the possibility that the execution of their plan might lead an undefined (group of) person(s) to commit certain crimes at an undefined time and location.

62. In line with the requirements of *dolus directus*, Judge Henderson further affirms that this notion of culpable foreseeability must be assessed by reference to the subjective knowledge of the defendant: what matters is not what a defendant might or could have known or foresee, but would they did know or foresee as being the virtually certain consequences of their actions:⁷⁰

Whereas foreseeability is the correct parameter for this type of situation, it is important not to stretch this concept, lest it becomes meaningless. Indeed, at some level of scale and abstraction, almost everything becomes ‘foreseeable’ in the sense that there is a possibility that it may occur. Any project or plan involving large numbers of individuals who are operating relatively autonomously involves a certain risk that some of these individuals may engage in criminal behaviour. The larger the group of people involved and the longer the operation lasts, the greater the risk becomes that at least one individual may commit a crime. However, the mere awareness of the statistical possibility that one or more of their subordinates may engage in criminal activity at some undefined moment or place is not enough to impute criminal intent to persons in leadership position. For this to be the case, the scale of the foreseen criminal activity and the likelihood of its occurrence must be significantly greater. The foreseeability of the crime(s) must also be clearly linked to the execution of an identifiable aspect of the alleged plan. The mere abstract expectation that at least one out of hundreds or even thousands of individuals involved in a broadly defined plan or operation that is executed over several months in a large geographic area will probably commit a murder or rape clearly does not suffice in this regard.
[...]

⁶⁹ ICC-02/11-01/15-1263-AnxB-Red, para. 1916.

⁷⁰ ICC-02/11-01/15-1263-AnxB-Red, paras. 1920, 1931.

The idea that control over the crime can be established on the basis of foreseeability of risk of criminal behaviour is antithetical to the notion of control over an organisation. Organisations are controlled by way of orders and directives, not by telepathy or risk calculus.

63. The crux of the issue before the Chamber is not just what is legally possible, but what is evidentially established, bearing in mind the particular role and knowledge of Mr. Al Hassan: did Mr. Al Hassan foresee that his particular contributions to the administration of civilian life in Timbuktu would (not could) result in the charged crimes being committed, bearing in mind:
- i. his lack of religious training or understanding of Islamic law;
 - ii. the fact that Sharia law is not inherently criminal or incompatible with a post-conflict justice scenario;⁷¹
 - iii. the fact that he was not involved in formulation of the common plan;
 - iv. the fact that he was not involved in the decisions of the Shura Council or the formulation of moral codes by the Presidency or Hesbah; and
 - v. the fact that he had no authority or influence over either key decision makers (the Presidency, the Islamic Tribunal, the Shura Council, Hesbah), or the physical perpetrators who committed the charges offences; and
 - vi. the lack of any nexus between his contributions and the common plan?⁷²
64. On the basis of the evidence disclosed to the Defence, the answer is a resounding no.
65. The Prosecution's case concerning other modes of liability is equally deficient. For Article 25(3)(b), although the degree of control for ordering or inducement might be of a reduced level as compared to perpetration, it must still be pleaded and established. And yet, once again, it is impossible to discern the manner in which the conduct of Mr. Al Hassan had a direct and intentional effect on the commission of the charged crimes. For Article 25(3)(c), the case falls due to the absence of any pleadings or proof that firstly, Mr. Al Hassan contributed to the commission of the charged crimes, and secondly that such contributions were made "for the purpose of facilitating the

⁷¹ See C. Zoli, M. Bassiouni, H. Khan, "Justice in Post-Conflict Settings: Islamic Law and Muslim Communities as Stakeholders in Transition", *Utrecht Journal of International and European Law*, accessed 31 July 2019.

⁷² *Defence Submissions for the confirmation of charges*, Sections 4.3 and 4.4.

commission of the charged crimes.”⁷³ This is simply no indication that Mr. Al Hassan engaged in the alleged tasks assigned to him for the purpose of facilitating the charged crimes. As reflected by the existence of civilian complaints, the Islamic Police provided assistance to civilians in securing law and order,⁷⁴ and Mr. Al Hassan accepted to work with Ansar Dine because he thought he would get a position in the hospital (that is, a role where he could help civilians).⁷⁵ It cannot, therefore, be assumed that Mr. Al Hassan knew and intended his generic tasks to contribute to the commission of the charged crimes.⁷⁶

66. As concerns Article 25(3)(d)(i), in contradistinction to the position of the Prosecution, ICC case law has affirmed that: “knowledge of a general criminal intention will not suffice to prove [...] that the accused knew of the group’s intention to commit each of the crimes forming part of the common purpose.”⁷⁷ In addition, both the crimes and the defendant’s contributions to the crimes in question must reach a certain level of gravity in order to justify the Court’s exercise of jurisdiction over the case.⁷⁸ As such, not just any contribution would suffice to incur responsibility under Article 25(3)(d).⁷⁹ The types of routine tasks ascribed to Mr. Al Hassan (organising patrols, writing up reports) – which do not entail any level of discretion or independent authority – do not satisfy this requirement.
67. Article 25(3)(d)(ii) also only applies where the crimes are “part and parcel” of the common plan (‘where such activity or purpose involves the commission of a crime’),⁸⁰ which is not the situation in this case.
68. Finally, irrespective as to which mode of liability Mr. Al Hassan is charged with, it is necessary for the Prosecution to plead and establish any additional mental elements (*lex*

⁷³ ICC-01/09-01/11-2027-Red-Corr, para. 136. See also para. 142.

⁷⁴ See paragraph 100, footnote 125 below.

⁷⁵ [REDACTED].

⁷⁶ ICC-01/04-01/07-3436-AnxI, para. 287.

⁷⁷ ICC-01/04-01/07-3436, para. 1642.

⁷⁸ ICC-01/04-01/10-465-Red, paras. 276-277.

⁷⁹ ICC-01/04-01/10-465-Red, paras. 276-277.

⁸⁰ ICC-01/04-01/07-3436-AnxI, para. 38.

specialis) set out in the offences themselves.⁸¹ They have failed to do so (as will be elaborated below).

6. The Prosecution's failure to establish Mr. Al Hassan's criminal culpability as concerns the charged crimes

6.1 The Prosecution has failed to establish substantial grounds to believe that Mr. Al Hassan is individually criminally responsible for crimes concerning sexual violence

69. The Prosecution's charges concerning the linkage between the common plan and acts of rape and sexual violence are defective, and fall outside the scope of Article 25(3) of the Statute. The Prosecution has not attempted to demonstrate that Mr. Al Hassan knew of specific incidents of sexual violence, or that he was aware that they would occur within the ordinary course of events; rather, they plead that he was aware of the existence of the system of forced marriage or alternatively that he was aware that crimes were foreseeable consequences of the common plan.⁸²

6.1.1 The Prosecution has failed to establish that Mr. Al Hassan made culpable contributions to the charged crimes of sexual framework with the framework of the common plan and the Statute

70. During the confirmation proceedings, the Prosecution clarified that acts of sexual violence and rape were not the objective of the common plan, but a foreseeable consequence of a non-criminal common plan. The degree of intent is not only lower than *dolus directus* (the standard required under Article 30), it is also lower than the equivalent Joint criminal enterprise 3 standard (which does not, in any case, apply to the ICC). In essence, the Prosecution is asking the Chamber to apply JCE III lite – a form of liability which does not exist, because it does not capture criminal conduct.

71. It is also notable that the Prosecution failed to specifically respond to the Pre-Trial Chamber's query as to whether rape and sexual violence fell within the framework of the common plan from its inception, or added at a later stage (and if so, when).⁸³ This is a critical omission; as emphasised by the ICTY Appeals Chamber in the *Krajišnik* case, if a common plan changes over time, for examples, the nature of its objective expands, it is necessary to establish that the defendant knew of, and accepted the

⁸¹ ICC-01/04-02/06-2359, para. 774: "In addition, individual criminal responsibility requires that the subjective elements are fulfilled as required by Article 30 and any *lex specialis*".

⁸² DCC paras. 1076, 347, 1076; *Prosecution Final Brief*, para 8.

⁸³ *Prosecution Final Brief*, para. 8.

amended common plan.⁸⁴ The Prosecution has, however, failed to establish that Mr. Al Hassan either knew that the initial plan to install Sharia law entailed the foreseeable commission of these crimes, or that he was made aware that it fell within its framework at a later stage, and nonetheless continued to contribute to its execution.

72. *Firstly*, the assertion that Mr. Al Hassan was aware that Abou Zeid was in favour of marriage and opposed to adultery⁸⁵ is entirely irrelevant from the perspective of criminal law. The Pope is also in favour of marriage and opposed to adultery, but it does not follow from this that either the Pope or any member of the Catholic faith is in favour of ‘forced marriage’, as defined under international criminal law, or otherwise supports sexual violence. Mr. Al Hassan also played no role in formulating these edicts, and had no authority to reverse or modify any decrees issued by Abou Zeid.
73. *Secondly*, the allegation that Mr. Al Hassan knew that one member of Ansar Dine raped a woman⁸⁶ does not establish that Mr. Al Hassan knew that rape was a virtually certain consequence of the common plan. This assertion is based on an uncorroborated anonymous summary – this is an insufficiently reliable basis to make conclusions concerning Mr. Al Hassan’s knowledge.
74. The alleged basis for his knowledge also derived from the fact that a member of Ansar Dine was punished for committing rape, which undercuts any inference that Mr. Al Hassan would have known from this that rape/sexual violence were virtually certain consequences of the implementation of the common plan. For the reasons set out above, the fact that one member had committed rape also does not in itself establish the statistical awareness that rape would occur in the ordinary course of events, as a result of the implementation of the common plan.⁸⁷
75. The Prosecution has also advanced fundamentally contradictory arguments on this point. Whereas the DCC characterises the individual’s conduct as ‘rape’ for the purpose of establishing Mr. Al Hassan’s knowledge of rape, in their final observations, they

⁸⁴ ICTY, *Prosecutor v. Krajisnik*, IT-00-39-A, Appeal Judgement, paras. 173-177.

⁸⁵ DCC, para. 347; *Prosecution Final Brief*, para. 161.

⁸⁶ DCC, para. 347; [REDACTED].

⁸⁷ ICC-02/11-01/15-1263-AnxB-Red, para. 1920.

characterise it as ‘adultery’,⁸⁸ which undercuts their argument that this incident could have put Mr. Al Hassan on notice as concerns ‘rape’.

76. *Thirdly*, the Prosecution’s allegation that Mr. Al Hassan knew that members of Ansar Dine were married in Timbuktu fails to address the exact nature of his knowledge.⁸⁹ This allegation is based on Mr. Al Hassan’s own statement, where he refers to traditional marriages, in relation to which the father had the power to refuse the offer.⁹⁰ In relation to Abou Dhar specifically, he also indicated that one marriage did not take place because the family did not consent.⁹¹ This clearly indicates that when Mr. Al Hassan accompanied Abou Dhar to negotiate a dowry, he was of the belief and understanding that the family could refuse the offer. There is also no indication that Mr. Al Hassan was armed or had a weapon when he went to their house.
77. The allegation that he wrote to request financial assistance for dowries⁹² also does not support the conclusion that he knew, and intended for these marriages to be of a forced nature, involving sexual violence. This allegation is based exclusively on Mr. Al Hassan’s statement, where he refers to assisting two other police officers to request financial assistance for a dowry.⁹³ He stated, in relation to one such marriage offer, that the family’s refusal was accepted by the member of Ansar Dine who had made the offer, and that the latter simply left.⁹⁴ Mr. Al Hassan’s role was thus very limited, and had no impact on the common plan as such. Moreover, although the Prosecutor delineated key indicators for forced marriage in their observations,⁹⁵ the Prosecution has not established that these indicators were present in these particular marriages. The Prosecution has also not established that the wives in question experienced harm that would rise to the threshold of inhumane treatment. These missing gaps cannot be established by mere speculation or argument. These are issues of fact, and it fell to the Prosecution to establish them with reliable evidence.

⁸⁸ *Prosecution Final Brief*, para. 162.

⁸⁹ DCC, para. 347.

⁹⁰ [REDACTED].

⁹¹ [REDACTED].

⁹² DCC, para. 347.

⁹³ [REDACTED].

⁹⁴ [REDACTED].

⁹⁵ *Prosecution Final Brief*, para. 12.

78. *Fourthly*, the Prosecution has failed to establish that Mr. Al Hassan had any power or authority to assist women to get divorced, or that he was otherwise aware that such women were victims of forced marriage or sexual violence. [REDACTED] uncorroborated testimony is based on pure speculation and does not refer to any specific incidents when this occurred. There is also no linkage between [REDACTED] speculation and the specific charged incidents. Notably, there are no reports or documents from the Islamic Police referring to the practices described by [REDACTED].

6.1.2 The Prosecution has failed to establish that Mr. Al Hassan exercised any form of culpable control or influence over the commission of the charged incidents or conduct

79. As set out below, the Prosecution has also failed to establish any linkage between the individual incidents of sexual violence, and Mr. Al Hassan's alleged contributions to the common plan.

a. Forced marriage of [REDACTED]⁹⁶

80. The Prosecution has provided insufficient information and details to comply with the requirements of Article 67(1)(a) in relation to this incident. Apart from the fact that the witness is anonymous, the name of the alleged perpetrator has also been redacted [REDACTED].⁹⁷ This makes it impossible to assess the link, if any, to the common plan, and Mr. Al Hassan's contributions to the common plan or sphere of influence and authority. If the perpetrator was hierarchically superior to Mr. Al Hassan, he would have had no means to control these acts, or to otherwise prevent them from occurring.

b. Forced marriage of [REDACTED]⁹⁸

81. The Prosecution has failed to establish that Mr. Al Hassan had any knowledge or involvement in this incident. The witness [REDACTED];⁹⁹ [REDACTED]. This is a highly suggestive form of questioning/eliciting identification evidence. There is, in any case, no evidence that Mr. Al Hassan had the power to exercise any control or authority over this person, or to otherwise influence or frustrate the commission of this incident.

⁹⁶ DCC, paras. 810, 1085(a); Counts 8-12, 13.

⁹⁷ [REDACTED].

⁹⁸ DCC, paras. 811, 1085(b); Counts 8-12, 13.

⁹⁹ [REDACTED].

c. Forced marriage of [REDACTED]¹⁰⁰

82. The Prosecution has failed to establish that alleged acts related to this incident were committed pursuant to, or as a virtually certain consequence of the common plan. Although the name of the perpetrator has been given [REDACTED]¹⁰¹ there is no information concerning his alleged role, if any, in the organisation. There is no evidence that Mr. Al Hassan was aware of this incident, that he provided any assistance or support to the perpetrator, or that he otherwise had the power to influence or frustrate the commission of this alleged crime.

d. Forced marriage of [REDACTED]¹⁰²

83. The alleged victim has provided multiple contradictory elements concerning the incident, and crucially, has identified the perpetrators as being [REDACTED].¹⁰³ The modalities of the rape [REDACTED] is not consistent with the objectives of the common plan, and there is an insufficient basis to link this to the common plan or to otherwise impute responsibility to Mr. Al Hassan, who had no alleged involvement or knowledge of this incident.

e. Forced marriage of [REDACTED]¹⁰⁴

84. The details of these allegations are insufficiently precise to satisfy the requirements of Regulation 52(b) of the RoC, and Mr. Al Hassan's right to be informed in detail of the charges against him. Apart from the fact that the victim is anonymous, the date range is between [REDACTED] 2012 and [REDACTED] 2013. It therefore precedes the earliest date on which the Prosecution established that Mr. Al Hassan started working with the Islamic Police. This is bolstered by the fact that the witness does not refer to Mr. Al Hassan or the Islamic Police. No specific identifying features have been provided in relation to the perpetrators; it is therefore impossible to ascertain any linkage between the common plan or Mr. Al Hassan. The allegation that [REDACTED] is also inconsistent with the Prosecution's position that forced marriage was a foreseeable consequence of the organisation's opposition to any form of adultery. This

¹⁰⁰ DCC, paras. 812, 1085(c); Counts 8-12, 13.

¹⁰¹ [REDACTED].

¹⁰² DCC, paras. 813, 1085(d); Counts 8-12, 13.

¹⁰³ [REDACTED]: "[REDACTED]."

¹⁰⁴ DCC, paras. 814, 1085(e); Counts 8-12, 13.

suggests that this incident is an isolated event that cannot be linked to the common plan or imputed to Mr. Al Hassan.

*f. Forced marriage of [REDACTED]'s [REDACTED]*¹⁰⁵

85. This incident is only supported by an anonymous statement. [REDACTED] also acknowledges that she had no knowledge (direct or indirect) as concerns the nature and daily reality of [REDACTED]'s marriage.¹⁰⁶ There is insufficient information concerning the identity of the perpetrators to assess whether their acts had any causal nexus to the common plan, or the alleged contributions of Mr. Al Hassan. There is no evidence that Mr. Al Hassan had any power to control or influence the conduct of these perpetrators, or that he was aware of their actions.

*g. Forced marriage of [REDACTED]*¹⁰⁷

86. The Prosecution has only relied on a victim application to establish this incident. Victim applications are not evidence in themselves;¹⁰⁸ although they might be relevant to credibility, they cannot be given independent evidential weight for the truth of their contents.¹⁰⁹ The Defence has also only recently learned that the Prosecution is in possession of a statement from this witness, which was never disclosed to the Defence, and which contradicts the information in the victim application in material aspects.¹¹⁰ It was highly inappropriate for the Prosecution to advance allegations in the DCC on the basis of an application form, whilst knowing that this information was contradicted by a statement from the same witness.

87. This allegation is therefore highly unreliable, and it has been pleaded in a manner that it is contrary to the right to a fair confirmation process. There is in any case, insufficient reliable information to establish a link between these allegations and the common plan, and Mr. Al Hassan's role in the common plan.

¹⁰⁵ DCC, paras. 818, 1085(f); Counts 8-12, 13.

¹⁰⁶ [REDACTED].

¹⁰⁷ DCC, paras. 819, 1085(g); Counts 8-12, 13.

¹⁰⁸ "Please note that the purpose of the application form for participation in the proceedings and for reparations is NOT to provide evidence", International Criminal Court, "Victims", <https://www.icc-cpi.int/about/victims>.

¹⁰⁹ ICC-01/05-01/08-2012-Red, para. 100; ICC-01/04-02/06-2359, para. 85.

¹¹⁰ ICC-01/12-01/18-410-Conf-Red, para. 18.

h. Forced marriage of an unidentified woman, as told by [REDACTED]¹¹¹

88. This information is based on anonymous hearsay, and fails to satisfy the level of detail required by Regulation 52(b) and Article 67(1)(a). The Prosecution has not disclosed the name of the victim or the alleged perpetrator – apart from an assertion that the perpetrator was an ‘Islamist’,¹¹² there is no evidence that the person was a member of Ansar Dine. This makes it impossible to assess the link, if any, to the common plan, and Mr. Al Hassan’s contributions to the common plan or sphere of influence and authority.

i. Forced marriage of [REDACTED]¹¹³

89. This incident is based on the anonymous hearsay of witness [REDACTED], who heard from an unidentified source that the anonymous victim had been married.¹¹⁴
90. The evidential basis is insufficiently reliable to confirm this incident. There is, in any case, no evidence concerning Mr. Al Hassan’s knowledge or contribution to this incident. The perpetrator has not been identified; it is therefore impossible to ascertain whether Mr. Al Hassan exercised any control or authority over his actions, and whether he otherwise had any power to frustrate or affect the commission of this incident.

j. Forced marriage of [REDACTED]¹¹⁵

91. This incident is based on anonymous hearsay of witness [REDACTED], and concerns an undated event.¹¹⁶ The evidential basis is insufficiently reliable to confirm. There is, in any case, no evidence concerning Mr. Al Hassan’s knowledge or contribution to this incident. The perpetrator has not been identified; it is therefore impossible to ascertain whether Mr. Al Hassan exercised any control or authority over his actions, and whether he otherwise had any power to frustrate or affect the commission of this incident. The Prosecution has failed to substantial grounds to believe that Mr. Al Hassan is individually criminally responsible for crimes concerning torture and inhumane treatment as a result of sentencing without due process

¹¹¹ DCC, paras. 817, 1085(h); Counts 8-12, 13.

¹¹² [REDACTED].

¹¹³ DCC, paras. 815, 1085(i); Counts 8-12, 13.

¹¹⁴ [REDACTED].

¹¹⁵ DCC, paras. 816, 1085(j); Counts 8-12, 13.

¹¹⁶ [REDACTED].

6.2 The Prosecution has failed to establish that Mr. Al Hassan made culpable contributions to the charged crimes concerning the passing of sentences and executions within the framework of the common plan and the Statute

92. The language of Article 8(2)(c)(iv) is clear, and does not leave any scope for the Prosecution to carve out crimes, that were not intended by the drafters.
93. The crucial limitation that has been ignored by the Prosecution is the specification, in Element 1, that the “perpetrator passed sentence or executed one of more persons”. This element is derived from the prohibition set out in Common Article 3 of the Geneva Conventions, which targets “‘summary’ justice or trial by any tribunal that fails to qualify as fair and regular.” (emphasis added)¹¹⁷ The ICRC commentary to Common Article 3 further explains the prosecutorial/judicial nature of the process:¹¹⁸

‘Sentence’ is defined as a ‘[t]he judgment that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer’. This means that the guarantee of a fair trial in common Article 3 applies to the prosecution and punishment of persons charged with a penal offence.

94. The overarching purpose of Common Article 3 is also to prohibit violence to life and person; it follows that the sentences prescribed by this provision must entail a sufficiently severe sentence to attract the framework of Common Article 3, and to be considered as a “serious violation” of this article. In line with this severity requirement, the ICRC commentary clarifies that, “Common Article 3 does not contain a specific prohibition on corporal punishment.”¹¹⁹ The commentary further observes that its inclusion in Article 4(2)(a) of Additional Protocol II appears to be “an indication that corporal punishment required an explicit prohibition in Additional Protocol II and is not prohibited under common Article 3”.¹²⁰ The need for this specific prohibition appears to have been linked to the fact that,¹²¹

¹¹⁷ ICRC Commentary of 2016, "Common Article 3", (2016), para. 675.

¹¹⁸ ICRC Commentary of 2016, "Common Article 3", (2016), para. 676.

¹¹⁹ ICRC Commentary of 2016, "Common Article 3", (2016), para. 595.

¹²⁰ ICRC Commentary of 2016, "Common Article 3", (2016), para. 595.

¹²¹ ICRC Commentary of 2016, "Common Article 3", (2016), footnote 33, citing *Official Records of the Diplomatic Conference of Geneva of 1974–1977*, Vol. VIII, pp. 421–429, paras 5 and 12, and Vol. X, pp. 49–50, paras. 146–147, and pp. 103–104.

unlike other parts of Article 4(2)(a) of the Protocol, the inclusion of the reference to corporal punishment gave rise to debate at the 1974–1977 Diplomatic Conference, with some delegations preferring a prohibition of ‘any form of bodily harm’, arguing that corporal punishment would include imprisonment and noting that corporal punishment was ‘a means of punishment recognized in many national legislations’.

95. The upshot of this is that corporal punishment is not a free-standing prohibition under Common Article 3 (although it could fall within its ambit if it met the threshold of cruel treatment). This ‘gap’ is therefore intentional.
96. In terms of the definition of ‘executions’, it is clear from the commentary that the inclusion of ‘executions’ in this provision was intended to provide a framework for penalising death sentences that would otherwise be lawful under international law and IHL.¹²²
97. The commentary concerning Article 6 of APII sheds further light as concerns the scope of the prohibition, that is, that it is confined to “offences related to the armed conflict; these must be criminal offences and not merely administrative or disciplinary offences or procedures.”¹²³ This confined category of cases is also consistent with the prerogative of armed forces to impose their own system of discipline and order amongst their members. This includes the right to impose corporal punishments, and to detain individuals without any court process.¹²⁴ Accordingly, if the Pre-Trial Chamber accepts that Ansar Dine was an organised armed group, then that would also trigger Ansar Dine’s right to exact military punishments as concerns its members.
98. Given this backdrop, it would be inconsistent with the origins of Article 8(2)(c) and the principle of legality to create new forms of conduct that are not supported by explicit text of this provision. The ambit must therefore be confined to the judicial act of passing a sentence as part of a criminal process, or the implementation of executions in circumstances which fail to comport with the requirements set out in this provision. The criminal process itself must also concern offences that are related to the armed conflict.

¹²² ICRC Commentary of 2016, "Common Article 3", (2016), paras. 594, 677.

¹²³ ICRC Commentary of 1987, "Penal Prosecutions", paras. 4589.

¹²⁴ U.S. Code, Title 10. Armed Forces, Article 15, “Commanding officer’s non-judicial punishment” (United States, Legal information Institute).

99. The charges in this case are therefore completely defective as a result of the Prosecution's failure to plead, or establish, that Mr. Al Hassan was involved in specific criminal proceedings, which concerned crimes that were related to the armed conflict.
100. A further defect concerns the fact that in contradistinction to the theory underpinning the alleged common plan to install Sharia law against the will of the civilians, proceedings before the Islamic Tribunal were triggered by complaints filed by civilians in Timbuktu;¹²⁵ the actions in question were initiated by these complaints. In circumstances where an alleged victim has instigated the proceedings, the police has no discretion not to act, and no discretion not to refer the complaint to the Tribunal. Such cases have no nexus to the common plan itself, or the armed conflict.

6.2.1 The Prosecution has failed to plead or establish that Mr. Al Hassan possessed the special intent for this offence

101. The Prosecution's case concerning Mr. Al Hassan's knowledge rests on the erroneous premise that he was aware that the establishment of Islamic Courts was itself a war crime.¹²⁶ This argument does not hold water.
102. *Firstly*, it is not correct that non-State groups cannot establish courts: "although the establishment of such courts may raise issues of legitimacy, trial by such means may constitute an alternative to summary justice and a way for armed groups to maintain 'law and order' and to ensure respect for humanitarian law".¹²⁷
103. *Secondly*, if non-State groups establish such courts, Article 8(2)(c)(iv) does not require compliance with domestic law: "common Article 3 requires 'a regularly constituted court'. If this would refer exclusively to State courts constituted according to domestic law, non-State armed groups would not be able to comply with this requirement. The application of this rule in common Article 3 to 'each Party to the conflict' would then be without effect. Therefore, to give effect to this provision, it may be argued that

¹²⁵ See for example, [REDACTED], where the individual, [REDACTED], was caught by the shop owner's neighbour. See also [REDACTED].

¹²⁶ ICC-01/12-01/18-430-Conf, para. 142: "this is established inter alia simply by proof that Mr Al Hassan was aware that the victims were subject without their consent to the new rules created by Ansar Dine/AQIM, and not the pre-existing law of Mali".

¹²⁷ ICRC Commentary of 2016, "Common Article 3", (2016), para. 689.

courts are regularly constituted as long as they are constituted in accordance with the ‘laws’ of the armed group.”¹²⁸

104. *Thirdly*, the Prosecution has not clearly pleaded or established that all elements of Sharia law, as applied in in Timbuktu were contrary to the standards set out in Article 8(2)(c)(iv), and that each and every judgment and punishment fell foul of these provisions. This would necessarily entail an assessment of firstly, whether the judgment in question had a nexus to the armed conflict, and secondly, whether the seriousness of the subject matter or the punishment in question would trigger the threshold of Article 8(2)(c)(iv). Article 8(2)(c)(iv) is also concerned with criminal proceedings, and not civil administration or the resolution of civil disputes. As noted above, it is not possible to perform this assessment on the basis of the facts pleaded in the charges, or the evidence disclosed in the case.
105. *Fourthly*, the Prosecution has misinterpreted footnote 59 of the Elements of Crimes. This footnote does not modify or dilute the burden on the Prosecution to establish that the defendant was aware of the specific elements that brought the proceedings within the ambit of Article 8(2)(c)(iv); rather, the purpose of this footnote was to underscore that the question as to whether a particular judgment or execution fell foul of Article 8(2)(c)(iv) might need to be assessed by reference to the proceedings as a whole.¹²⁹ If anything, this footnote affirms the importance of establishing that the defendant was in a position to apprise themselves of all relevant information concerning the judicial progression and adjudication of a particular case.

6.2.2 The Prosecution has failed to establish any culpable linkage between the conduct of Mr. Al Hassan and the passing of sentences that fell under Article 8(2)(c)(iv)

106. As set out below, of the 36 Islamic Tribunal judgments disclosed in this case, the Prosecution has only attempted to link four of them to Mr. Al Hassan on the very nebulous basis that he wrote and signed the reports of the initial complaint.¹³⁰ The Prosecution has nonetheless failed to plead or establish the impact, if any, on the adjudicative process, and sentence passed by the Tribunal. Mr. Al Hassan played no role in the decision to apply Sharia law in Timbuktu, and he was not involved in, and

¹²⁸ ICRC Commentary of 2016, "Common Article 3", (2016), para. 692.

¹²⁹ K. Dörmann, "Article 8" in O. Triffterer, K. Ambos (eds), *Rome Statute of the International Criminal Court* (Hart Publishing 2016), p. 345.

¹³⁰ DCC paras 210, 307, 419, 464, 449, 465. The Prosecution, in the DCC [REDACTED].

had no influence over the specific entities in Timbuktu, which were responsible for interpreting Sharia law, and deciding which specific rules and punishment would apply. The Prosecution has also tendered no evidence or made a case as concerns whether Mr. Al Hassan exercised any discretion or authority as concerns what would be put in a report, and whether it would be transmitted to the Islamic Tribunal. Indeed, the very fact that Mr. Al Hassan wrote and signed a report concerning a complaint against Adama suggests that firstly, the process was automatic and not discriminatory or discretionary, and secondly, that Mr. Al Hassan's role was not directed towards committing crimes against civilians, but administering a civilian police service, which included protecting civilians against crimes.¹³¹

107. The Prosecution has also failed to establish that each of the four judgments fell under Article 8(2)(c)(iv).

a. Case [REDACTED]¹³²

108. The Judgment¹³³ pertaining to [REDACTED] makes no reference to the separate Islamic Police report.¹³⁴ The Prosecution has not established that the police report played an essential, or indeed, any role in the adjudicative process. The Prosecution has also not adduced any evidence that Mr. Al Hassan played any role in the proceedings before the Tribunal. The proceedings and eventual judgment also have no discernible nexus to the alleged armed conflict. [REDACTED] was charged with the offence of [REDACTED]:¹³⁵ these offences are not "related to the armed conflict". The Prosecution has not established how the proceedings against [REDACTED] as a whole, failed to comport with the requirements of Article 8(2)(c)(iv).

b. Case [REDACTED]¹³⁶

109. The Judgment¹³⁷ makes no reference to the report written by the Islamic Police,¹³⁸ and includes information that appears to have been derived from an investigation that was separate from the information set out in the report. The Prosecution has also not

¹³¹ *Prosecution Final Brief*, para. 66, citing [REDACTED].

¹³² DCC, paras. 307, 435, 562, 1056(b), 1061; Count 6.

¹³³ [REDACTED].

¹³⁴ [REDACTED].

¹³⁵ [REDACTED].

¹³⁶ DCC, paras. 435, 464, 1061; Count 6.

¹³⁷ [REDACTED].

¹³⁸ [REDACTED].

adduced any evidence that the report or Mr. Al Hassan played any role in the proceedings before the Tribunal itself. The individuals in this case were proceeded against [REDACTED]; this offence is not “related to the armed conflict”. The Prosecution has not established how the proceedings, as a whole, failed to comport with the requirements of Article 8(2)(c)(iv).

c. Case [REDACTED]¹³⁹

110. The Judgment¹⁴⁰ makes no reference to the report written at the Islamic Police,¹⁴¹ and contains additional information, which suggests that an independent investigation was conducted at the level of the Islamic Tribunal. The Prosecution has also not adduced any evidence that the report or Mr. Al Hassan played any role in the proceedings before the Tribunal. The individual in question was [REDACTED]; this is not a penal offence, it is not “related to the armed conflict”, and it fails to amount to a serious violation of common Article 3 to the Geneva Conventions. The Prosecution has also not established how the proceedings, as a whole, failed to comport with the requirements of Article 8(2)(c)(iv).

d. Case [REDACTED]¹⁴²

111. The Prosecution has not established any connection or causation between the report allegedly written by Mr. Al Hassan and the judgment of the Islamic Court. The police report merely contains a statement of events in the form of minutes or notes,¹⁴³ it does not refer to any actions taken by Mr. Al Hassan. The Judgment¹⁴⁴ makes no reference to this report, and the Prosecution has not adduced any evidence that Mr. Al Hassan played any role in the proceedings before the Islamic Tribunal. The offence [REDACTED] is not related to the armed conflict.

e. Remaining 32 judgments¹⁴⁵

112. The Prosecution has not established any link between the remaining judgments and Mr. Al Hassan. Indeed, the absence of any report or paper signed by Mr. Al Hassan in these

¹³⁹ DCC, paras. 435, 455, 1061; Count 6.

¹⁴⁰ [REDACTED].

¹⁴¹ [REDACTED].

¹⁴² DCC, para. 305, 435, 554, 1061; Count 6.

¹⁴³ [REDACTED].

¹⁴⁴ [REDACTED].

¹⁴⁵ DCC, paras. 455, 1061; Count 6.

cases demonstrates that Mr. Al Hassan did not play any role, let alone an essential role, in relation to the proceedings before the Islamic Tribunal, nor did his functions have a direct impact on the matters before the Tribunal.

113. The Prosecution has also not pleaded or otherwise established that Mr. Al Hassan exercised any form of influence or control over the members of the Islamic Tribunal. Rather, according to the Prosecution's explanation of the hierarchical structure in Timbuktu,¹⁴⁶ the members of the Islamic Tribunal were not subordinate to the Islamic Police.¹⁴⁷ When the Islamic Tribunal referred to shared investigative activity, the references concern Hesbah rather than the Islamic Police; confessions outside the framework of the proceedings before the Islamic Tribunal are also only acknowledged when they were taken by Hesbah.¹⁴⁸
114. As concerns the Prosecution's response to the questions of the Pre-Trial Chamber concerning Case [REDACTED],¹⁴⁹ the Defence notes that the Prosecution has not depicted the facts in an accurate manner. The Tribunal acquitted the defendant – [REDACTED] – of the alleged [REDACTED] to the fact that this component of the evidence had been obtained through duress; a conviction was entered in relation to the remaining allegations due to the fact that they were corroborated by independent evidence.¹⁵⁰ This judgment therefore demonstrates that the Tribunal was applying the due process rules that exist in Islamic law; the Tribunal was therefore applying the principles set out in the laws established by the group.

6.3 The Prosecution has not established that Mr. Al Hassan exercised direct or joint control over the punishment implemented by the Islamic Tribunal or that he otherwise had a direct impact on the decision to implement such sentences, or made culpable contributions to the commission of these acts

115. As set out in the Defence Brief, the only type of punishment that is proscribed by Article 8(2)(c)(iv) is executions.¹⁵¹ Thus, posterior involvement in other punishments would not fall under the ambit of this article, unless it can be established that the conduct in question contributed to the anterior passing of the sentence that led to the

¹⁴⁶ [REDACTED].

¹⁴⁷ DCC, paras. 120, 114, 1029.

¹⁴⁸ [REDACTED]

¹⁴⁹ [REDACTED]; *Prosecution Final Brief*, para. 28.

¹⁵⁰ [REDACTED].

¹⁵¹ *Defence Submissions for the confirmation of charges*, para. 251.

punishment in question. As set out above, the Prosecution has not established that Mr. Al Hassan exercised any form of control over the passing of sentences by the Islamic Tribunal. His limited and circumscribed presence during the implementation of some punishments also did not constitute a culpable form of contribution or assistance. The Prosecution's evidence is also heavily dependent on the statements of Mr. Al Hassan, or evidence (photographs extracted from videos) for which absolutely no information has been disclosed as concerns the authenticity, provenance and chain of custody.¹⁵²

a. Punishment of [REDACTED] and [REDACTED]¹⁵³

116. The Prosecution submits that in [REDACTED] 2012, the Islamic Tribunal issued an irregular judgment [REDACTED].¹⁵⁴ The Prosecution does not allege that Mr. Al Hassan arrested either [REDACTED] or [REDACTED],¹⁵⁵ or that he was the one to inflict the punishment.

117. It is in fact [REDACTED], [REDACTED], who inflicts the punishment, making a speech prior to its start, and being the first perpetrator.¹⁵⁶ Other perpetrators cannot be precisely identified, since they wore masks.¹⁵⁷

118. In the absence of any evidence that Mr. Al Hassan exercised any authority or influence over the perpetrators, [REDACTED], his mere presence does not equate to a culpable contribution to the act, or tacit approval or encouragement.

b. Amputation of P-0552¹⁵⁸

119. The Prosecution claims that without P-0552's arrest by Mr. Al Hassan, the amputation would not have taken place.¹⁵⁹

120. First, P-0552's statement [REDACTED] contains no mention of Mr Al Hassan, he mentioned a "*Procureur Oka Oka*", who was the one communicating and with his family, "*son adjoint Sada Houmama*", and "*Grand imama de Bélafaradi, il se*

¹⁵² [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED].

¹⁵³ DCC, paras. 1047-1050; Counts 1-6, 13.

¹⁵⁴ DCC, paras. 436, 456-457, 536-546.

¹⁵⁵ DCC paras. 537, 539, 540, [REDACTED]; [REDACTED].

¹⁵⁶ [REDACTED].

¹⁵⁷ [REDACTED].

¹⁵⁸ DCC, paras. 547-549, 605-607, 1051; Counts 1-6, 13.

¹⁵⁹ DCC, para. 607.

prénomme Daouda.” Further, the Islamic Court judgment related to P-0552,¹⁶⁰ makes no mention of the Islamic Police or any documents received from the Islamic Police. The Prosecution has also not established that Mr. Al Hassan was involved in the amputation, that he made a culpable contribution, or that he had any authority or influence over the perpetrators.

*c. Flogging of [REDACTED] on or around [REDACTED]*¹⁶¹

- [REDACTED] and [REDACTED]

121. The punishment of these two individuals was ordered pursuant to an Islamic Tribunal judgment, [REDACTED].¹⁶² The Judgment specifies that the investigation was conducted by both the Islamic Tribunal and Hesbah.¹⁶³ The Prosecution adduced no evidence to show that Mr Al Hassan or the Islamic Police played any role in the investigation and prosecution of these individuals: rather, the Judgment refers to Hesbah.

122. There is no information regarding the identity of the person(s) who inflicted the alleged punishment. In the absence of any evidence that Mr. Al Hassan exercised any authority or influence over the perpetrator(s), his presence does not equate to a culpable contribution to the act, or tacit approval or encouragement.

- [REDACTED] and [REDACTED]

123. The Prosecution fails to establish any link, direct or indirect, or provide any reference, supporting the allegation that Mr Al Hassan is a co-perpetrator of the punishment of these individuals. The relevant Islamic Court Judgment¹⁶⁴ does not mention the Islamic Police or refer to any document it provided. The Judgment further acknowledges the investigative role of Hesbah in obtaining the confession.¹⁶⁵

¹⁶⁰ [REDACTED].

¹⁶¹ DCC, paras. 550-555, 583, 597, 608, 615, 618, 621, 1023, 1024, 1035, 1037, 1052; Counts 1-6, 13.

¹⁶² [REDACTED].

¹⁶³ [REDACTED].

¹⁶⁴ [REDACTED].

¹⁶⁵ [REDACTED].

124. There is no information regarding the identity of the person(s) who flogged the alleged victims. As with the case of [REDACTED] and [REDACTED], discussed above, Mr. Al Hassan's mere presence does not equate to a culpable contribution.

- [REDACTED] and [REDACTED]

125. These two individuals were sentenced by the Islamic Tribunal on [REDACTED];¹⁶⁶ it was a Hudud punishment that fell within the exclusive purview of the Tribunal and the Sharia Committee. The Judgment of the Islamic Tribunal does not refer to a handwritten paper allegedly sent to the Islamic Court and signed by Mr. Al Hassan in relation to this incident.¹⁶⁷

126. The Prosecution alleges that Mr. Al Hassan admitted that he implemented the sanction imposed by the Tribunal on [REDACTED].¹⁶⁸ The punishments were ordered by the Head of the Islamic Tribunal, pursuant to a Judgment. Mr. Al Hassan exercised no control or authority over the Islamic Tribunal and had no power or ability to refuse to implement a sanction imposed by the Tribunal.

*d. Punishment of [REDACTED] on or around [REDACTED]*¹⁶⁹

127. The Prosecution fails to establish any link, direct or indirect, or provide any reference, supporting the allegation that Mr. Al Hassan is a co-perpetrator of the punishment of [REDACTED]. The Islamic Court Judgment related to [REDACTED]¹⁷⁰ instead acknowledges the active involvement of Hesbah in her arrest and investigation of her case and partially bases its findings accordingly. The Islamic Court further acknowledges the legal opinion provided by Hesbah and the sayings of the Prophet.¹⁷¹

128. There is no indication that Mr. Al Hassan was present, knew of the punishment, or could have had any influence over its execution. Further, it was ordered by the Head of the Islamic Tribunal, pursuant to a Judgment.

¹⁶⁶ [REDACTED].

¹⁶⁷ DCC, para. 465, referring to [REDACTED]

¹⁶⁸ [REDACTED].

¹⁶⁹ DCC, paras. 459, 556-558, 586, 612, 1053; Counts 1-6, 13.

¹⁷⁰ [REDACTED].

¹⁷¹ [REDACTED].

*e. Punishment of [REDACTED] ([REDACTED])*¹⁷²

129. The Prosecution alleges that [REDACTED], a member of the Islamic Police, punished [REDACTED] on [REDACTED],¹⁷³ but fails to show Mr. Al Hassan's actual role or provide any reference that links him to this incident. The relevant Islamic Court Judgment¹⁷⁴ makes no mention of the Islamic Police or Mr. Al Hassan. Mr. Al Hassan was not present during the punishment. The Prosecution has also misquoted Mr. Al Hassan's statement. Mr Al Hassan did not state that the Islamic Police were involved; rather, when shown a video, Mr. Al Hassan stated that he was not sure who was driving the vehicle, which was also used by other groups¹⁷⁵.
130. There is no indication that Mr. Al Hassan was present, knew of the incident, that he made a culpable contribution, or that he had any authority or influence over the perpetrators. Further, the flogging was ordered by the Head of the Islamic Tribunal, pursuant to a Judgment.

6.4 The Prosecution has not established that Mr. Al Hassan exercised direct or joint control over incidents of torture, or cruel and inhumane treatment *which occurred without a prior judgment of the Islamic Tribunal, or that he otherwise had a direct impact on, or made culpable contributions to the commission of these acts*

131. The Prosecution has also failed to establish that the incidents in the charges all reach the threshold for torture, or inhumane treatment. Torture requires the establishment of "severe physical or mental pain or suffering".¹⁷⁶ For inhumane treatment, it is necessary to demonstrate that the conduct in question occasioned "great suffering" to physical, mental or bodily health; the formulation thus excludes dignity (which had been included in the 1996 ILC draft code).¹⁷⁷
132. As concerns torture, the Prosecution has failed to establish that Mr. Al Hassan knew, and intended to inflict pain and suffering that "did not arise only from, and was not

¹⁷² DCC, paras. 461, 559-561, 587, 612, 1054; Counts 1-6, 13.

¹⁷³ DCC, para. 558.

¹⁷⁴ [REDACTED].

¹⁷⁵ [REDACTED].

¹⁷⁶ Element 1, Article 7(1)(f).

¹⁷⁷ The ILC Code specified that "the act must in fact cause injury to a human being in terms of physical or mental integrity, health or human dignity" M Boot and C Hall, "Crimes Against Humanity, Inhumane Acts" in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (Hart Publishers 2008), p. 230.

inherent in or incidental to, lawful sanctions”.¹⁷⁸ The notion of lawful sanctions must be construed in a manner which is consistent with Article 67(1)(i), which specifies that the burden falls on the Prosecutor to demonstrate that each element of the offence is fulfilled. In this context, it fell to the Prosecution to demonstrate that Mr. Al Hassan knew and intended to inflict pain and suffering, in a manner that was independent of lawful sanctions.

133. The Prosecution has also failed to establish that Mr. Al Hassan intended to cause great suffering, within the context of the charges of inhumane acts. This element is a fundamental requirement, as buttressed by the fact that the Elements of the Crimes require the perpetrator to have been aware of the factual circumstances that established the character of the act. The content also “seems to follow the interpretation of the ICTY and excluded inhumane acts which cause the enumerated consequences without intent”.¹⁷⁹
134. These elements must also be strictly construed: “the language of the relevant statutory provision and the Elements of Crimes, as well as the fundamental principles of criminal law, make it plain that this residual category of crimes against humanity must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity.”¹⁸⁰
135. The ambit of this provision is therefore limited to “conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.” This language was inserted to allay concerns of Asian and Arab states concerning cultural relativism and the potential penalization of practices which were accepted in those countries;¹⁸¹ the use of the word ‘international law’ therefore underlines that a mere breach of human rights law (which governs the conduct of

¹⁷⁸ Element 3, Article 7(1)(f).

¹⁷⁹ M. Boot and C. Hall, “Crimes Against Humanity, Inhumane Acts in O. Triffterer” (ed) *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article* (Hart Publishers 2008 at p. 232.

¹⁸⁰ ICC-01/09-02/11-382-Red, para. 269.

¹⁸¹ D. Robinson, “The Elements of Crimes Against Humanity’ in R Lee (ed) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) at p. 67-69, 71. See also K. Kittichaisaree ‘Crimes Against Humanity’ (excerpt from *International Criminal Law*. Oxford: Oxford University Press 2001): “The principle of legality (*nullum crimen sine lege*) was often cited in support. The Delegation of Iran, for example, often pointed out the possibility that ordinary people in a remote village might find that their long-established norms of behaviour were now criminalized as crimes against humanity within the ICC’s jurisdiction although the norms were lawful under their domestic law.”

States) would not be sufficient to trigger the operation of this article.¹⁸² It is, instead, necessary to demonstrate that the conduct in question is prohibited vis-à-vis individuals; that is, that it entails individual criminal responsibility under relevant sources of international law, which govern individual criminal responsibility. It is notable in this regard that although sharia law punishments have been described as a violation of human rights law triggering the responsibility of States, there has been no corresponding call for persons who implement Sharia law punishments to be prosecuted. The language used by UN rapporteurs in relation to Sharia law punishments is also prescriptive rather than proscriptive:¹⁸³ i.e. States are called on to abolish such punishments, they are not called on to prosecute those who implement them.

136. As set out below, the Prosecution has also failed to establish any substantial contribution of Mr. Al Hassan to any of the individual incidents of physical punishments without a prior judgment.

a. Punishment of two unidentified men at the Yoboutao market on or around [REDACTED] 2012¹⁸⁴

137. Although the Prosecution has listed this incident in the “extra-judicial punishment” category, in his interview with Prosecution investigators (which is relied upon by the Prosecution), Mr. Al Hassan’s stated that the two men were arrested by the police, and brought to the Islamic Tribunal, where a sanction was imposed.¹⁸⁵ The fact that this punishment was ordered by the Tribunal is also reflected by the language used in the DCC.¹⁸⁶ [REDACTED] is also a crime for which there is no discretion as concerns the prosecution or punishment; once the Tribunal decided that the persons had committed the offence, the punishment would be carried out irrespective of any intervention or conduct on the part of Mr. Al Hassan. The video of the incident¹⁸⁷ does not evidence severe or great suffering; the individuals are clothed, and given the specific 90 degree

¹⁸² D. Robinson, ‘Defining Crimes against Humanity at the Rome Conference’, *American Journal of International Law* Vol. 93, No. 1 (January 1999), pp. 43-57, at 53. “All delegations agreed that the court’s jurisdiction relates to serious violations of international criminal law, not international human rights law”.

¹⁸³ See C. Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application*, pp. 208-209, concerning the proscriptive versus prescriptive difference as concerns human rights law relating to crimes against humanity, as compared to international criminal law.

¹⁸⁴ DCC, para. 1056(a); Counts 1-6, 13.

¹⁸⁵ [REDACTED].

¹⁸⁶ DCC, paras. 477 [REDACTED] (emphasis added).

¹⁸⁷ [REDACTED].

angle used to by the persons implementing the punishment, the degree of force appears limited.

b. Interrogation of [REDACTED]¹⁸⁸

138. The *actus reus* of this incident appears to concern the interrogation of [REDACTED], which is alleged to have involved mistreatment.¹⁸⁹ The Prosecution has not identified or explained the nature and degree of this mistreatment. The Prosecution has also not identified the physical perpetrators – including as concerns whether the person was in fact mistreated by members of the Islamic police or Hesbah, and the relationship between such persons and Mr. Al Hassan. There is no evidence establishing that Mr. Al Hassan was involved or otherwise contributed to this interrogation and treatment, and there is evidence that indicates that he was not involved. Specifically, the Prosecution has relied on its interviews with Mr. Al Hassan to establish that he had heard that persons were beaten during questioning, but the same evidence also establishes that he was not involved in such beatings,¹⁹⁰ and that such matters fell outside his authority,¹⁹¹ and did not occur in his presence.¹⁹²

139. The fact that this treatment was referred to in the report alleged prepared by Mr. Al Hassan also undercuts any inference that he approved or otherwise endorsed this form of interrogation since the consequence of including this information was that any such confession would be excluded, and the Islamic Tribunal would be required to investigate the facts anew.

c. Beating of [REDACTED]¹⁹³

140. The Prosecution has failed to establish any causal nexus between the conduct of Mr. Al Hassan, and the beating of [REDACTED], which was allegedly carried out by Mohamed Moussa and three other men, who chased [REDACTED] into [REDACTED] and beat her for not being appropriately covered.¹⁹⁴

¹⁸⁸ DCC, para. 1056(b); Counts 1-6, 13.

¹⁸⁹ DCC, para. 1056(b).

¹⁹⁰ [REDACTED].

¹⁹¹ [REDACTED]; [REDACTED]

¹⁹² [REDACTED].

¹⁹³ DCC, paras. 472, 1056(c); Counts 2, 5-6, 13.

¹⁹⁴ DCC, paras. 472, 1056(c).

141. Firstly, this conduct cannot be considered to be a virtually certain consequence of the common plan. The Prosecution has relied on the instructions promulgated by Abou Zeid concerning rules of conduct in order to define the contours of this common plan.¹⁹⁵ These rules prohibit any persons from being followed [REDACTED], or being sanctioned without prior notice and procedure.¹⁹⁶ Other items of Prosecution evidence also indicate that Mohamed Moussa was not acting in accordance with the goals and objectives of the common plan.¹⁹⁷
142. The Prosecution has also not established that Mr. Al Hassan exercised any form of influence or authority over the perpetrator or the perpetrator's superior, that he had any power to prevent or influence the commission of this alleged incident, or that he in any other way contributed to this specific conduct. The alleged perpetrators were identified as members of Hesbah, [REDACTED].¹⁹⁸ When viewed in connection with the timing of the incident (approximately [REDACTED] after the arrival of the armed groups in Timbuktu),¹⁹⁹ it is clear that Mr. Al Hassan's conduct leading up to this point would not have impacted on, or influenced the commission of this incident.²⁰⁰

*d. Arrests and detention of [REDACTED]*²⁰¹

143. The Prosecution has failed to establish that Mr. Al Hassan was involved in the arrest and detention of [REDACTED], or that he otherwise controlled the perpetrators, or exercised any other form of control over the commission of these acts.
144. These incidents are supported solely by indirect hearsay: [REDACTED] was not present when these events occurred, and his source of information and detail is unknown.
145. In contrast to the allegations set out in the DCC, it is clear from the evidence that these incidents occurred independently of Mr. Al Hassan, and fell outside his authority, and the authority of the Islamic Police. According to the statement of [REDACTED],

¹⁹⁵ *Defence Submissions for the confirmation of charges*, para. 162(c).

¹⁹⁶ [REDACTED]; [REDACTED].

¹⁹⁷ [REDACTED]; [REDACTED].

[REDACTED]

¹⁹⁹ The DCC states in some places that it occurred around [REDACTED] after the arrival of the armed groups in Timbuktu: DCC, paras. 472, 1056(c), 1058, 1063, 1066.

²⁰⁰ [REDACTED].

²⁰¹ DCC, paras. 321, 350, 419, 474, 824, 840, 964, 976, 994, 1024, 1041, 1056(d); Counts 1-6, 13.

[REDACTED] first arrest and detention was executed and ordered by Hamed Moussa (not Mr. Al Hassan).²⁰² Hamed Moussa is alleged to have been a member of Hesbah.²⁰³ There is no evidence that Mr. Al Hassan was present, or that he knew of the arrest and detention, or that he played any part in it. The Prosecution has also not established that Mr. Al Hassan could have exercised any authority or control over Hamed Moussa, or that he otherwise had any power to frustrate the commission of these incidents.

146. The [REDACTED]'s second arrest is alleged to have occurred when she [REDACTED] at the [REDACTED].²⁰⁴ [REDACTED]— on the basis of indirect hearsay — alleges that when Mr. Al Hassan came [REDACTED].²⁰⁵ Mr. Al Hassan was not involved in any of the subsequent actions, and exercised no control or authority over the persons responsible for these acts. This is consistent with Prosecution evidence concerning the fact that the oversight of such matters (moral rules) fell under the purview of Hesbah.²⁰⁶
147. In relation to the alleged detention of [REDACTED],²⁰⁷ the evidence is insufficiently clear to ascertain the circumstances under which this occurred. There is no detail as to who requested the detention and why, and whether it was in fact intended as detention (as opposed to asking her to stay with [REDACTED]). The redactions imposed at paragraph 87 of [REDACTED]²⁰⁸ also render it impossible for the Defence to ascertain who had the authority to potentially release her.

*e. Arrest of [REDACTED], and flogging of [REDACTED] in [REDACTED]*²⁰⁹

148. The Prosecution has failed to establish that Mr. Al Hassan knew and intended that these incidents would occur, that he made a culpable contribution to the commission of these acts, or that he otherwise had the power to frustrate their commission. The women were arrested by Mohamed Moussa,²¹⁰ who fell under the authority of Hesbah. [REDACTED] also alleged that it was Mohamed Moussa who took them away, and

²⁰² [REDACTED]. The Prosecution alleges, without any reference, that the [REDACTED] first arrest took place because she was not wearing a veil. DCC, para. 474.

²⁰³ [REDACTED].

²⁰⁴ [REDACTED].

²⁰⁵ [REDACTED].

²⁰⁶ [REDACTED]; [REDACTED].

²⁰⁷ [REDACTED].

²⁰⁸ [REDACTED].

²⁰⁹ DCC, paras. 475, 575, 585, 611, 964, 1056(e); Counts 1-6, 13 of the DCC.

²¹⁰ [REDACTED]. The incident is described differently in para. 964 of the DCC: “**AI HASSAN** a lui-même veillé à ce que [REDACTED] soient arrêtées.”

allegedly ordered that they be beaten.²¹¹ As noted above, Mohamed Moussa fell under the authority of Hesbah, not Mr. Al Hassan. Mr. Al Hassan also played no role in the development and promulgation of the moral rules enforced by Hesbah. Prosecution evidence also indicates that Moussa was acting in a manner that fell outside the common plan.²¹²

f. Arrest, beating and detention of [REDACTED]²¹³

149. The Prosecution has pleaded insufficient details in relation to this incident to comply with the requirements of Regulation 52(b) of the Regulations of the Court.²¹⁴ The DCC alleges that around the month of [REDACTED] 2012, members of the “organisation” chased [REDACTED] inside [REDACTED], and then arrested and detained her at the BMS, for not covering herself properly.²¹⁵ The direct perpetrators of the alleged crime are described as two men, with pale skin, wearing khakis and speaking Arabic, who were flying a black flag on their vehicle.²¹⁶ Neither the DCC nor the witness statement specifies which entity they belonged to. The absence of this identifying information renders it impossible to firstly, ascertain whether the conduct fell within the scope of the common plan, secondly, determine the link between these individuals, and either Mr. Al Hassan or any co-perpetrators, and thirdly, assess whether Mr. Al Hassan exercised control jointly or individually, over the execution of these actions. Given that the infraction was related to moral rules, it would have fallen outside the scope of Mr. Al Hassan’s authority or influence.

g. Arrest, detention and punishment of [REDACTED]²¹⁷

150. This incident is based entirely on an anonymous statement; this is an insufficient evidential basis to support the confirmation of this incident.

151. The DCC alleges that around [REDACTED] 2012, Mohamed Moussa, from the Hesbah and two other men arrested and detained [REDACTED] at the BMS, for not covering

²¹¹ [REDACTED].

²¹² [REDACTED].

²¹³ DCC, paras. 470, 1056(f); Counts 2, 5-6, 13.

²¹⁴ ICC-01/04-01/06-3121-Red, para. 123.

²¹⁵ DCC, para. 1056(f). See also, para. 470.

²¹⁶ [REDACTED].

²¹⁷ DCC, paras. 471, 574, 604, 964, 1056(g); Counts 1-6, 13.

herself properly.²¹⁸ There is no evidence that Mr. Al Hassan was involved in her arrest, or that he otherwise knew of it, or contributed to it.

152. The DCC does not allege that Mr. Al Hassan was aware of her detention or even present. The fact that he played no role in this incident also indicates that his role and contributions were not essential to the implementation of such incidents. Mr. Al Hassan also exercised no authority over Adama, and had no power to frustrate or stop his actions. The Prosecution has also not established that Mr. Al Hassan played any role in the decision to promulgate the dress code, or its content.

*h. Alleged arrests, mistreatment and detention of [REDACTED]*²¹⁹

153. The Prosecution has failed to establish that Mr. Al Hassan controlled, or played a significant role in these incidents, or that he otherwise had the power to frustrate their commission. The key acts concerning [REDACTED] detention and punishment were carried out by persons, whom Mr. Al Hassan exercised no control or authority over.
154. Whereas the DCC asserts that Mr. Al Hassan arrested and detained [REDACTED], there is insufficient information from the text of the statement to reach such a conclusion. Although [REDACTED] states that Mr. Al Hassan came to [REDACTED], he also refers to 'ils', thereby indicating that other persons were with Mr. Al Hassan.²²⁰ In the absence of further particulars concerning the identity and role of such persons, it is not possible to simply conclude that Mr. Al Hassan was responsible for taking him to the police station. This action would not, in any case, fulfil the threshold of any crimes under the Rome Statute.
155. [REDACTED] also states that after being detained for a night, he was put under the authority of Mohamed Moussa (from Hesbah) and it was Mohamed Moussa who was responsible for making the decision concerning his punishment, and for executing it.²²¹ Mr. Al Hassan's extremely limited act of [REDACTED] was completely insignificant, and did not influence or otherwise affect the outcome in question.

²¹⁸ [REDACTED].

²¹⁹ DCC, paras. 450, 451, 563, 568, 1056(h); Counts 1-6, 13.

²²⁰ [REDACTED].

²²¹ [REDACTED].

156. The subsequent alleged incidents also had no link or nexus to Mr. Al Hassan. The actions were ordered by the Head of Hesbah, the Head of the Islamic Tribunal, the Head of the Security Battalions and a member of the Presidency. Mr. Al Hassan exercised no control or authority over these persons and had no power or ability to controvert their actions. He would also have been disciplined if he had attempted to do so.²²²

*i. Arrest and detention of [REDACTED]*²²³

157. The Prosecution has only relied on an anonymous statement to support this incident. When considered in conjunction with the vagueness of [REDACTED] testimony, there is insufficient reliable evidence to establish – to the standard of substantial grounds to believe – Mr. Al Hassan’s culpable contribution to this incident.

158. As a first point, the Prosecution has pleaded that [REDACTED] was detained at some point between between April 2012 and January 2013.²²⁴ In line with the principle of in dubio pro reo, it cannot be excluded this incident took place before the earliest date that the Prosecution has established that Mr. Al Hassan was working with the Islamic Police (sometime in May 2012).²²⁵ The Prosecution has also failed to establish that Mr. Al Hassan controlled, or played a significant role in these incidents, or that he otherwise had the power to influence or frustrate their commission. [REDACTED] was allegedly arrested by Mohamed Moussa (the Head of Hesbah) pursuant to the moral code which fell under the authority of Hesbah to enforce. [REDACTED] does not refer to Mr. Al Hassan (which reinforces the likelihood that it occurred before he started working for the Islamic Police) and there is no indication that Mr. Al Hassan otherwise knew of this incident.

*j. The flogging of a man named [REDACTED]*²²⁶

159. This incident is only supported by anonymous hearsay, and the Prosecution has pleaded insufficient details in relation to this incident to comply with the requirements of

²²² See [REDACTED] “[REDACTED].”; [REDACTED].

²²³ DCC, paras. 961, 964, 1056(i); Counts 5-6, 13.

²²⁴ At para. 634 of the DCC, it is alleged that this event took place around Ramadan 2012. However, this is not supported by the statement of [REDACTED], who vaguely states that it took place ‘after the MNLA left the town’. See [REDACTED].

²²⁵ DCC para 23, see for example, [REDACTED].

²²⁶ DCC, paras. 576, 588, 1056(j); Counts 1-6, 13.

Regulation 52(b) of the Regulations of the Court. The Prosecution has failed to establish – to the standard of substantial grounds to believe – that Mr. Al Hassan started working with the Islamic Police before mid-May 2012. The overly vague dates of sometime between [REDACTED] 2012 and [REDACTED] 2013 are inconsistent with Mr. Al Hassan’s right, under Article 67(1)(a) to receive sufficient details in order to be able to defend himself. In line with the principle of *in dubio pro reo*, in light of the fact that the date range precedes the date on which Mr. Al Hassan alleged started working with the Islamic Police, the doubt might be applied to the benefit of Mr. Al Hassan - that is, that it must be concluded that the incident occurred before he started working with the Islamic Police. This conclusion is further bolstered by the fact that there is no indication that Mr Al Hassan was present, or otherwise involved in this incident.²²⁷

6.5 The Prosecution has not established to the necessary evidential threshold that Mr. Al Hassan individually responsible for the destruction of protected property (Count 7)

160. The Prosecution has not pleaded that Mr. Al Hassan was involved in the decision to destroy the buildings, or that he otherwise contributed to this decision.²²⁸
161. There is also no evidence that Mr. Al Hassan was present during the destruction of the buildings or that he otherwise participated in their destruction. Although [REDACTED] towards Alpha Moya cemetery,²²⁹ he does not specify though, how far they were from the cemetery and whether they were on a route that would have led elsewhere. [REDACTED] also indicated that [REDACTED].
162. According to Prosecution evidence, Mr. Al Hassan could not have ordered or instructed any members of the Islamic Police to participate in these acts, because [REDACTED], the destruction was carried out on a voluntary basis.²³⁰ The Prosecution has therefore not established that Mr. Al Hassan exercised any control or influence over the commission of these acts, or that he otherwise had the power to frustrate the commission of these acts.

²²⁷ DCC, para. 1056(j). See also paras. 476, 576, 588, 609. [REDACTED].

²²⁸ See DCC, para. 1067: “En juin 2012, Iyad AG GHALY a pris la décision de détruire les mausolées de Tombouctou, en consultation avec Abou ZEID, Yahia Abou AL HAMMAM, et Abdallah AL CHINGUETTI.”

²²⁹ [REDACTED].

²³⁰ “[REDACTED]”: (emphasis added) [REDACTED].

163. Although the Prosecution has attempted to rely on the mere existence of telephone contacts between different numbers to try to establish Mr. Al Hassan's knowledge and involvement, the Prosecution has failed to demonstrate that Mr. Al Hassan [REDACTED] using these numbers at the specific times, which coincided with the destruction of the buildings.²³¹ The Prosecution's attempt to use [REDACTED] to insert Mr. Al Hassan into the picture is also fatally undermined by the absence of any evidence [REDACTED] concerning the relevance and content of [REDACTED]. [REDACTED] in an extensive manner concerning the destruction of these buildings, and yet [REDACTED]. The absence of any evidence [REDACTED] on this undercuts any inference that such contacts are evidence of coordination [REDACTED].²³²

6.6 The Prosecution has not established to the necessary evidential threshold that Mr. Al Hassan individually responsible for persecution (Count 13)

164. The Prosecution charges all incidents contained in the DCC as also constituting persecution under Count 13. Only the following incidents have not been covered elsewhere in the present Submissions.

a. Prohibition of traditional and cultural practices, including the cases of [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED]²³³

165. These cases all relate to judgments of the Islamic Tribunal. They have no link to Mr. Al Hassan, for the reasons set out in paragraph 112 above.

b. The case of [REDACTED]²³⁴

166. [REDACTED] accounts are provided through a one-page "procès-verbal" of a civil party claim.²³⁵ [REDACTED], also mentioned in the DCC,²³⁶ seems to have an identical account; it is possible that they are the same person.

²³¹ The Prosecution has also cherry-picked information from Mr. Al Hassan's statement: namely, it has used the statement to establish that Mr. Al Hassan used this number, but at the same time, it has ignored his evidence that he was not the exclusive user of this number: [REDACTED].

²³² See ICC-01/09-01/11-2027-Red-Corr, para. 130 concerning the Prosecution's reliance on indirect evidence, when direct evidence would have been available if the accused had in fact made the alleged utterances.

²³³ DCC, para. 1092.

²³⁴ DCC, paras. 916, 1092.

²³⁵ [REDACTED].

²³⁶ DCC, para. 916.

167. In any event, the identity of the alleged perpetrators or their affiliation to which armed group is unknown. The statements make no link, direct or indirect to the contribution of Mr. Al Hassan in the perpetration of the acts. It also impossible from the amount of information provided to establish whether Mr Al Hassan had any knowledge that the crime was committed or would be committed, or any control over the alleged perpetrators.

c. Torture and rape of [REDACTED], [REDACTED], [REDACTED], and [REDACTED]²³⁷

168. The Prosecution has not established any evidential basis to conclude that Mr. Al Hassan made intentional contributions to these acts. It cannot be inferred from a mere statement concerning the existence of rules of conduct and demeanour that he knew and approved of the rape and torture of women. Such a conclusion would turn the laws of liability on their head. The Prosecution has also not established that Mr. Al Hassan exercised any form of control (joint or otherwise) or influence over the physical perpetrators (who were either unidentified or appear to belong to Hesbah), or that he otherwise had the power to frustrate the commission of these acts. The formulation of such rules and their implementation fell within the authority of the Presidency and Hesbah.²³⁸ The Prosecution has also not demonstrated a causal nexus between Mr. Al Hassan's role and duties, which did not involve the enforcement of the rules of conduct,²³⁹ and the commission of such acts. The Prosecution has also relied on evidence that fails to satisfy the evidentiary threshold for confirmation: i.e. they have relied on an incident recounted by anonymous witness [REDACTED] concerning a hearsay account of an unidentified person on unidentified dates involving unidentified individuals.²⁴⁰

²³⁷ DCC, para. 1092.

²³⁸ DCC, paras. 954, 1028, 1029. See also [REDACTED]

²³⁹ *Defence Submission for the confirmation of charges*, para. 163

²⁴⁰ DCC, para. 1096 refers to [REDACTED] in support of the allegation of rape in detention, but she herself said she was never raped in detention, and only recounts the hearsay concerning the other unidentified person: [REDACTED].



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