

1 International Criminal Court  
2 Pre-Trial Chamber I  
3 Situation: Republic of Mali  
4 In the case of The Prosecutor vs Al Hassan Ag Abdoul Aziz Ag Mohamed Ag  
5 Mahmoud - ICC-01/12-01/18  
6 Presiding Judge Péter Kovács, Judge Marc Perrin de Brichambaut and Judge Reine  
7 Adélaïde Sophie Alapini-Gansou  
8 Confirmation of Charges Hearing - Courtroom 1  
9 Thursday, 11 July 2019  
10 (The hearing starts in open session at 9.31 a.m.)  
11 THE COURT USHER: [9:31:53] All rise.  
12 The International Criminal Court is now in session.  
13 Please be seated.  
14 PRESIDING JUDGE KOVÁCS: [9:32:21] (Interpretation) Good morning, ladies and  
15 gentlemen.  
16 Court officer, please call the case.  
17 THE COURT OFFICER: [9:32:29] (Interpretation) Good morning, Mr President, your  
18 Honours.  
19 The situation in the Republic of Mali, in the case of The Prosecutor versus Al Hassan  
20 Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, case reference ICC-01/12-01/18.  
21 And we are in open session.  
22 PRESIDING JUDGE KOVÁCS: [9:32:47] (Interpretation) Thank you very much.  
23 According to our schedule as amended yesterday, we will move to the second part of  
24 the Legal Representatives presentations and then to the Defence.  
25 First of all, are there any changes in the team, Prosecutor?

1 MS BENSOUA: [9:33:14] Mr President, good morning. May I please call on the  
2 senior trial lawyer to do the presentations. Thank you.

3 PRESIDING JUDGE KOVÁCS: [9:33:23] (Interpretation) Very well.

4 MR DUTERTRE: [9:33:24](Interpretation) Good morning, Mr President. Good  
5 morning, your Honours.

6 We have the Prosecutor, Fatou Bensouda. And our team has changed slightly. We  
7 have our case manager, Florie Huck, Hesham Mourad, Yayoi Yamaguchi,  
8 Raymond Sandoval, Marie-Jeanne Sardachti and Paola Sacchi, and myself.  
9 Thank you.

10 PRESIDING JUDGE KOVÁCS: [9:34:06] (Interpretation) Ms Taylor, Defence.

11 MS TAYLOR: [9:34:10] Good morning, Mr President, your Honours. Good  
12 morning, Madam Prosecutor and my colleagues in the courtroom.

13 The Defence for Mr Al Hassan is represented today by myself Melinda Taylor, and by  
14 my colleagues, Ms Marie-Hélène Proulx, Ms Sarah Marinier-Doucet, Ms  
15 Marie-Noëlle Delisle and Ms Lily Wang.

16 Thank you very much.

17 PRESIDING JUDGE KOVÁCS: [9:34:31] (Interpretation) Thank you. Legal  
18 Representatives.

19 MR DOUMBIA: [9:34:36](Interpretation) Mr President, your Honours, good  
20 morning.

21 The team of the Legal Representatives of Victims has not changed.

22 PRESIDING JUDGE KOVÁCS: [9:34:45] (Interpretation) Thank you very much,  
23 Counsel.

24 Before giving the floor to Maître Kassongo, I would like to make an observation.

25 Following the precise calculations of the court officer, the Prosecutor used 9 hours

1 and 10 minutes. Accordingly, if the Defence so wishes, the same time will be  
2 allocated to them. I would like to thank the Defence and the Legal Representatives  
3 for their flexibility and understanding after the amendment of the schedule.

4 Now I would like to give the floor to the Legal Representatives of the Victims.

5 Mr Dutertre?

6 MR DUTERTRE: [9:35:40](Interpretation) Yes, Mr President.

7 *Mea culpa*, I had forgotten to introduce my excellent colleague Dianne Luping, who is  
8 seated to my right.

9 PRESIDING JUDGE KOVÁCS: [9:35:59] (Interpretation) Mr Kassongo, you have the  
10 floor.

11 MR KASSONGO: [9:36:04](Interpretation) Thank you, Mr President, your Honours.

12 I am Maître Kassongo, the Legal Representatives of the victims of Timbuktu in this  
13 case.

14 Allow me, Mr President, to present the bulk of my observations in public, but I would  
15 like to begin in private session because of the risk of stigma. I will present my plan  
16 and then I would like to request your Chamber so that we should move exceptionally  
17 to private session for five minutes.

18 My presentation this morning is intended to demonstrate why this growing number  
19 of victims constitute a mass, not any type of mass, but a mass of extreme gravity, of  
20 exceptional gravity. I will like to limit myself to two points, and I will take  
21 30 minutes only so as not to encroach on the time allocated to the Defence.

22 My presentation will be in two parts.

23 I will first begin by presenting the profile of the victims who have been admitted by  
24 your Chamber to participate in the proceedings. My second part of the presentation  
25 will be a brief summary of their opinions and concerns.

1 At this stage of the proceedings, Mr President, I will follow the order of the questions  
2 put to us by the Chamber. You asked to obtain the presentations of the LRVs and  
3 that is what we are doing today.

4 Considering the large number of young girls living in a certain neighbourhood of  
5 Timbuktu, I would like to first of all ask you to grant us a private session for the  
6 presentation of that part of the document.

7 PRESIDING JUDGE KOVÁCS: [9:38:57] (Interpretation) Court officer, please let us  
8 move into private session.

9 (Private session at 9.39 a.m.)

10 THE COURT OFFICER: [9:39:11] (Interpretation) We are in private session, your  
11 Honour.

12 (Redacted)

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Page redacted – Private session.

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13 (Open session at 9.46 a.m.)

14 THE COURT OFFICER: [9:46:12] (Interpretation) We are back to open session,  
15 Mr President.

16 MR KASSONGO: [9:46:21](Interpretation) Thank you, Mr President.

17 Your Honours, based on the statements of the victims that I met, I asked myself the  
18 question whether in light of the facts that had been recounted to me, whether the  
19 situation did not intrinsically constitute a situation of exceptional gravity, given the  
20 growing number of victims having been subjected to crimes under the jurisdiction of  
21 this Court, a population without any dignity or respect, which has been rejected by  
22 their community, which has been subjected to physical and psychological violence.  
23 These victims are a mass of people having been subjected to a large number of  
24 prejudices, both material and moral. Several hundreds have been victims of the war  
25 crimes and, at the same time, just as many were victims of crimes against humanity.

1 I would like to digress here a little bit to say what violence really signifies.  
2 According to the experts, there was a psychological violence, and I quote, "sexual  
3 violence leave psychological and material scars that do not heal."  
4 So the mass suffered exceptional violence because all segments of the population of  
5 Timbuktu were affected. Some were affected in their faith by the destruction of the  
6 mausoleums, not only in their flesh but also in their souls.  
7 Mr President, your Honours, I will try to show you how this mass reflects the gravity  
8 of the crimes which have been charged against Mr Al Hassan.  
9 The entire Timbuktu was targeted and attacked. It is on the basis of the examples  
10 that came out from that mass that we can illustrate the irreparable damage, and it is  
11 on the basis of that that it will be possible for me to demonstrate the manner in which  
12 the occupation of Timbuktu caused the elaborately described crimes in the DCC.  
13 The first time I met a victim who recounted the crimes against her, we were just about  
14 before the end of the Serval operation which put an end to the hostilities. This  
15 young girl was 15 years old and she travelled over 1,000 kilometres to be able to talk  
16 to me. So she fled her refuge in Timbuktu, she fled from shame from her  
17 environment and from the frustration and stigma of her community. She sought  
18 refuge in the bush. And after that, on the face of her mother I read the helplessness,  
19 because she had been unable to defend her daughter. There was also her brother  
20 who had been unable to defend his sister.  
21 When I heard this, I thought it was an isolated case, but no, Mr President, your  
22 Honours, it was not an isolated case.  
23 And later on when I went to Timbuktu, a group of young girls, whose number I will  
24 not say now, jointly decided to come and entrust me with their stories. They  
25 decided to hand over their case to me so that I could listen to them. And after

1 listening to them, it became possible for me to talk about crimes of violence  
2 sexual -- of a violent sexual nature because I was face to face with that mass of  
3 victims.  
4 We, the LRVs, have a specific approach in answer to your questions. And I will  
5 mention the case of forced marriages amongst those girls and there is something  
6 incredible and different with forced marriages in comparison to traditional marriages.  
7 There is also the case of discreet marriages, which is an arrangement between the man  
8 and the woman, and then there are also arranged marriages by the families, but in  
9 that union there has to be consent, there has to be feasting. Traditionally, there has  
10 to be respect also, but these three elements did not exist with the violence that was  
11 committed.

12 This is the case of the victim that we will refer to with a pseudonym as TBT-000 who  
13 was forcibly brought back by the troops after her mother had refused to accept the  
14 amount of 2,000 francs, which is equivalent to about 40 euros. She was locked up in  
15 the camp and gang raped by her so-called husband and other people.

16 This is a case with another victim who explained her rape, and I quote:

17 "I was raped by a group of rebels in 2012. I remember about three of them before I  
18 lost consciousness."

19 Mr President, this seems as if we were going up the scale of gravity or seriousness.

20 a/45141/18, and I quote:

21 "I witnessed the events in 2012. I was raped by men who imprisoned me for one day  
22 and a night. I suffered and I am sick."

23 So the ladder of seriousness keeps going on, using different techniques to rape and  
24 hurt people.

25 This victim a/45141/18 explains, and I quote:



1 "I was raped by a single armed person. I suffered from that, but the problem is that I  
2 did not have appropriate treatment."

3 Mr President, your Honours, these are cases that have happened and which are  
4 similar. You have victim, 14, who was raped for seven months, locked up in a camp  
5 by her so-called husband. She stayed there pregnant because the jihadists fled and  
6 she remained with a baby who in her words is white.

7 In another form of gravity 1201/18 (*sic*) explains that she was beaten while being  
8 raped. The level of sexual violence is beyond comprehension.

9 When a/45268/18, who was 12 years, explained:

10 "I was raped by armed men and the manner in which I was gang raped led to diseases.  
11 I went to a hospital. Before that I received traditional treatment. I was in the first  
12 year in primary school."

13 Mr President, at that time I could not provide any answer to these victims. It is only  
14 after this hearing which opened on Monday that we will attempt to give them  
15 answers.

16 The Chamber has heard their cries and, in order to mitigate their impatience and their  
17 waiting, it is necessary to refer this case to a Trial Chamber so as to begin the process  
18 of appeasement.

19 Your Honours, these victims came to us without any interruption. That is why we  
20 are talking about a mass and, as far as I am concerned, this mass of victims constitute  
21 a single entity, but each of the victims suffers in her own way.

22 This mass is not a coincidence. It is the result of a multiplicity of crimes committed  
23 at a large scale. In that entity several victims were raped, tortured, persecuted,  
24 injured in their faith and beliefs, and today they find themselves without any hope  
25 other than justice.

1 With regard to the occupation of Timbuktu, the rebels of Ansar Dine and AQMI  
2 perpetrated crimes, including the crime against the community of Timbuktu. Their  
3 objective was achieved. Timbuktu is analogous to a girl who is at the origin of its  
4 creation. So in this case Timbuktu is female, it is a synonym of peace and love.  
5 And in order for there to be love and peace there is only one thing that is necessary,  
6 and that is hate, and that is what happened in 2012.

7 The woman is at the very core of Timbuktu. She gave birth to a university in  
8 Timbuktu through an anonymous gift. This university took on the name of a famous  
9 neighbourhood known as Sankoré in Timbuktu. This was a place of intellectual  
10 summit for Africans in ancient times and there were several students who came for  
11 different scientific research.

12 Mr President, it is this academic area which experienced the execution of several cases  
13 of floggings from Mr Al Hassan with his accomplices of AQMI and Ansar Dine. It  
14 was that soul that was targeted by the commission of crimes upon women and girls,  
15 causing collective prejudice.

16 Mr President, your Honours, the presentation of the mass of all these victims  
17 constitute a phase. These victims represent a multifaceted phase and these victims  
18 have no intention of simply participating in this phase of the proceedings as tokens.  
19 Contrary the observations of the Defence, they want to have their voices heard and  
20 they would like to use their cries and pain as a means of achieving justice.

21 Mr President, your Honours, the profile of these victims of crimes of extreme gravity  
22 cannot leave us indifferent.

23 In order not to encroach on the time of the Defence, I will be very quick.  
24 I saw the faces of these victims, the victims of the crimes of the destruction of the  
25 mausoleums, and they are vulnerable. These victims lost everything.

1 And I will add to the statement of -- in answer to question 25, I saw their helplessness  
2 and their inability to flee from some  
3 of the victims attached to their land and mausoleums. They were unable to flee,  
4 while abandoning their historic monuments and heritage. These were the owners  
5 and heads of large families.

6 I will give you some quotations to corroborate these events.

7 I will talk about this guard of a mausoleum, a/35002/6, and I quote:

8 "Many people saw mausoleums: Imams, marabouts, guards ... people came from the  
9 entire world to see the mausoleums and receive blessings. They gave gifts, money,  
10 offerings. All that no longer exists."

11 Mr President, your Honours, when a/45004 was affected by the destruction, he said:  
12 "I witnessed the destruction of the mausoleums in 2012. I am shocked and I am not  
13 prepared to forgive. I am very attached to the Sidi Yahia mausoleum. I  
14 experienced the destruction of the mausoleums in 2012 and I shall not forgive."

15 The accounts are similar amongst other victims. Many were mentioned, and they  
16 gave their various accounts which will be made available to you.

17 Mr President, your Honours, to conclude with a brief conclusion, there is simply a  
18 word, the acts represented a sign of the times. These are the cries of the victims  
19 which went unheard and, through you, their cries will be heard today.

20 They intend to present their observations as necessary, but there cannot be any  
21 observations without a trial, hence the great importance of this stage of the  
22 proceedings which opened three days ago. It shows the importance of the  
23 expectations of the victims who have their hopes and expectations on the  
24 confirmation of charges. With these proceedings that have already commenced,  
25 they expect the impression of justice to replace the impression of impunity.

1 Mr President, your Honours, the victims that I represent along with my colleagues  
2 thank you for this time allocated to us. Thank you.

3 PRESIDING JUDGE KOVÁCS: [10:05:29] (Interpretation) Thank you very much,  
4 counsel.

5 Now it is time for the Defence to present its oral observations. You will have the  
6 same time allocated to the Prosecutor, that is 9 hours and 10 minutes.

7 If your client Mr Al Hassan would like to floor, please kindly indicate that to me.

8 Now you have the floor.

9 MS PROULX: [10:06:15] (Interpretation) Mr President, your Honours, good morning.

10 I thank you for allowing me to address the Court this morning.

11 My presentation has three parts.

12 First of all, I would like to introduce you to the real Mr Al Hassan and discuss the  
13 aspects that the Prosecution has hidden during their investigations and within their  
14 theory of the case.

15 Then I will speak to the many reiterations and inaccuracies found in the OTP's  
16 submissions this week.

17 And finally, I will speak more specifically to the issue of the telephone call records.

18 This week the members of the OTP painted a picture of Mr Al Hassan, and this  
19 portrait was very dark indeed. Their various presentations were dramatic,  
20 unrealistic and exaggerated. It's as if they came right from a Hollywood movie.

21 The Prosecutor, your Honours, has thrown up a smokescreen so as to draw your  
22 attention away from the evidence, which is so thin, so scanty, and today we ask you  
23 to set aside this grotesque portrait.

24 Mr Al Hassan is not a radical. He is not a misogynist. He is not a jihad fighter.

25 He is not the monster that the Prosecution has made him out to be.

1 The Prosecutor deliberately, voluntarily set aside the evidence, the statements that  
2 raise doubt and which tend to demonstrate that Mr Al Hassan was always loved and  
3 respected by his community and the people of Timbuktu, even during the events of  
4 2012.

5 By deciding in a biased fashion not to tell you about that side of our client, the  
6 Prosecution has painted an unfair and inaccurate portrait of Mr Al Hassan.

7 The Prosecution has said not a word about the general context, the backdrop against  
8 which the events of 2012 unfolded.

9 These events did not occur just like that out of nowhere, nor were the events the  
10 result of a form of Islam that has been blamed and diabolised by the Prosecutor. The  
11 events of 2012 find their origin in a Tuareg rebellion. The Tuareg were neglected  
12 and overlooked during the decolonisation process within the Sahel. They raised up  
13 and began an uprising five times since the beginning of the 20th century.

14 The people of the Sahara, these people live in utter poverty and the government of  
15 Mali is indifferent to their fate, and even hostile towards them at times. They have a  
16 number of demands, they have a number of problems, yet the international  
17 community takes little interest in these people.

18 And this backdrop is not provided by the Prosecution, so we have to say that it is not  
19 the Defence that is providing you with the information, the backdrop, it is to be found  
20 in the evidence of the Prosecution themselves.

21 Even in the video that was played, the video came from a three-part documentary  
22 from Al Jazeera and it was called "Orphans of the Sahara". Two of the three parts of  
23 this documentary have been provided as possible evidence in this case,  
24 MLI-OTP-0015-0495 and MLI-OTP-0020-0003. Yet Ms Bensouda decided to show  
25 you the black flags and the trucks, not the despair of the Tuareg people who have no

1 hope other than independence from the Azawad.

2 For example, she did not play this video footage, and this particular excerpt of video  
3 footage can be played in open Court.

4 THE COURT OFFICER: [10:11:30] For the record of case, the video can be seen on  
5 the screen pressing evidence channel 1 on your respective consoles. Thank you.

6 (Viewing of the video excerpt)

7 MS PROULX: [10:12:47] (Interpretation) Your Honours, why did we show you this  
8 footage? Not because we believe that a press article is a valid source of evidence in  
9 the course of confirmation of charges hearings, quite on the contrary.

10 The Prosecution told you that they investigated eyes wide open without hiding  
11 anything whatsoever - transcript 3, page 29, lines 14 to 16 - but this is not the case. If  
12 it were so, the Tuareg issue would also have been investigated and would not have  
13 been completely excluded from this case.

14 Another example, some aspects of Islamic law were already in effect in Timbuktu  
15 before April 2012. That fact should have been explored.

16 Once again, we are not making anything up. It is P-4 himself who said so, and I  
17 quote:

18 "Sharia existed in Timbuktu before the occupation but not the extreme version that  
19 they wanted to impose upon us. Before the occupation, if you wanted to you could  
20 go to the government judge; that was the non-Islamic form of justice. Or you could  
21 go see the *cadi*, that is to say the traditional Muslim judge." End of quote.

22 Reference MLI-OTP-0003-0002-R01, paragraph 146.

23 You have not been told anything about the existence and implementation of Islamic  
24 law in Timbuktu before 2012. Why?

25 Because the Prosecution has decided to select various items of evidence and set aside

1 other items, and this is counter to their own obligation to establish the truth as  
2 provided for in Article 54(1)(a) of the Statute.

3 In response to remarks made by the Prosecution yesterday at the end of their  
4 presentation, allow me to say that any item that is partially or completely exculpatory,  
5 if it is not disclosed at this stage it is useless to the Defence during confirmation of  
6 charges. These shortcomings, this failure to disclose, or to disclose at the last minute  
7 is, well, the harm has already been done.

8 The Prosecution has voluntarily turned a blind eye to many things and this has  
9 affected the quality of the items of evidence presented. For example, in the  
10 Muthaura, Kenyatta and Ali case, Pre-Trial Chamber II, paragraph 63,  
11 23 January 2012, it was said that:

12 "The role of the Chamber at this stage of the proceedings is to determine whether or  
13 not there is sufficient evidence to provide substantial reasons to believe that the  
14 suspects committed the crimes in question. Adducing such evidence is the result of  
15 the investigations conducted by the Prosecution. If the Prosecution has not carried  
16 out suitable investigations, the quality and the nature of the evidence will certainly be  
17 affected and the Chamber will make a finding after reviewing such items in  
18 accordance with Article 61(7)." End of quote.

19 On Monday the Prosecution also alleged that no one could join Ansar Dine or AQMI  
20 without pledging allegiance to the leader, yet the Prosecution provided no evidence  
21 to establish that Mr Al Hassan might or might not have pledged allegiance to such  
22 groups.

23 Furthermore, the Prosecution said that there was no other reason for anyone to  
24 establish any kind of link with Ansar Dine or AQMI. No reason other than a  
25 political/religious agenda.

1 Ansar Dine and AQMI did not accept assistance from people who did not share their  
2 views. And these items of information come from transcript 3, page 48, lines 13  
3 to 18.

4 These statements show that the Prosecution voluntarily and with full awareness made  
5 the decision to ignore the context that led to the events of 2012. Of course, that  
6 context does not suit the Prosecution, but their choice to disregard the context and all  
7 the various possible areas of inquiry had to have a negative impact on the quality and  
8 the nature of their evidence.

9 The events of 2012 are clearly part of a general context, namely, the fight of the  
10 Tuareg people for independence within Azawad.

11 Mr Al Hassan, above all, is a Tuareg person and he has seen the indifference and the  
12 hostility from the government of Mali. He has suffered from this indifference and  
13 hostility.

14 Mr Al Hassan is a man who loves his community and he has always tried to improve  
15 the lot of his people. He is a man who comes from his community. He is a family  
16 man, a husband, the father of young children from whom he was cruelly taken to  
17 come and appear before the ICC, even though he's just small fry, a very small fish in a  
18 large ocean.

19 The Prosecution cannot deny the human qualities of Mr Al Hassan. Even  
20 incriminating witnesses have told us about the good reputation that Mr Al Hassan  
21 enjoyed in Timbuktu, even today, quote:

22 "I don't believe that he was tough with people. His name did not come up when  
23 people complained about the behaviour of the various groups" said Witness P-608,  
24 who only knew Mr Al Hassan by reputation. Reference MLI-OTP-0060-9414-R01,  
25 page 9446, paragraph 131.



1 In turn, Witness P-654 also said in respect of Mr Al Hassan:

2 "He is a former veterinary pharmacist who worked for the communities. He was a  
3 shy person, he wasn't a problem."

4 "He is a good person by nature."

5 These two quotes can be found at MLI-OTP-0019-0296-R01, page 0326, paragraph 173,  
6 and at MLI-OTP-0056-0344-R01, paragraph 42.

7 Your Honours, if Mr Al Hassan was the monster that the Prosecution spoke of, would  
8 the people still have held him in such high esteem? Would he have had such a good  
9 reputation? Of course not.

10 Thus, the Defence calls upon the Bench to set aside this shameful portrait that has  
11 been painted by the OTP. We ask you not to judge this man on the basis of  
12 unfounded allegations on the basis of evidence that has not been corroborated.

13 To sum up, today we call upon you to give him the benefit of the doubt and to allow  
14 him to benefit from the presumption of innocence, something he is entitled to.

15 I would now like to turn to the second part of my presentation, which bears upon the  
16 reiterations and inaccuracies that we have heard earlier this week.

17 Mr President, your Honours, when the evidence speaks for itself, the Prosecution  
18 does not have to engage in - how should I put this - tricks to convince the Bench of the  
19 rightness of their cause.

20 The last few days have been useful in one way because we have seen that there is  
21 little evidence and that the evidence has little probative value. The 13 lawyers of the  
22 OTP have come before the Court one after another with a handful of incidents on  
23 which they attempt to justify 13 counts of war crimes and crimes against humanity.  
24 They have also provided you with the account of the (Redacted) girl no less than six  
25 times, pages 52 and 53 of transcript 3, pages 28 and page 67, transcript 4; pages 45, 53

1 and 91 of transcript 5, the last version being a real-time version, not an edited version.  
2 They have also told you all the details about one single case, the amputation of  
3 Dédéou Maïga three times, at pages 38 of transcript 3, the edited version; at pages 22  
4 and 23 and 81 to 83 of transcript 4, not no mention many other mentions that were  
5 made of this single amputation that do not necessarily refer to the identity of the  
6 person whose hand was amputated.  
7 And the Legal Representative of Victims decided to hark back to that event as well,  
8 pages 109 to 110, transcript 5.  
9 These are only a few examples, but these constant reiterations have been very  
10 numerous throughout the Prosecution's presentation.  
11 We have also seen some manipulation of evidence. In actual fact, on Tuesday the  
12 Prosecution felt the need to provide you with footage and an audio recording, two  
13 completely different items of evidence. Apparently, their goal was to make their  
14 evidence more dramatic, to make their account more attractive, perhaps. This was  
15 transcript 4, edited version, pages 81 and 82.  
16 But if we look beyond the reiterations and other distractions, we see the Prosecution  
17 has also made several inaccurate references or provided references that suit them, but  
18 do not provide -- but they never provided any contrary elements of information or  
19 incompatible aspects.  
20 We would now like to provide you with some examples of the inaccuracies to be  
21 found in the OTP's presentation. And of course, we cannot claim that we have been  
22 exhaustive in this regard. We will only provide two examples that we thought were  
23 particularly relevant.  
24 Here's our first example: Transcript 4, page 6, lines 13 to 16, what do we read? The  
25 Prosecution said, and I quote:

1 "During the investigations led by Al Hassan, torture was used. If a suspect did not  
2 confess, he was threatened. If he still refused to confess, then he was tortured. In  
3 Timbuktu, that was the method used by Al Hassan to conduct his investigations."  
4 Yet when we look at the actual statement made by Al Hassan, which the Prosecution  
5 has referred to many times, we read -- and this is MLI-OTP-0060-1662, from page 1671,  
6 line 300, to page 1672, line 346. What do we read? And once again, I quote:

7 Question: "How do you get to the truth?"

8 Answer: "The first method used by the police is to advise the person to tell the truth,  
9 to show the person all the evidence. If he doesn't confess, threats are necessary. If  
10 he doesn't make an admission after the threat, then it is necessary to torture."

11 Question: "When you say torture, what kind of torture?"

12 Answer: "Wallah it was not part of my job to torture people, but I heard that they  
13 tortured by beating the person up. Mostly the torture is just hitting the person."

14 End of quote.

15 This passage is clear. Mr Al Hassan said that he was not involved in torture, that  
16 torture was not part of his job. He only heard about torture.

17 The Prosecution's statement to the effect that torture was the method used by  
18 Mr Al Hassan himself when he investigated, when he carried out investigations, this  
19 affirmation is completely false.

20 Here is my second example, and I refer to transcript 5, page 48, lines 9 to 13. I will  
21 quote the Prosecution:

22 "In this case the Prosecution has taken stock of approximately 300 incidents of  
23 violence and persecution against the civilian population of Timbuktu and the people  
24 in the region since the period covered by the 13 charges."

25 Yet, if you turn to page 433 of the DCC and read the footnote, you see that the

1 Prosecution acknowledges that one cannot dismiss the possibility of two copies -- or,  
2 rather, two people saying the same thing. Because some of the victims, you see,  
3 were anonymous and there were multiple sources, so how can these double copies be  
4 included in the number of 300 alleged violent acts? It's impossible to determine this.  
5 The annexes to the DCC are extremely vague when it comes to the identity of the  
6 alleged victims, the time of the alleged crime, the circumstances, the people  
7 responsible for the crimes. One cannot base charges in a criminal trial on elements  
8 that are so hazy, so imprecise that they cannot be either proven or refuted.  
9 So when the Prosecution tells us that all of the alleged 300 victims were civilians, they  
10 are not providing the actual evidence to support such a statement.  
11 Your Honours, these few examples need to alert you to the fact that you cannot  
12 entirely trust the OTP. Do you see this?  
13 All their statements have to be verified once, verified twice, contrasted with all the  
14 evidence. You must look at the inconsistencies, the incompatibilities and you will  
15 see just how insufficient the evidence is.  
16 This concludes this second part of my presentation regarding the inaccuracies in the  
17 Prosecution's arguments.  
18 Let me now tackle the third part of my presentation, namely call data records in  
19 relation to the presentation made by the OTP on Tuesday morning.  
20 I would like to start off by simply recalling that the burden of proof is on the Office of  
21 the Prosecutor. It is their duty to demonstrate based on appropriate evidence that  
22 there is substantial reason to believe that the crimes charged were committed and that  
23 they are attributable to Mr Al Hassan.  
24 Although that might appear to be obvious, the Prosecutor constantly has attempted to  
25 push their case without providing the necessary evidence or by relying on

1 contradictory evidence or evidence with little probative value. The Office of the  
2 Prosecutor is simply inviting you to believe them, to trust them with your eyes closed.  
3 These are substantive lacunae in their case that affect all the dimensions of their case.  
4 The shortcomings were even more blatant when it came to the presentation on the call  
5 data records which we shall now address.

6 First of all, we must note that the DCC is almost entirely silent on this matter of  
7 telephone evidence. It makes very little references to telephone data itself and  
8 provides very little evidence in that regard. Furthermore, most of the evidence does  
9 not substantiate the Prosecutor's case.

10 On Tuesday morning there was a presentation and a PowerPoint, reference HNE-1,  
11 which was full of allegations which were mostly unfounded and not contained in the  
12 DCC.

13 I'll take an example. The Prosecutor attempted to demonstrate that two telephone  
14 numbers were assigned to Mr Al Hassan. Reference HNE-1 at 6 to 14 and transcript  
15 number 4 from page 15, line 14.

16 The first number ending in 7799 is not mentioned even once in the DCC. It therefore  
17 seems that there is an unexplainable expanding of the charges here. At page 7 of the  
18 Prosecutor's PowerPoint presentation HNE-1 asserts that Mr Al Hassan himself  
19 admitted that this was his number, but the source mentioned in MLI-OTP-0019-0354  
20 at page 0366 is not the source at all. It is not reference to an admission. The  
21 document was not issued by Mr Al Hassan. It is a document that bears no date and  
22 the author and origin are unknown and therefore such a document cannot be relied  
23 upon.

24 The second number which ends in 2392 is that infamous number which we see on the  
25 billboard of the Islamic police and which the OTP made so much ado of these past

1 few days. The Prosecutor claims that since this number is posted on the wall of the  
2 Islamic police office it must necessarily belong to Mr Al Hassan and that if it belongs  
3 to Mr Al Hassan, then this person must have been a person in high authority within  
4 the police. By such deductions, the Prosecutor has completely disregarded the more  
5 reasonable possibility that this number was actually not Mr Al Hassan's number.  
6 The evidence therefore relating to the assignment of this number is rather absurd.  
7 Reference is made only to the banner and document MLI-OTP-0001-7323 on which  
8 the Prosecutor relies is a simple piece of paper that was found by a journalist and was  
9 photographed by we don't know who and which bears a manuscript note. We don't  
10 know the author of the note, we don't know the date of the note, we don't know the  
11 author of the note.

12 Your Honours, we cannot rely on the attribution of a telephone number in a criminal  
13 case simply on a piece of paper and a signpost. This kind of determination must  
14 flow from expert analysis. So the Prosecutor has failed in that respect.

15 The Prosecutor also relied on the so-called admissions of Mr Al Hassan as referenced  
16 in document MLI-OTP-0051-0571 at page 0593, but Mr Al Hassan clearly states that  
17 this number 2392 is the number of the police and not his personal number.

18 Therefore, it flows from his answer that there is some ambiguity which has not been  
19 highlighted by the OTP. When the OTP claims that he used that number most of  
20 time, that clearly presupposes that this number was used by several other persons  
21 within the police force.

22 That is a much more reasonable possibility which has never been raised by the  
23 Prosecutor, neither in the DCC nor in its presentation on Tuesday morning. Yet, the  
24 available inculpatory evidence does not point to the fact that the more 50,000 alleged  
25 calls were all made or received by Mr Al Hassan. And once again, the Prosecutor

1 simply assumes a number of things and uses Mr Al Hassan's words against him while  
2 dismissing the details and nuances, and in so doing, attributes a number of calls to  
3 him which occurred at a specific time without proving that it was Mr Al Hassan who  
4 was using the phone at those specific moments. Yet, the onus is on the Prosecutor to  
5 establish that fact, otherwise his case fails.

6 The Prosecutor further tries to support the argument that the phone number 2392 was  
7 used every day to call members of Al Hassan's family, reference HNE-1 at page 11.  
8 However, the Prosecutor fails to mention which numbers belonged to members of his  
9 family. Furthermore, he fails to also mention the numbers of the family members  
10 and goes on to not present any proof on the assignment of those numbers.

11 These, once again, your Honours, are new allegations which do not figure in the DCC  
12 and are not based on the evidence disclosed by the Prosecutor.

13 Mr President, your Honours, the evidence pointing to the assignment of the numbers  
14 7799 and 2392 to Mr Al Hassan, that evidence is so thin that it hinges on the absurd.  
15 In fact, the report of the expert provided by the Prosecutor, reference  
16 MLI-OTP-0061-1642 at page 1683, that report indicates that those two telephone  
17 numbers ending in 7799 and 2392 had communicated with each other on 11 occasions,  
18 meaning that Mr Al Hassan was calling himself. The Prosecutor did not point out  
19 that inconsistency or even attempt to explain it.

20 A second experience of the inconsistency of that evidence can be found at page 1685  
21 of the expert report. Number 7799 was localised in Gao on 20 June 2012, and at  
22 paragraph 727 of the DCC the Prosecutor indicates that Mr Al Hassan was at the Sidi  
23 Mahmoud cemetery on the same day. Those two facts are therefore completely  
24 incompatible and once again, the Prosecutor fails to explain this.

25 Your Honours, the evidence relating to these telephone numbers is so weak and so

1 incoherent that it cannot stand the test of even the simple analysis that I have just  
2 made. The examples I have picked might appear to be ordinary and might point just  
3 to a few incoherencies within the case. But such is not the case because the errors  
4 and inconsistencies in the case are not without significance. They point to the very  
5 substance of this case, of this trial. They affect other aspects of the trial and add up  
6 finally to what one might consider as a deck of cards that might collapse at any time.  
7 They cause prejudice and damage which cannot be underestimated or minimised.  
8 Let's take, for example, the issue of attributing telephone numbers to members of the  
9 alleged common plan. In the DCC no telephone number is clearly attributed to the  
10 members of the alleged common plan. At annex F of the DCC there is no mention of  
11 anybody who is alleged to have been a member of the common plan.  
12 But on Tuesday the Prosecutor presented a new version, a corrected version of annex  
13 F at figure 19 of the PowerPoint presentation HNE-1.  
14 That version of annex F is entirely different, but what immediately jumps at you is  
15 that pictures of the alleged members of the common plan have been added and that  
16 telephone numbers have been assigned to those people.  
17 Let me repeat, your Honours, the DCC does not assign any telephone number to any  
18 of these individuals. The Office of the Prosecutor in its presentation on Tuesday did  
19 not provide any proof that the telephone numbers were so assigned as identified in  
20 annex F.  
21 I mentioned the expert report a short while ago with reference and it does analyse the  
22 use of these numbers but does not attribute those numbers to members of the  
23 common plan, nor to anyone whatsoever.  
24 The Prosecutor therefore is asking you to assign 13 telephone numbers without  
25 providing the evidence. In this deck of cards based on attributions that are not



1 substantiated in evidence, the Prosecutor is asking you to come to conclusions  
2 pertaining to these communications on the said telephone numbers. The Prosecutor  
3 relies heavily on these calls in the determination of the existence of the alleged  
4 common plan.

5 So, your Honours, if these numbers are not assigned properly, how can you come to  
6 any conclusions pertaining to their activities?

7 We have already said so, but allow me to repeat. We are here in a criminal case.

8 Factual findings cannot be presumed or assumed, they must be established based on  
9 the available evidence.

10 The Prosecutor has failed to place that evidence before you. He simply is asking you  
11 to believe him, to not closely examine his allegations and to confirm charges based on  
12 sinking sand.

13 The Prosecutor is also asking you to confirm allegations which lie outside the scope of  
14 the charges.

15 You granted him 500 pages for the DCC but, in spite of that, a number of the  
16 allegations made during the presentations are absent from the DCC.

17 Mr President, your Honours, you gave the Prosecutor all possible opportunities and  
18 chances. They failed to deliver the goods.

19 The time has now come to stop this train that is heading nowhere. The charges  
20 against Mr Al Hassan should not be confirmed.

21 That brings me to the end of my conclusion and I will now give the floor to my lead  
22 counsel, Ms Taylor.

23 Thank you very much.

24 PRESIDING JUDGE KOVÁCS: [10:48:44] (Interpretation) Ms Taylor, please.

25 MS TAYLOR: [10:49:07] Good morning, Mr President, your Honours. A

1 confirmation hearing is not supposed to be a mini trial. The charges are supposed to  
2 be sufficiently clear and substantiated that the case can stand and fall on the charging  
3 document and the evidence.

4 And yet, the Prosecution felt compelled to request 500 pages for its charging  
5 document. It has presented its case over three days with what we counted to be 13  
6 different lawyers.

7 And yet, and yet at the end of this presentation what is meant to be the high-water  
8 mark for the evidence in the possession of the Prosecution, we are left asking, is that  
9 all there is?

10 Mr President, your Honours, there is a children's game called *Where's Waldo?*, *Où est*  
11 *Charlie?* in French, and in this game there's generally a picture with lots of persons  
12 and things and it's necessary to try and find Waldo somewhere in that picture. And  
13 that is how it's felt over the last couple of days. We have been presented with videos,  
14 maps, photographs, witness statements and allegations which have no ostensible link  
15 to Mr Al Hassan or where he is, at most, a background or peripheral figure.

16 Indeed, given that the Prosecution's case as presented by Ms Luping at page 79 of  
17 yesterday's transcript is that Mr Al Hassan was a key enforcing, a key implementer,  
18 it's surprising how little evidence there is concerning Mr Al Hassan's role in  
19 implementing the charged crimes.

20 And what is striking is that, when the Prosecution do proceed to get very specific  
21 concerning Mr Al Hassan's alleged role in the alleged crimes, they then get very  
22 vague about the evidential details, citing either no evidence or, as my co-counsel  
23 Ms Proulx explained, inaccurate evidential citations or accusations based on pure  
24 unbridled speculation.

25 Since the confirmation hearing is not a mini trial we don't intend to use the Court's

1 time by reading out our response to the document concerning the charges line by line.

2 It's been filed, it's in the record, and we invite the Pre-Trial Chamber to give detailed  
3 consideration to the serious arguments and case law set out therein.

4 Instead, I intend to focus on three issues today.

5 Firstly, issues concerning notice regarding the nature, cause and content of the  
6 charges, and the proper scope of this confirmation proceedings.

7 Secondly, issues concerning nexus, both as concerns the nexus to the armed conflict  
8 and as concerns the nexus between the charged crimes and Mr Al Hassan's personal  
9 conduct.

10 And thirdly, I intend to address the principle of legality and the paramount need to  
11 ensure a consistent interpretation application of the provisions in the Rome Statute.

12 I'm about to proceed to my first topic, but noting the time I would be advised by the  
13 Bench if this would be a suitable time to break or whether I should continue.

14 PRESIDING JUDGE KOVÁCS: [10:54:07] (Interpretation) I think this is a good time  
15 to break. Are you in a position to tell us how much time you need for those three  
16 points?

17 MS TAYLOR: [10:54:20] Thank you, Mr President. I estimate that I would need at  
18 most 40 minutes.

19 PRESIDING JUDGE KOVÁCS: [10:54:29] (Interpretation) Forty?

20 MS TAYLOR: Yes.

21 PRESIDING JUDGE KOVÁCS: [10:54:32] (Interpretation) We shall break now.

22 THE COURT USHER: [10:54:36] All rise.

23 PRESIDING JUDGE KOVÁCS: [10:54:45] (Interpretation) We resume at 11.30.

24 (Recess taken at 10.54 a.m.)

25 (Upon resuming in open session at 11.33 a.m.)

1 THE COURT USHER: [11:33:07] All rise.  
2 Please be seated.

3 PRESIDING JUDGE KOVÁCS: [11:33:27] (Interpretation) Good morning once again.  
4 I would also like to greet the members of the public in the public gallery, and I give  
5 the floor now to lead counsel for the Defence to continue with her presentation. You  
6 have the floor.

7 MS TAYLOR: [11:33:53] Thank you, Mr President.  
8 My first issue concerns this fundamental point of notice and the extent to which that  
9 hasn't been respected because of the constant mutating nature of this case.  
10 As we argued on Monday, the purpose of the deadlines set out in Article 61 is to  
11 ensure that the Defence has proper notice concerning the exact nature of the charges  
12 before the confirmation hearing, not during it.  
13 This notion of advanced notice is intrinsically tied to the right to adequate time and  
14 facilities to prepare the Defence case. That is, we need to know the parameters of the  
15 charges sufficiently in advance of the confirmation hearing so that we can prepare our  
16 own case and pleadings.  
17 This fundamental right is not respected in circumstances where the Prosecution starts  
18 raising key material facts and allegations for the very first time during the  
19 confirmation proceedings itself.  
20 Put simply, the Defence cannot obtain instructions and formulate an informed  
21 position if information and allegations are handed out in dribs and drabs in  
22 a piecemeal manner throughout the proceedings.  
23 On the very first day of the proceedings, the Prosecutor vowed and declared that, and  
24 I quote:  
25 "There is no opportunity here for the Prosecutor to expand anything whatsoever, and

1 I think that this point must be made very clear and very clearly."  
2 That was transcript 3, pages 42 to 43.  
3 Well, we heard you loud and clearly, but this clarity seems to have got lost along the  
4 way. Over the last three days we have heard a range of material facts and  
5 allegations that were not in the Prosecution's charging documents.  
6 My co-counsel Madam Proulx has already spoken to you about the missing  
7 attribution evidence and allegations, which were nowhere to be seen in the 457-page  
8 document concerning the charges, and which popped up for the first time on day 2 of  
9 the confirmation hearings.  
10 But there are many more examples.  
11 Firstly, in question 40, the Pre-Trial Chamber requested the Prosecution to adduce  
12 further information concerning Mr Al Hassan's communications with the most  
13 responsible members. And lo and behold, on Tuesday, suddenly the Prosecution  
14 pleads its theory that Mr Al Hassan communicated with them via walkie-talkies.  
15 Now, of course we have no evidence concerning attribution of these walkie-talkies,  
16 we have nothing beyond a photograph of one on a desk. We don't know the  
17 communication range or who they were used to communicate with. This accusation  
18 has no evidential value but it does illustrate the shifting nature of the case.  
19 Similarly, in question 6, on the basis of observations from the representatives of  
20 victims, the Pre-Trial Chamber asked the Prosecution for evidence concerning the  
21 targeting of persons within certain areas. And now in response, the Prosecution has  
22 for the first time introduced allegations of persecution based on racism. It's  
23 transcript 4, page 38.  
24 The Prosecution has also introduced new legal theories concerning the interpretation  
25 of key provisions, such as Article 8(2)(c)(iv), and new material facts concerning the

1 manner in which the Islamic tribunal can be said to have fallen foul of this provision.  
2 We also note that in response to judicial questioning, the Prosecution has introduced  
3 new submissions concerning the stigma and ongoing consequences of the alleged  
4 crimes. This is not a sentencing hearing, so it appears that the purpose of these  
5 submissions is to amplify the gravity of the charges. But for the purpose of  
6 contesting admissibility, it is the charges and not the evidence that frames the gravity  
7 debate, and yet this framework has been thrown out the window.  
8 Apart from the issue of prejudice, which in itself necessitates the exclusion of these  
9 arguments, there are also extremely persuasive legal and practical reasons to exclude  
10 new theories and allegations from the Chamber's scrutiny.  
11 Firstly, the Prosecution brought this case with the conviction that its case was trial  
12 ready. They were ready and able to meet the threshold for confirmation as concerns  
13 each of the charges on the basis of the information set out in the charging document.  
14 A case which changes and mutates, in the face of any form of judicial inquiry, is not  
15 a case which is sufficiently reliable to confirm.  
16 Secondly, the Pre-Trial Chamber only has the power to confirm or not confirm the  
17 charges as framed by the Prosecution. If the charges are confirmed, it will be the  
18 Document Containing the Charges as confirmed by the Chamber that frames the  
19 parameters of the trial. The Pre-Trial Chamber's reliance on new material facts and  
20 allegations which are not in the Document Containing the Charges will therefore  
21 generate ambiguities and issues of notice that will haunt any future trial.  
22 A further issue of notice concerns what we, as the Defence, don't know at this point.  
23 We have some unknown unknowns and a lot of unknown unknowns lurking beneath  
24 the surface.  
25 Article 61(7) specifies that the confirmation decision can only be based on issues

1 disclosed to the Defence in advance of the hearing, and discussed in an *inter partes*  
2 manner during the hearing. This implies an open, transparent, adversarial debate  
3 limited to the issues in the evidence that both parties are fully aware of.  
4 The confirmation proceedings should be based on the open discussion. It should not  
5 be a tête-à-tête between the Pre-Trial Chamber and the Prosecution. And yet, over  
6 the last few days, we have seen quite a bit of the latter through the use of veiled  
7 references by the Prosecution to information that's not in the record and  
8 behind-the-scenes political considerations.

9 On day 1, we heard the Prosecution refer to paragraphs of uncited filings in order to  
10 make a claim that was supposed to be responsive to the Defence.

11 On day 1, Madam Prosecutor noted that this would not be the last case concerning  
12 Mali. And we are not oblivious to media reports concerning individuals, but it's not  
13 clear what they are trying to convey with this point. Are they trying to convey that  
14 it's a test case, fishing for sharks with shrimp?

15 But this case must rise and fall on its own merits. Confirming overly large and  
16 entirely irrelevant charges in this case as a placeholder for a future suspect, it doesn't  
17 work. This strategy is not only risky and expensive, but it exposes witnesses and  
18 victims to the unnecessary trauma of testifying in this case, having their credibility  
19 challenged in this case in connection with allegations that are likely to be dismissed at  
20 trial due to the absence of any nexus to this defendant in the courtroom.

21 On the same day, we heard the Prosecutor say at page 69 of the transcript that:  
22 "... we note the Defence challenges almost everything and it is entirely in their right to  
23 do so, including, for example, the existence of an armed conflict which itself justified  
24 the UN sending of a peace mission to Mali."  
25 Mr Al Hassan knows this.

1 The Prosecution has also emphasised that the armed conflict continues to this day. I  
2 refer you to transcript 5, page 76.

3 These arguments, these claims, they have no relevance to the charges. Rather, there  
4 is an appearance that the Prosecutor is using this point, these sideways allusions as  
5 a means of saying to the Judges: Don't look there. Don't listen to the Defence  
6 because otherwise there might be problems for certain organisations or certain  
7 governments, wink wink, nudge nudge.

8 Now, UN peacekeeping forces invited by a state, they don't need an armed conflict as  
9 a point of entry. We are, however, aware that the operational guidelines and rules of  
10 engagement of Operation Serval and Operation Barkhane, they are contingent on the  
11 existence of an armed conflict. These forces can't neutralise terrorists if this  
12 precondition doesn't apply.

13 But this point, this veiled reference is not a legitimate or a legal basis for confirming  
14 the existence of an armed conflict or a nexus to such a conflict where insufficient  
15 proof -- and, in many regards no proof has been adduced in this particular case.

16 It would also be a poisoned chalice to accept and endorse the Prosecutor's contorted  
17 and confused application of the laws of warfare to the north of Mali. Their position  
18 would expose ordinary civilian and administrative duties to penal sanctions for  
19 crimes that have no nexus to the conflict and no nexus to the charged individual.

20 This, this theory, more than anything else, would have a chilling effect on legitimate  
21 peacekeeping efforts and the applications of the laws of war.

22 Take, for example, the Prosecution's position concerning alleged nexus between the  
23 armed conflict and the commission of rape and sexual slavery. Yesterday, in order  
24 to try to make some kind of link to the common plan in this case and prompted to do  
25 so by the Judges, the Prosecution argued that rape and sexual violence were not part



1 of the common plan, but were, rather, a foreseeable consequence of war and armed  
2 conflict in the area. And I refer you to page 5 and 17 of the transcript. And that  
3 anyone associated with the armed group is, consequently, responsible for rapes  
4 committed by that armed group.

5 Firstly, the claim that something was foreseeable that certain acts could occur, not that  
6 it was foreseen by Mr Al Hassan himself that they would occur or were a virtually  
7 certain consequence, this claim means that the Prosecution is relying on *dolus*  
8 *indirectus*; that they are trying once more to introduce the third category of joint  
9 criminal enterprise from the ad hoc tribunals.

10 The ICC statute does not allow this. And this third category, which derives from  
11 common law jurisdictions, has now been roundly repudiated by these jurisdictions.

12 If this premise were to be accepted, it would mean that each and every time there are  
13 public accusations that members of a particular peacekeeping force have committed  
14 rape, if you stay in that force, if you continue to provide administrative, logistical  
15 assistance to that force, you are guilty of contributing to a common plan that involves  
16 the commission of rape, even if you have no personal knowledge of such rapes and  
17 even if you do not intend to contribute to their commission.

18 Now, what nation on earth would contribute to UN peacekeeping forces in countries  
19 under ICC jurisdictions if this is the standard applied by this Court, that it is enough  
20 to demonstrate -- as argued by the Prosecution at page 17 yesterday -- that the  
21 organisation was composed mostly of men, some of whom saw women as sexual  
22 objects.

23 Now, the only way to untangle this Gordian knot is to accept the otherness  
24 underpinning the Prosecution's arguments; that members of Ansar Dine are different  
25 from western peacekeepers or soldiers or any other law firm or organisation

1 dominated by men who see women as sexual objects around the world, and that  
2 because of this difference, this otherness, it's okay to accept the premise advanced  
3 yesterday that Ansar Dine soldiers were somehow crazy, sex-starved beasts. And  
4 that was page 13 of yesterday's transcript.

5 Mr President, your Honours, this needs to be put clearly. This premise, this claim is  
6 underwritten with a highly discriminatory stereotype concerning Muslim men, and  
7 this Court cannot and should not base its cases and prosecutions on such false  
8 stereotypes.

9 You cannot eliminate persecution with persecution. And it shouldn't be necessary to  
10 use these very convoluted and extended modes of liability. It shouldn't be necessary  
11 to use these discriminatory tropes to charge someone for sexual violence if the  
12 individual in question bears individual responsibility for these crimes.

13 Mr Al Hassan, who was not a soldier, not an invading infidel but a civilian, a Tuareg  
14 from Timbuktu, who was married before the events in question, there is no evidence  
15 that he was sexist; that he viewed women as sexual objects or that he otherwise made  
16 a contribution to crimes of sexual violence.

17 If it was really necessary for the Prosecution to go down such an unpalatable path in  
18 order to find some kind of a link between its common plan and Mr Al Hassan, if they  
19 had to throw in a couple of al-Qaeda yesterday into their presentation for good  
20 reference, then it means that they're prosecuting the wrong person and using the  
21 wrong case.

22 And that brings me to my point regarding the lack of nexus between the common  
23 plan, the evidence and Mr Al Hassan.

24 In a nutshell, the Prosecution case can be described as follows: Lots of bad things  
25 happened in Timbuktu. For a lot of it, we don't know the time, the place or the

1 perpetrator, but we think it's Ansar Dine. Mr Al Hassan worked for the police force  
2 set up when Ansar Dine was there; ergo, Mr Al Hassan is responsible for all crimes  
3 against humanity and war crimes committed in and around Timbuktu during this  
4 period.

5 This might be how criminal law works in a prosecution fan fiction book, but not  
6 reality; at least, not within the reality regulated by the Rome Statute. And now we  
7 are losing time because we are now in search of a lost nexus.

8 A lot has been written about mens rea and modes of liability, but at the end of the day,  
9 it all boils down to the very simple concept that individuals can only be charged and  
10 convicted for crimes to which they made an intentional contribution. And this is set  
11 out in the plain language of Article 30 of the Statute.

12 There is then a range of different gradations as concerns the extent of the contribution  
13 and the question as to whether the defendant knew and intended to commit the crime  
14 or only merely knew and intended to contribute to the crime; this difference between  
15 a committer and a contributor.

16 But all of these scenarios require the Prosecution to demonstrate at a minimum these  
17 necessary elements that Mr Al Hassan engaged in conduct that contributed to the  
18 realisation of the charged crimes in this case. And, when Mr Al Hassan engaged in  
19 this conduct, he knew and intended to contribute to these charged crimes. That  
20 evidence is missing.

21 In order to explain Mr Al Hassan's contribution to the common plan, the Prosecution  
22 argued yesterday, at page 79 of the transcript, that Mr Al Hassan was a key  
23 implementer and enforcer who helped the organisation to implement its common  
24 plan and its common purpose. That is, he is basically a doer, not a thinker.

25 In making this point that he was a doer, the Prosecution very clearly underlined why

1 the Bemba et al. appellate ruling concerning common plan theory is not applicable to  
2 Mr Al Hassan.

3 Now in the Bemba et al. case, the Prosecution theory rested on the premise that  
4 Mr Bemba was the architect of the common plan; that his essential contribution rested  
5 in the creation of the common plan itself, which they argued arose from his role as  
6 the defendant and his instructions.

7 And it is within this context the Appeals Chamber's ruling must be understood, that  
8 is, that where the defendant plays such a key role in creating the common plan itself,  
9 that creation can constitute an essential contribution to each of the charged crimes  
10 because without the common plan, the crimes would not have taken place.

11 It rested on the consideration that where a defendant's contribution is front-loaded,  
12 that happens at the beginning -- the genesis of the common plan, is not necessary to  
13 demonstrate further contributions at the execution stage as concerns the  
14 implementation of each charged crime.

15 In contrast, in this case, the Prosecution has not alleged that Mr Al Hassan was  
16 involved in the inception of the plan. Nor can he in any sense of the word be  
17 described as the architect of the plan. Rather, as mentioned, they focused on his role  
18 in executing the common plan.

19 But they can't have their cake and eat it too. If he was the executioner and the  
20 common plan was not in itself inherently criminal, then it means that in order to have  
21 the requisite degree of control over the crime, the charged crime, Mr Al Hassan must  
22 have executed or contributed to the realisation of the material elements of the charged  
23 crimes. Otherwise, if he is making non-criminal contributions to a non-criminal  
24 common plan, he cannot in any sense of the word be termed a co-perpetrator or  
25 charged as someone who has made a culpable contribution to the charged crimes.

1 In arguing that it was not necessary for them to demonstrate Mr Al Hassan's  
2 contributions were linked to the realisation of specific crimes, the Prosecution also  
3 appears to have forgotten that they also argued in the document concerning the  
4 charges, at paragraph 1042, that it was possible to infer Mr Al Hassan's criminal intent  
5 from his conduct.

6 But that inferential reasoning, it doesn't work on any level if there's no nexus between  
7 this conduct and the realisation of the material elements of the crimes. You can't  
8 infer criminality from non-criminal conduct.

9 Finally, the Prosecution also tried to lower the bar for confirmation by using the  
10 findings in the Bemba et al. case, that a person can be held to have made an essential  
11 contribution if, but for the contribution, the crime would not have occurred or it  
12 would have occurred in a substantially different manner.

13 Now this formulation, it came into being because of the Trial Chamber's attempt to  
14 not rule on the truth or falsity of witness testimony, and it is very specific to that case  
15 in Article 70 offences, because in that case the Chamber found that if a witness's  
16 testimony had changed, that change could in itself constitute contempt.

17 But this formulation doesn't work in Article 5 cases. For example, if I as a secretary, I  
18 schedule something to take place on Monday at 12 rather than on Monday at 5, I've  
19 changed the way something is carried out. But I haven't contributed or controlled  
20 the criminality of the act. I don't control the commission of the crime and I can't  
21 frustrate its commission. There's that distinction between administrative, logistical  
22 changes and substantive changes -- substantive contributions which are directed to  
23 the material elements of the offence.

24 And that's the problem with the Prosecution's case concerning Mr Al Hassan. If we  
25 start to play *Where's Waldo, Où est Charlie*, and we eventually find him, even if we

1 take him out of the picture, the picture remains the same. The charged crimes in this  
2 case would have happened in substantially the same manner, irrespective of whether  
3 Mr Al Hassan was in Timbuktu or not.

4 This brings me to my final point, the principle of legality.

5 Throughout the course of the proceedings, we have heard certain laws being referred  
6 to as being illustrative. For example, the laws of occupation, the Al Mahdi judgment,  
7 but Mr President, your Honours, the Rome Statute is not a picture book. Laws either  
8 bind the conduct of individuals or they do not. To say that something is illustrative  
9 is to attempt to extend the definition of a crime by analogy and that is exactly what  
10 Article 22 of the statute says that you cannot do. That is, Article 22(2) states quite  
11 clearly the definition of a crime shall be strictly construed and shall not be extended  
12 by analogy.

13 For good measure, this prohibition is repeated in the elements of the crimes. For  
14 example, the paragraph in the introduction to Article 7 states:

15 "Since Article 7 pertains to international criminal law, its provisions, consistent with  
16 Article 22, must be strictly construed, taking into account that crimes against  
17 humanity as defined in Article 7 are among the most serious crimes of concern to the  
18 international community as a whole, warrant and entail individual criminal  
19 responsibility, and require conduct which is impermissible under generally applicable  
20 international law, as recognised by the principle legal systems of the world."

21 So when my colleagues on the other side of the courtroom say that it doesn't matter  
22 that certain conduct is permitted in certain countries, with the greatest respect, they  
23 are wrong. It does matter because the Statute doesn't punish human rights  
24 violations. It only punishes conduct that is clearly accepted by the principle legal  
25 systems of the world as entailing individual criminal responsibility. And Islamic

1 law is indeed one of the principle legal systems of the world.  
2 The law of war crimes is similarly circumscribed by the principle of legality. It was  
3 therefore somewhat disturbing to hear yesterday the Prosecution concede that its  
4 points concerning Article 8(2)(c)(iv) were novel, on page 62.  
5 Well, if it's a novel issue or a novel position, then that's where it belongs, in a novel  
6 and not the Rome Statute.  
7 Now since the Trial Chamber is not bound by the interpretation of law adopted by  
8 this Bench, the confirmation phase is not the appropriate forum for testing novel legal  
9 theories or expanded boundaries of accepted responsibility. There's too much risk  
10 that the case would collapse on a point of law.  
11 And that is exactly what the Prosecution is attempting to do in creating new  
12 categories and subcategories of crimes in this provision. The wording in Article  
13 8(2)(c)(iv) is clear. It derives from very specific World War II related case law that  
14 was directed to these two scenarios: The passing of sentences or the execution -- the  
15 execution of the dealt penalty as worded in the Statute.  
16 Now, if we broaden the ambit of this provision to other forms of conduct, we not only  
17 fall foul of Article 22 of the Statute, we end up capturing conduct, such as, the *petit*  
18 *tazirs*, that is insufficiently serious to meet the chapeau requirement of Article 8.  
19 These provisions are restricted to serious violations of the laws of warfare, and if this  
20 gravity component happened to be met for the conduct, then that means that this  
21 conduct is prohibited elsewhere; for example, under inhumane treatment. There are  
22 no lacuna, therefore, there's no need to play with words in order to create new crimes.  
23 The same issues of legality arise in relation to the Prosecution's claim that the  
24 definition of a regularly constituted court can be determined by reference to domestic  
25 law.

1 Now this is the first time that I've heard the Prosecution make that argument before  
2 this Court; that the Judges should have regard to domestic law and violations thereof.  
3 The legitimacy of this Court, it rests on the consistent, the uniform application of its  
4 laws. The uniform interpretation of identical or similar provisions is also mandated  
5 by Article 31 of the Vienna Convention on the law of treaties.  
6 The Court cannot therefore interpret the Statute to mean that it must withhold  
7 domestic and human rights law protections whenever the defendant seeks their  
8 protection - for example, in connection with the admissibility of evidence or the  
9 admissibility of cases - but then use the very same domestic and human rights law  
10 protections to impose criminal law sanctions and criminal punishments on the  
11 defendant.  
12 If you accept the definitions of Article 8(2)(c)(iv) advanced by the Prosecution in this  
13 case, if you accept the loose modes of liabilities, then this Court, this Prosecution must  
14 also accept responsibility for any mistreatment or torture of suspects that occurred in  
15 connection with domestic proceedings and that they gave the green light to -- for  
16 example, through Article 19, or in any way influenced or impacted.  
17 And this Court, this Prosecution must also accept the applicability of these standards  
18 concerning fairness and impartiality and independence to the proceedings against  
19 Mr Al Hassan in this courtroom. We can't use one law to judge the Islamic tribunal  
20 in Timbuktu and a different law to judge our own proceedings. And if we were to  
21 apply these principles of law advanced by the Prosecution, then there is no way the  
22 charges could be confirmed against Mr Al Hassan. Thank you.  
23 PRESIDING JUDGE KOVÁCS: [12:14:14] (Interpretation) Thank you very much,  
24 Ms Taylor. I have understood that you have concluded your submissions, but  
25 because of the various formalities in relation to the transcript and so on and so forth, I



1 would like to have confirmation from you that you have concluded your submissions  
2 within the nine hours that were allotted to you.

3 MS TAYLOR: [12:14:46] Thank you, Mr President, your Honours. Yes, I confirm  
4 for the record that the Defence concludes its submissions.

5 PRESIDING JUDGE KOVÁCS: [12:14:55] (Interpretation) Thank you very much.

6 Thus, the Defence oral submissions have come to an end. And I would like to  
7 thank the parties and participants for their submissions. I also thank the interpreters,  
8 the court reporters and the technical experts from the Registry who ensured that the  
9 hearings went smoothly and could be followed in house and beyond the courtroom.

10 We shall resume on Wednesday next week to hear the final submissions from the

11 OTP, the Legal Representatives of Victims and the Defence. Wednesday, 17

12 July 2019 at 9.30.

13 THE COURT USHER: [12:15:51] All rise.

14 (The hearing ends in open session at 12.16 p.m.)