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PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Presiding Judge
Judge Marc Pierre 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 "Prosecution's final written observations regarding confirmation of the charges", 24 July 2019, ICC-01/12-01/18-430-Conf

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INTRODUCTION

1. The people of Timbuktu, the “Malian pearl of the desert”,¹ suffered from the harsh system of oppression applied by Ansar Dine, *Al Qaeda* in the Islamic Magreb (“AQMI”) and the institutions of control they created (“Organisation”), during their occupation from 2012 until 2013. The Islamic police was an omnipresent, integral, part of their oppressive system. **AL HASSAN** played a vital role within the Islamic police in ensuring that the police could work effectively within this system. He was a key figure – a key implementer and enforcer of the Organisation’s rules, its religious and ideological vision, and its repressive system of power. Indeed, the crimes would not have been carried out in the same way without the exercise of his functions.
2. The Prosecution asks the Chamber to confirm all 13 counts, on the basis of all alternative modes of liability as requested, as there are substantial grounds to believe that Mr. **Al HASSAN** is individually criminally responsible for all crimes as charged.
3. The Prosecution submits its final written observations², subsequent to the hearing to confirm the charges on which the Prosecution intends to seek trial. In these submissions, the Prosecution details its responses to: (a) the written questions of Pre-Trial Chamber I (“Chamber”)³, and (b) Defence assertions made during its oral⁴ and written submissions⁵. It is not possible for the Prosecution to respond within the set page limits⁶ to all Defence arguments, which include a number of unfounded allegations, misstatements and inaccuracies⁷. Silence on any of these Defence claims, however, should not be interpreted as agreement.

I. RESPONSE TO THE CHAMBER’S QUESTIONS

Question A.1⁸: ‘Question générale’

4. Most of the members of the Malian local administration fled Timbuktu out of fear prior to, or on the day of the arrival of the armed groups,⁹ leaving the town without a functioning police and judiciary.¹⁰

¹ Report, MLI-OTP-0001-2588, p.2630.

² ICC-01/12-01/18-385, para.33. The Prosecution also relies on the Amended and Corrected Document Containing the Charges, ICC-01/12-01/18-335-[REDACTED] (“DCC”).

³ [REDACTED].

⁴ T-006-CONF-ENG-ET, p.12, l.9-p.41, l.4; T-007-CONF-ENG-ET, p.24, l.14-p.34, l.13.

⁵ ICC-01/12-01/18-394 [REDACTED].

⁶ ICC-01/12-01/18-385, para.33.

⁷ ICC-01/12-01/18-394 [REDACTED] (« Defence Submissions »).

⁸ Que s’est-il passé pour les membres de l’administration locale de Tombouctou, en charge de la police et de la justice, lors de l’arrivée des forces d’AQMI et d’Ansar Dine ? Ces fonctionnaires de l’État malien s’étaient-ils enfuis, ou bien ont-ils été limogés et/ou chassés?

⁹ [REDACTED]
[REDACTED] T-003-FRA-ET, p.45, l.24- p.46, l.3.

Question B.2¹¹: ‘Violences sexuelles’

5. The Prosecution decided not to charge the incidents of rape in detention involving [REDACTED] under the separate crime against humanity and war crime of rape but to charge them as underlying acts of gender persecution.

Question B.3¹²: ‘Violences sexuelles’

6. The Prosecution is not including the rape of [REDACTED] while in detention among the incidents comprising her ill-treatment. In relation to this witness, the Prosecution charges AL HASSAN with the crime against humanity of other inhumane acts and the war crime of outrages upon personal dignity on the basis [REDACTED] in inhumane detention conditions, in which [REDACTED].

Question B.4¹³: ‘Violences sexuelles’

7. The context in which the “prison des femmes” is mentioned in [REDACTED] tends to indicate that it pertains to the Islamic tribunal rather than the “BMS” (Banque Malienne de Solidarité) or the prison at Garde Nationale. [REDACTED]
[REDACTED]
[REDACTED]». ¹⁴ The evidence shows that female victims and witnesses name and describe various places of detention in Timbuktu where women would be detained: at the BMS, ¹⁵ at the Islamic Tribunal (Hôtel La Maison), ¹⁶ at the Gouvernorat, ¹⁷ at the prison Garde Nationale ¹⁸ and at the BDM ¹⁹ among others. A key location where female victims were detained was a small room at the BMS, which was described as the “cellule de cauchemar des femmes”. ²⁰ This location is an ATM room within a bank and

¹⁰ [REDACTED]
[REDACTED].

Pourquoi le Document contenant les charges (le « DCC ») qualifie-t-il les cas de certaines victimes [REDACTED] victimes alléguées de viol en détention, d’« autres actes inhumains » ou d’« atteintes à la dignité », mais pas « viol »?

¹² Concernant le Témoin [REDACTED] le Procureur inclut-il le viol allégué en détention dans les mauvais traitements qualifiés d’actes inhumains et atteintes à la dignité? Voir DCC, paragraphes 628 et 634 faisant référence à [REDACTED].

Quelle était la « prison des femmes », la BMS ou l’ancienne prison située au camp de la Garde nationale ?

¹⁴ [REDACTED]
¹⁵ See e.g. [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

was used by the members of the groups as a cell. The Prosecution is not aware of any men detained in this small room.

Question B.5²¹: ‘Violences sexuelles’

8. The acts of rape, sexual slavery and forced marriage underlying Charges 8 to 12 of the DCC are understood as crimes that would occur in the ordinary course of events as a result of implementing the common plan.²² The co-perpetrators, including **AL HASSAN**, intended these crimes in the meaning of article 30(2)(b), in the sense that they were aware from the outset that these crimes would occur in the ordinary course of events. This followed, in line with the common plan, from: (a) imposing the Organisation’s ideological and religious vision that all sexual relations between males and females were only permitted under the guise of a so-called “marriage” (as understood in the terms of their ideology); (b) their view of women as sexual objects²³; (c) their intention to impose their ideological and religious vision upon the population of Timbuktu including by force and coercion; and (d) the fact that this practice, of marriages between members of the Organisation and local women and girls was further encouraged and supported by the Organisation.²⁴ In these circumstances, the co-perpetrators, including **AL HASSAN**, were aware that in the ordinary course of events: (a) women and girls in Timbuktu would be compelled to “marry” members of the Organisation in coercive circumstances where the perpetrator could abuse their positions of power; and (b) once the victims were under the power and authority of their “husband”, they would not be able to freely express their choice and would be forced to have non-consensual sex.

Question B.6²⁵: ‘Violences sexuelles’

9. This question is addressed to the Legal Representative for Victims.

²¹ Les actes de viols, esclavages sexuels et mariages forcés sont-ils entendus par le Procureur comme ayant fait partie du plan commun, dès le début de l’attaque sur Tombouctou ou ont-ils été ajoutés au plan commun postérieurement ? Dans la seconde hypothèse, à partir de quelle date estime-t-elle que ces actes ont fait partie intégrante du plan commun ?

²² T-005-CONF-FRA-ET, p.4. 1.26-p.5, 1.4.

²³

Comme évoqué par les Représentants légaux des victimes (Observations des Représentants légaux des victimes, paras 34, 38-40), quels seraient les éléments de preuve établissant le fait que les victimes étaient repérées (et ainsi visées) par les groupes armés selon leurs établissements scolaires et selon certains quartiers de Tombouctou, notamment Bella-Farandi, traduisant un « lieu de vie traditionnellement dédié aux esclaves ‘Bella’ » ?

Question B.7²⁶: ‘Violences sexuelles’

10. The Prosecution submits that there is no inconsistency in this regard. The members of AQMI and Ansar Dine and the Organs they created (“Organisation”) sought to install an Islamic state in the north of Mali, imposing their ideological and religious vision upon the region, including Timbuktu.²⁷ The Organisation therefore occupied Timbuktu with the intention to remain. The fact that the Organisation imposed their own new rules also clearly indicated their intention to control the town and replace the authority of the Malian government. The armed groups declared that it was their rules that applied in Timbuktu.²⁸ Indeed, Sanda Ould BOUMAMA said that they were trying to establish their religion and rejected any ideas or solutions that contradicted their own religion or any constitution or system except Sharia law.²⁹ [REDACTED] the intention of the armed groups to create a new generation merged with the jihadists as a result of sexual relations with women from Timbuktu.³⁰
11. However, the leaders of the Organisation were also realistic and conscious of the fact that they may need to leave Timbuktu because of the potential threat posed by the Malian army, in particular due to the support they could receive from international forces.³¹ Indeed this threat was realised when international forces and the Malian army, during *Opération Serval* launched in January 2013, succeeded in ousting the Organisation from Timbuktu.³² This was after the groups tried to reach Bamako, and launched for this purpose the attack on Konna and Diabali.³³ [REDACTED] accepted the possibility of short-term marriages as being compatible with their rules.³⁴
12. There are clear distinctions between traditional marriages celebrated in Timbuktu and the so-called marriages many women in Timbuktu were forced into by members of the armed groups. These were not “traditional forms of Islamic marriage”³⁵ agreed in

²⁶ Comment réconcilier l’affirmation du Procureur selon laquelle les mariages forcés permettaient « de créer une ‘nouvelle génération’ de djihadistes qui aurait fusionné avec la population locale » (DCC, paras 767, 790) avec

[REDACTED] ? Quelles sont les différences (culturelles, pratiques...) entre les mariages traditionnels maliens et les mariages prétendument imposés par les groupes armés pendant la période concernée?

²⁷ DCC, para. 44, 52.

²⁸ DCC, para.219, [REDACTED]

²⁹ DCC, para.223, fn. 569; Media Article, MLI-OTP-0001-3271, p.3272.

³⁰ [REDACTED]

³¹ [REDACTED]

³² DCC, para. 89,

³³ [REDACTED]

consensual circumstances, where unarmed individuals approached a prospective spouse and family either alone or with other family, with money for dowries coming from them or their families. Instead, these were unions forced through intimidation in the context where the city was under constant control of armed groups known to use violence and feared by everybody, depriving people of freely consenting. The usual pattern of these ‘marriages’ instead involved armed men with other armed men, at times joined by leaders such as **AL HASSAN** - known to wield power in the city – appearing at the family home or propositioning their victims in streets, with offers of money financed by their superiors. In some instances, there were threats or physical violence used from the outset if the victim or parent refused.³⁶ Moreover, the elements of traditional Malian marriages that were missing from the forced marriages included the marriage ceremony and the act of accompanying the married woman to the home of her husband.³⁷

Question B.8³⁸: ‘Violences sexuelles’

13. The perception the victims had, or still have, of their status as so-called wives of jihadists is rather personal. Certain victims, for example, still live with the fear that their so-called “ex-husband” would come back to Timbuktu to look for them, alleging that they are still married.³⁹ It is however clear from all the victims’ statements that their status as so-called wives of jihadists placed them in a particular vulnerable situation, at the time, and that they were aware of this vulnerability. Once married, they were exposed, more than any other resident of Timbuktu, to the power and brutality of the members of the Organisation under whose control they were.
14. The victims viewed themselves as forced “wives” to the members of the Organisation they were coerced to marry, even if they did not agree or accept this status. They were ashamed to even recount their so-called marriages.⁴⁰

Question B.9⁴¹: ‘Violences sexuelles’

15. Women who were coerced to marry members of the Organisation experienced a significant degree of stigmatisation arising from the forced marriages.⁴² This stigmatisation was distinct from, and in addition to, that which arose from the sexual

³⁶ See Section 8.5 of the DCC. See also e.g. T-005-CONF-ENGCT, p.5, l.2-p.15, l.17.

³⁷ T-005-CONF-FRA-ET, p.8. l.11-18.

³⁸ Quelle est la perception des victimes quant à leur statut allégué de « femme/épouse » des membres des groupes armés ?

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⁴⁰

Est-il possible d’apporter de plus amples informations sur la stigmatisation dont les victimes auraient souffert pendant ou après leurs mariages forcés allégués à des membres des groupes armés (en les distinguant du préjudice subi suite aux violences sexuelles prétendument subies en tant que telles) ?

⁴² T-005-CONF-FRA-ET, p.7. l.19-p.8, l.10.

violence these women were subjected as purported wives of the members of the armed groups. They were ostracised in society, with other people accusing them of marrying the members of the armed groups for financial gain.⁴³

Question B.10⁴⁴: ‘Violences sexuelles’

16. Women and girls forced to marry members of the Organisation, as well as the children who were born from the rapes committed during these forced marriages, suffer from long-term prejudice. These females and the children they bore as a result of their forced marriages were ashamed and scared to leave their homes.⁴⁵ It was difficult to register the children’s births due to the lack of any documentation establishing the marriages.⁴⁶ In addition, like other children born at this time, the children could not obtain any birth certificates due to the absence of government services during the occupation.⁴⁷ The children did not receive any financial support from the members of the Organisation who had fathered them.⁴⁸ These women were also doubly prejudiced, as not only were they ostracised as a result of having been the purported wife of a member of the Organisation, but were also unlikely to be able to marry as they already had children.⁴⁹

Question B.11⁵⁰: ‘Condemnations’

17. Members of the Islamic Tribunal were also concomitantly members of the executive power in control of Timbuktu including Abdallah AL CHINGUETTI, who was a member of the presidency, Ahmed AL MAHDI and Mohamed MOUSSA who were the first and second head of *Hesbah* respectively, and Radwan who was a member of the media office.⁵¹
18. For instance, Abdallah AL CHINGUETTI, while being a member of the presidency was appointed at the same time to be a member of the Islamic Tribunal and to supervise the work of the *Hesbah*.⁵² He participated in the implementation of the common plan in his capacity as a member of the presidency, and for instance participated in the destruction

⁴³ [REDACTED].
⁴⁴ Comme évoqué par les Représentants légaux des victimes (Observations des Représentants légaux des victimes, paras 61-66), quelles seraient les conséquences sur le long terme pour les femmes prétendument victimes de mariages forcés et les enfants qui en auraient été issus?

⁴⁵ [REDACTED]
⁴⁶ [REDACTED]
⁴⁷ [REDACTED]
⁴⁸ [REDACTED]
⁴⁹ [REDACTED]

⁵⁰ Quels sont les éléments de preuve qui établiraient, à la norme d’administration de la preuve requise, que les juges du Tribunal islamique exerçaient également d’autres fonctions, notamment au niveau de l’exécutif, de façon concomitante avec leurs fonctions judiciaires?

⁵¹ [REDACTED]
 [REDACTED]
 [REDACTED]
 DCC, evidence cited in support of paras. 247, 426 and [REDACTED]
 [REDACTED]

of the shrines.⁵³ HOUKA HOUKA, the president of the tribunal who issued and signed the judgments, was influenced in his decisions including by AL CHINGUETTI and Radwan.⁵⁴

19. Radwan, while being a member of the Islamic Tribunal, was also a member of the media office and participated in imposing the sanctions on the civilian population and in the destruction of the shrines.⁵⁵
20. Similarly, AL MAHDI and Mohammed MOUSSA were both members of the Islamic tribunal, while also part of the *Hesbah*.⁵⁶ AL MAHDI was the head of the *Hesbah* from May to around August 2012, succeeded by Moussa, who headed the *Hesbah* from August to December 2012.⁵⁷ [REDACTED]
[REDACTED] [REDACTED] [REDACTED].⁵⁸
21. Upon the arrest of [REDACTED] Mohamed MOUSSA participated in all phases of their case, the interrogation at the police station, hearing the case and rendering the sentence at the tribunal, and the implementation of the sentence in public.⁵⁹

Question B.12⁶⁰: ‘Condemnations’

22. HOUKA HOUKA participated in numerous meetings with the leaders of Ansar Dine and AQIM, the purpose of which was to advance the common plan and the policy of the armed groups in a manner that at a minimum undermined the perception of his impartiality.⁶¹ These meetings included an initial meeting with Abou ZEID and Iyad AG GHALY when HOUKA HOUKA agreed to cooperate with them.⁶² [REDACTED]
[REDACTED] [REDACTED] [REDACTED]
[REDACTED]
[REDACTED] HOUKA HOUKA, Abou ZEID, AL MAHDI, AL HASSAN, Abdallah AL CHINGUETTI [REDACTED]
[REDACTED]
[REDACTED] This demonstrates that HOUKA HOUKA was involved with the other leaders of the Organisation in planning staged demonstrations aimed at advancing

⁵³ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] DCC, paras. 247, 426 and [REDACTED]. E.g. [REDACTED]
[REDACTED]

[REDACTED] DCC, para. 255.

⁵⁶ [REDACTED].

⁵⁷ DCC, para. 137.

⁵⁸ [REDACTED]

⁵⁹ DCC, paras 457 and 458. E.g. [REDACTED].

⁶⁰ En quoi la présence de Houka Houka à certains événements (DCC, par. 425) prouverait sa partialité en tant que juge du Tribunal islamique?

⁶¹ DCC, para. 425.

⁶² [REDACTED].

23. Similarly, HOUKA HOUKA [REDACTED]

[REDACTED].⁶⁴ He [REDACTED]

[REDACTED].⁶⁵ Further, HOUKA HOUKA [REDACTED]

[REDACTED].⁶⁶ HOUKA HOUKA's close affiliation with the leaders of the armed groups and active participation in their political and military activities, when considered together with the other relevant factors discussed in the DCC as to the fundamental flaws of the Islamic Tribunal,⁶⁷ show that he lacked the independence and impartiality expected of a judge of a regularly constituted tribunal within the framework of article 8(2)(c)(iv) of the ICC Statute.⁶⁸

Question B.13⁶⁹: 'Condemnations'

24. The first two documents⁷⁰ are part of a series of documents [REDACTED] from the BMS [REDACTED] and hotel "La Maison" [REDACTED], the headquarters of the Islamic Police and the Islamic Tribunal respectively during the 2012/2013 events.⁷¹

25. [REDACTED]

[REDACTED].⁷² [REDACTED]

⁶³ [REDACTED]

⁶⁴ [REDACTED]

⁶⁶ DCC, para. 425.

⁶⁷ DCC, section 8.1.1.1.

⁶⁸ T-004-CONF-ENG-ET, p.31, l.15-p.32, l.14.

⁶⁹ Indiquer la provenance des documents dont la source est indiquée comme étant la Section des sciences criminalistiques du Bureau du Procureur, voir par exemple: [REDACTED]

⁷² [REDACTED]

26. [REDACTED]

[REDACTED] 73

[REDACTED] 74 [REDACTED]

[REDACTED]

[REDACTED] 75

27. During its investigations, the Prosecution has presented many of the documents [REDACTED] and by the OTP in its June 2013 mission to AL HASSAN himself as well as other witnesses who confirmed their origin, content, author and/or the stamp of the Islamic police and the Islamic Tribunal when applicable.⁷⁶

Question B.14⁷⁷: ‘Condemnations’

28. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].⁷⁸ The judgment demonstrates that the tribunal was aware that the accused had been tortured and had

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Le Procureur peut-elle préciser les faits contenus dans

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confessed under the influence of torture, but nevertheless based its decision to convict and sentence him to pay a fine partly based on the confession obtained through torture.

Question B.15⁷⁹: ‘Condemnations’

29. Although document [REDACTED] is not explicitly labelled as a judgment of the Islamic tribunal, the Prosecution submits that it can be reasonably concluded to be a judgment based on the following factors. First, the document appears on a page in the middle of a notebook [REDACTED]⁸⁰ [REDACTED] from *Hotel La Maison*, which was the seat of the Islamic Tribunal. Second, it is part of a notebook that contains sufficient indicia to attribute it to the Islamic tribunal such as the names of the judges of the Islamic tribunal and a list of cases.⁸¹ The name of the judge HOUKA HOUKA appears on page [REDACTED] with names of other members of the tribunal. Finally, the same notebook contains many handwritten judgements and proceedings. Some of them correspond to typewritten judgments separately collected by the Prosecution. The name of the Islamic tribunal and the signature of the presiding judge appear in the documents separately collected. For instance, in two cases concerning magic: first, [REDACTED]⁸² and secondly, against [REDACTED]⁸³

Question B.16⁸⁴: ‘Condemnations’

30. Similar to the previous response, this judgment also appears on a page in the middle of the same notebook [REDACTED] from the *Hotel La Maison*, which was the seat of the Islamic Tribunal during the temporal period of the charges.⁸⁵
31. This judgment follows cases decided on 23 May 2012 in the notebook.⁸⁶ The next case decided in the notebook is dated 11 June 2012.⁸⁷ From this it can be reasonably inferred that this judgment is dated between 23 May 2012 and 11 June 2012.

⁷⁹ La Chambre constate que [REDACTED]

[REDACTED] Sur quelle base [REDACTED]

[REDACTED] ?

⁸¹ [REDACTED]

⁸² [REDACTED]

La Chambre constate que le document [REDACTED]

[REDACTED] Sur quelle base [REDACTED]

[REDACTED] ?

⁸⁶ [REDACTED]

⁸⁷ [REDACTED]

Question B.17⁸⁸: Torture

32. Where charged incidents involve both flogging and inhumane detention conditions, the Prosecution submits that the Chamber should be careful to ensure that the totality of the relevant conduct is captured by the confirmed charges. The Prosecution further submits that the Chamber should confirm the charged crimes cumulatively, in order to ensure that any future Trial Chamber can decide which charges form the most appropriate basis for any conviction, based on the evidence adduced during the trial. This may include a conviction for some of the crimes charged, or a cumulative conviction for the totality, depending on the Trial Chamber's assessment of the evidence and the applicable legal provisions.
33. For example, the inhumane conditions in which [REDACTED] were detained formed an integral part of their treatment, which also included their flogging. In the Prosecution's view, since the evidence establishes substantial grounds to believe that this conduct constituted multiple offences (including torture as a war crime and crime against humanity, cruel treatment as a war crime, outrages upon personal dignity as a war crime, and other inhumane acts as a crime against humanity), the Chamber should confirm all these charges, and leave a future Trial Chamber in a position then to enter the most appropriate convictions, if the Prosecution's case is proven.

Question B.18⁸⁹: Torture

34. The Prosecution decided not to include a charge of mutilation for the one incident of Dedeou MAIGA's amputation, in addition to the charges on the basis of: the crime of torture as both a war crime and crime against humanity; the war crime of cruel treatment; the crime against humanity of other inhumane acts and war crime of outrages upon personal dignity.
35. The Prosecution considers that there is ample evidence which establishes that this one incident of amputation provides the factual basis for these separate charges.
36. The Prosecution asks that the Chamber confirm all these charges cumulatively, so that the trial chamber may have the flexibility of deciding on which basis **AL HASSAN** be held responsible based on the evidenced adduced, at the end of the trial.

⁸⁸ La Chambre note que pour certains cas (par exemple P-0565 et P-0557), dans le résumé des charges (voir DCC, paras 1048-1049), le Procureur décrit un ensemble de faits allégués (la flagellation, mais aussi les conditions de détention déléteres). Est-ce que le Procureur demande à la Chambre de confirmer cet ensemble de faits allégués sous la seule qualification de torture (voir DCC, par. 1058), et, à défaut, de confirmer cet ensemble de faits sous une autre qualification (par exemple, actes inhumains); ou bien le Procureur demande-t-elle à la Chambre de qualifier uniquement la flagellation alléguée de torture, et séparément, par exemple, les conditions de détention déléteres alléguées de traitements inhumains ?

⁸⁹ Le cas de l'amputation de la main de Dédéou Maiga : si les faits sont établis, ne devraient-ils pas être qualifiés juridiquement de « mutilation » au sens de l'Article 8-2-c-i du Statut et 8-2-c-i-2 des Éléments des crimes ? Pourquoi le Procureur n'a-t-elle pas retenu cette qualification juridique ?

Question B.19⁹⁰: Torture

37. The crime against humanity of other inhumane acts under article 7(1)(k) of the ICC Statute entails, among others, the following key elements:
-) The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
 -) Such act was of a character similar to any other act referred to in article 7(1) of the ICC Statute.
38. The Prosecution submits that the crime against humanity of other inhumane acts is a residual category that covers acts that, although they do not meet the severity threshold for torture, meet the threshold gravity for a crime against humanity where those acts cause suffering, or injury to body or mental health. The Prosecution refers the Chamber in this regard to jurisprudence from international criminal tribunals which illustrate how some incidents fell short of the severity threshold of torture but nonetheless entailed a sufficient degree of suffering or injury so as to amount to the crime against humanity of other inhumane acts.⁹¹

Question C.20.1⁹²: ‘Questions sur la responsabilité alléguée du suspect’

39. The other co-perpetrators who were members of the common plan are as listed in paragraph 241 of the DCC.⁹³ In addition, in paragraph 242, the Prosecution has sought to specify that other, unnamed members of the Organisation may also have been co-perpetrators to the extent that they made essential contributions to implementing the common plan as did the named co-perpetrators. Given the nature of the Organisation, these persons may not be labelled with reference to a particular position in the hierarchy or ‘job description’, but may be identified by their functional role in the charged crimes. Abou DHAR is one such person. Abou DHAR was also a co-perpetrator and member of the common plan.⁹⁴

⁹⁰ À la lecture de la version tant française qu’anglaise de l’article 7-1-f (torture) et 7-1-k (autres actes inhumains) des Éléments des crimes, quelles sont différences entre les éléments constitutifs de ces deux crimes en ce qui concerne le degré de souffrance requis ?

⁹¹ See e.g. ICC-01/09-02/11-382-Red, 23 January 2012, para. 277; *Prosecutor v Delalic*, IT-96-21-T, Judgment, 16 November 1998, para. 542; *Prosecutor v Krnojelac*, IT-97-25, Judgment, 15 March 2003, para. 219.

⁹² La Chambre note qu’au paragraphe 241 du DCC, le Procureur énumère les membres du plan commun, puis au paragraphe 242 du DCC, elle ajoute que « [I]es co-auteurs incluaient en outre d’autres membres de l’Organisation impliqués dans les crimes commis et qui ont soutenu son action ». Puis, dans les paragraphes 243 à 259, le Procureur qualifie par endroits la contribution d’un individu d’« essentielle » mais ne le fait pas systématiquement. 20.1. Qui seraient les individus qui ont apporté une contribution essentielle au plan commun et qui peuvent donc être qualifiés de co-auteurs directs/indirects au sens de l’article 25-3-a du Statut ? Veuillez préciser les éléments de preuve étayant votre réponse. La défense et les représentants légaux de victimes peuvent également faire des observations à ce sujet.

⁹³ T-005-CONF-ENG-CT, p.75, l.25-p.76, l.2.

⁹⁴ DCC, para. 116, 122, 320, 367, (fn. 908), 371, 551, 571-573, 608, 655-656, 683, 723, 726, 769, 771, 835, 838, 846, 965, 1001, 1026, 1052, and 1056.

40. The Appeals Chamber in *Lubanga* stated that: “the accused must be provided with detailed information regarding [...] (iii) the identities of any alleged perpetrators”.⁹⁵ The Prosecution has done so.⁹⁶ The Prosecution also observes that the ICTY and ICTR have held that even at the conclusion of trial: “there is no requirement to specifically identify each of the persons involved in a joint criminal enterprise”;⁹⁷ and more specifically, that the requirement to “identify the plurality of persons belonging to the JCE” does not make it “necessary to identify by name each of the persons involved”.⁹⁸ It may be sufficient instead “to refer to categories or groups of persons”, provided that the Trial Chamber is not overly vague.⁹⁹ The case law on JCE at the ICTY and ICTR is relevant in the context of identifying the co-perpetrators to the common plan under article 25(3)(a), even though technically speaking, JCE is not a mode of liability in the Rome Statute.

Question C.20.2¹⁰⁰: ‘Questions sur la responsabilité alléguée du suspect’

41. **AL HASSAN** exercised joint control over the Organisation in his functions and role as *de facto* commissaire, and acting in the name of the Émir, within the Islamic police.
42. It is not necessary to prove that **AL HASSAN** or any of his co-perpetrators, because of their precise role or authority within the Organisation, was individually in a position to control the Organisation. Instead, it is necessary to prove that the control was exercised by the co-perpetrators jointly.¹⁰¹ Moreover, whilst compliance with orders is one way of demonstrating this power it is not the only way.¹⁰² Therefore it is not necessary to prove that **AL HASSAN** had any elevated or decision-making role - or that he had the power to *stop* the charged crimes from occurring at all¹⁰³ - to show that he could frustrate implementation of the common plan, or crimes committed pursuant to execution of that

⁹⁵ ICC-01/04-01/06-3121-Red, para.123.

⁹⁶ See e.g. DCC, Section 8.

⁹⁷ *Prosecutor v Karamera*, ICTR-98-44-A, Appeals Judgment, 29 September 2014, para. 150.

⁹⁸ *Prosecutor v. Gotovina et al.*, IT-06-90-A, Appeal Judgement, 16 November 2012, para. 89; *Prosecutor v. Br anin* IT-99-36-A, Appeal Judgement, 3 April 2007, para. 430.

⁹⁹ *Prosecutor v. Krajisnik*, IT-00-39-A, Appeals Judgment, 17 March 2009, para.156-157.

¹⁰⁰ M. Al Hassan avait-il lui-même la « capacité de faire obstacle » à la commission des crimes qui lui sont reprochés comme co-auteur direct et indirect au sens de l'article 25-3-a du Statut ? Si oui, de quelle manière ? Veuillez préciser les éléments de preuve étayant votre réponse. La défense et les représentants légaux de victimes peuvent également faire des observations à ce sujet.

¹⁰¹ See e.g. ICC-01/04-01/06-2842, para. 994; ICC-01/05-01/13-1989-RED, para. 62; ICC-02/11-02/186, para. 136; ICC-01/04-01/07-717, para.524, 488(b), referring to “joint control over the crime” and control “together with others”; ICC-01/04-01/07-717, para.515-516,518;ICC-01/09-02/11-382-RED, para.297; ICC-01/09-01/11-373, para.292; ICC-01/05-01/08-14-tENG, para.78.

¹⁰² See e.g. Thomas Weigend, ‘Perpetration through an Organisation: The Unexpected Career of a German Legal Concept’, 9 Journal of International Criminal Justice 1, pp.95-101 (noting that under the theory as originally articulated, the touchstone is the dominance enjoyed by the perpetrator behind the perpetrator, not orders as such).

¹⁰³ Cf. Defence Submissions, para.164.

plan.¹⁰⁴ As the Appeals Chamber recently confirmed, for the purposes of article 25(3)(a) a person may make an essential contribution as a co-perpetrator within the framework of the common plan, if their contribution was such that without it, the crimes could not have been committed or they “would have been committed in a significantly different way”.¹⁰⁵

43. Contrary to the Defence’s arguments, the Appeals Chamber’s alternative test - that without the contributions the crimes “would have been committed in a significantly different way”¹⁰⁶ - is applicable to this case: (a) it was an interpretation of article 25(3)(a) in general and not specific to article 70 rather than article 5 crimes;¹⁰⁷ and (b) it is wrong to argue that the Appeals Chamber’s common plan theory does not apply because Bemba was the “architect of the common plan” whilst **AL HASSAN** was not.¹⁰⁸ The Defence is attempting to turn evidentiary considerations into propositions of law, which is incorrect. The Appeals Chamber was not making any legal finding whereby being the architect of the common plan becomes an elevated form of an essential contribution. Indeed, the Appeals Chamber explicitly stated that essential contributions to implementing the common plan can be made in different ways and need not even be criminal in and of themselves.¹⁰⁹ This confirms that a person may make an essential contribution under article 25(3)(a) without necessarily directly perpetrating one or more crimes him or herself. The contributions to the plan can be made at any stage.¹¹⁰
44. Moreover, it is incorrect for the Defence to argue that the charged crimes would have happened significantly in the same manner irrespective of whether **AL HASSAN** was in Timbuktu or not.¹¹¹ The question is not what would have happened if **AL HASSAN**, the individual, was present or not in Timbuktu. The question is whether the crimes would have happened in significantly the same way if he did not make his essential contributions to the plan that he made in the role and functions he exercised within the Islamic police. For instance, Trial Chamber I in *Lubanga* referred to the “power to frustrate the commission of the crime *by not performing [the] tasks*”.¹¹²

¹⁰⁴ ICC-02/04-01/15-422-Red, para.38.

¹⁰⁵ ICC-01/05-01/13-2275-Red, para.820. *See also* T-005-CONF-ENG-CT, p.77, l.11-p.79, l.1.

¹⁰⁶ *See* ICC-01/05-01/13-2275-Red, para.820.

¹⁰⁷ Cf. T-006-CONF-ENG-ET, p.37, l.9-23.

¹⁰⁸ T-006-CONF-ENG-ET, p.35, l.21-p.37, l.23.

¹⁰⁹ *See* ICC-01/05-01/13-2275-Red, para. 910.

¹¹⁰ *See* ICC-01/04-01/06-3121-Red, paras.469, 473; ICC-01/05-01/13-2275-Red, para.810 and 819; ICC-01/05-01/13-1989-Red, para.69.

¹¹¹ T-006-CONF-ENG-ET, p.37, l.24-p.38, l.3.

¹¹² ICC-01/04-01/06-2842, para.989.

45. **AL HASSAN** could frustrate the commission of crimes because without his essential contributions, the crimes would have been committed in a significantly different way. This is particularly reflected by the importance of the contributions that he made as *de facto* commissaire of the Islamic police, or in the name of the Émir.¹¹³
46. **AL HASSAN**'s primary role was ensuring that the police functioned effectively. The police were omnipresent from monitoring and punishing the population to the destruction of the mausoleums.¹¹⁴ **AL HASSAN** was a key and important leader within the Islamic police.¹¹⁵ **AL HASSAN** carried out crucial activities as the *de facto commissaire* of the Islamic police. This included powers that he could exercise in the name of the Émir of the police in implementing the common plan, which impacted on nearly every aspect of the lives of the local civilians.
47. The Prosecution does not need to prove, however, that he was omnipresent and contributed to every aspect of the plan. However, without all of his essential contributions, the crimes would not have been carried out as effectively or as extensively in the same way. For instance, there would not have been the same coordination for the police, or its work with other organs including the Tribunal (to whom cases were referred by him) and the *Hesbah* (who received support from the police in patrols). Tellingly, **AL HASSAN** was maintained in his key position throughout the occupation. He was indispensable to the work of the police – from handling complaints (including enforcement of their adultery rules), investigating and drafting reports used by the Islamic tribunal, using his power, influence and language skills in dealing with the population. The Defence conceded, regarding **AL HASSAN**'s evidence concerning his role in drafting of the Islamic police reports, that "he was one of the few people in the police who could do so."¹¹⁶

Question C.20.3¹¹⁷: 'Questions sur la responsabilité alléguée du suspect'

48. **AL HASSAN** is a co-perpetrator whose essential contributions to the realisation of the common plan began from the start of the common plan in early April 2012 through his important role in the Islamic police. Throughout the relevant period, the Islamic police

¹¹³ See e.g. DCC, para.24 and 261. For instance, some viewed him as the successor of ADAMA and as Chief of the Islamic police (DCC, para.24, footnote 70). He also signed official documents on behalf of the Islamic police in June and November 2012, in the name of the Émir of the Islamic police. See e.g. [REDACTED]

DCC, para. 118-134.

¹¹⁵ DCC, para. 24 and 261.

¹¹⁶ Defence Submissions, para. 193.

¹¹⁷ À partir de quel moment M. Al Hassan pourrait-il être qualifié de co- auteur au sens de l'article 25-3-a eu égard au caractère essentiel de sa contribution alléguée ? Veuillez préciser les éléments de preuve étayant votre réponse. La défense et les représentants légaux de victimes peuvent également faire des observations à ce sujet.

the ordinary course of events, commit the type of offences charged.¹²⁶ The Appeals Chamber stated:

With respect to witnesses D-23 and D-26, the Appeals Chamber reiterates that it was *not necessary for the Trial Chamber to enter specific findings on Mr Mangenda's knowledge with respect to each witness's false testimony in order to incur criminal liability* as a co-perpetrator. ...[T]he Trial Chamber found that Mr Mangenda's essential contribution to the common plan indicated his *intent to engage in the illicit interference with defence witnesses* and that he knew and intended that the 14 witnesses would provide false testimony. The Appeals Chamber considers such finding sufficient for the purposes of liability as a co-perpetrator....¹²⁷

52. Accordingly, contrary to the Defence's arguments,¹²⁸ it is sufficient under article 25(3)(c) to refer to the Suspect being aware that members of the Organisation would commit, in the ordinary course of events, the crimes charged (i.e. the 'type' of crime, in the sense of its nature, rather than the details of particular incidents) as set out in counts 1 to 6 and 13.¹²⁹ Similarly, contrary to what the Defence has asserted,¹³⁰ it is sufficient under article 25(3)(d) to refer to **AL HASSAN** intentionally providing his contributions (in the sense of article 30(2)(b)) with awareness that members of the Organisation acting together, would commit, in the ordinary course of events, the crimes charged (i.e. the 'type' of crimes) set out in counts 1 to 13 .¹³¹
53. Moreover, as regards article 25(3)(a), the Appeals Chamber further confirmed that it is not necessary to prove that a co-perpetrator made an intentional contribution to each of the specific crimes or criminal incidents,¹³² provided that the crimes or incidents occurred within the framework of the common plan.¹³³ The Appeals Chamber reasoned:

Depending on the circumstances, co-perpetration may cover situations in which, at the time the common plan is conceived, the exact contours of all the crimes or offences that will be committed as part of the plan's implementation are not yet known; in addition, actions of an accused person not made at the execution stage

¹²⁶ ICC-01/05-01/13-2275-Red, para.1308. Albeit in the context of joint criminal enterprise, *see, e.g., Prosecutor v Sainovic et al.*, IT-05-87-A, para.1491; *Prosecutor v Kvočka et al.* para.276.

¹²⁷ Emphasis added. *See* ICC-01/05-01/13-2275-Red, para.1308.

¹²⁸ Defence Submissions, para.10.

¹²⁹ DCC, para.1038.

¹³⁰ Defence Submissions, para.10.

¹³¹ DCC, para.1039.

¹³² *See* ICC-01/05-01/13-2275-Red, para.812 and 821. *See also* T-007-CONF-ENG-ET, p.11, l.14-p.12, l.9.

¹³³ *See* ICC-01/05-01/13-2275-Red, para.812 and 821. *See also* ICC-01/04-01/06-3121-Red, para.445; ICC-01/05-01/13-2275-Red, para.1307, 1029; T-005-CONF-ENG-CT, p.76, l.19-p.77, l.1; T-007-CONF-ENG-ET, p.11, l.14-p.12, l.9.

*may nevertheless be a basis for finding that he or she made an essential contribution. Requiring that each co-perpetrator make an intentional contribution to each of the specific crimes or offences that were committed on the basis of the common plan would be clearly incompatible with the above.*¹³⁴

54. The Defence is incorrect to suggest that article 30 requires actual knowledge of crimes or certainty of the crimes that would be committed.¹³⁵ Rather, it suffices that **AL HASSAN** was: (a) aware that certain crimes would occur in the *ordinary course of events* as a consequence of the common plan; and (b) made an essential contribution to the plan with that knowledge. Moreover, it was not necessary that his awareness extended to the details of particular criminal incidents.¹³⁶ He merely required awareness of the nature of the crimes (i.e. the type of crime) which followed from the common plan.

Question C.22¹³⁷: ‘Questions sur la responsabilité alléguée du suspect’

55. The Prosecution is not relying on the mode of liability of indirect perpetration.¹³⁸

Question C.23¹³⁹: ‘Questions sur la responsabilité alléguée du suspect’

56. The Islamic police, Hesbah and Islamic tribunal were all created from about April 2012.¹⁴⁰ The security battalion appears to have been created sometime earlier, but it is unclear exactly when this took place.¹⁴¹ Each organ was headed by a different individual.¹⁴² The security battalion was headed by Abou Talha.¹⁴³ According to **AL HASSAN**, the Islamic police was involved in patrols within the town and “correcting objectionable acts” such as drinking alcohol, smoking and a woman adorning herself. The police also ran the town’s affairs, particularly with respect to traffic and the market. It also ensured the whole town’s security by day and by night.¹⁴⁴ The police was in

¹³⁴ ICC-01/05-01/13-2275-Red, para. 821.

¹³⁵ Defence Submissions, para.206, 211, 220, 239.

¹³⁶ Defence Submissions, para.206.

¹³⁷ La Chambre note que le Procureur a utilisé la qualification d’« auteur indirect » au paragraphe 398 du DCC. Cette qualification n’est toutefois pas reprise ailleurs. S’agit-il d’une erreur ?

¹³⁸ T-005-CONF-ENG-CT, p.67, l.22-23.

¹³⁹ À quelles dates/ périodes précises les différentes entités (police islamique, tribunal islamique, sécurité islamique ou « bataillons de sécurité » etc.) de l’ « Organisation » ont-elles été créées? À quel moment sont intervenues la sécurité islamique et la police islamique ? Quelle est la différence entre ces deux entités ? Veuillez indiquer les éléments de preuve pertinents afin d’étayer votre réponse. La défense et les représentants légaux de victimes peuvent également faire des observations à ce sujet.

¹⁴⁰ DCC, para. 118, 135 and 139; T-003-ENG-CT, p.58, l.18-19 ;

¹⁴² See Section 4.3 of DCC.

¹⁴³ See Section 4.3 of DCC.

¹⁴⁴

charge of the prison,¹⁴⁵ issued permits for various activities,¹⁴⁶ summonsed people,¹⁴⁷ received and settled a variety of complaints,¹⁴⁸ including those dealing with serious matters such as adultery,¹⁴⁹ theft¹⁵⁰ and murder.¹⁵¹ During the initial months of the occupation, one of the responsibilities of the Islamic police was to guard the entry points into Timbuktu. Following a restructuring, the security battalion took over this responsibility.¹⁵² Those in charge of the entry points would screen all people and vehicles entering the town for any contraband items such as cigarettes and alcohol.¹⁵³ In this regard, the Islamic Police and the Security battalion were different.

Question C.24¹⁵⁴: ‘Questions sur la responsabilité alléguée du suspect’

57. The various organs of the armed groups regularly worked together in a coordinated fashion. The Islamic police and members of the Hesbah, for instance, conducted joint patrols. The security battalions request assistance from the Islamic police. The Islamic police worked closely with the Islamic tribunal. **AL HASSAN** sent reports and cases to the tribunal, and the Islamic police obtained authorisation from the tribunal to interrogate suspects using torture, punished civilians including by floggings, and helped destroy the mausoleums.¹⁵⁵ [REDACTED] **AL HASSAN** [REDACTED]
[REDACTED]¹⁵⁶ [REDACTED]
[REDACTED]. Moreover, it was **AL HASSAN** [REDACTED]
[REDACTED].¹⁵⁷

¹⁴⁵ [REDACTED]

¹⁴⁸ See e.g. [REDACTED]

See e.g. [REDACTED]

See e.g. [REDACTED]

See e.g. [REDACTED]

T-003-ENG-CT, p.58, 1.8-17.

¹⁵³ T-003-ENG-CT, p.60, 1.17-19; [REDACTED]

Les différentes entités de l' « Organisation » (la police islamique, la sécurité islamique ou les bataillons de sécurité, le tribunal islamique, etc.) agissaient- elles de manière coordonnée au quotidien ? Veuillez indiquer les éléments de preuve à l'appui de votre réponse. La défense et les représentants légaux de victimes peuvent également faire des observations à ce sujet.

¹⁵⁵ T-005-CONF-ENG-CT, p.88, 1.23-p.89, 1.11; DCC, paras 392-398; [REDACTED]

Defence Submissions, para.230.

¹⁵⁷ [REDACTED]

Question C.25¹⁵⁸: ‘Questions sur la responsabilité alléguée du suspect’

58. The Islamic police played a central role in the commission of alleged crimes against Timbuktu’s civilian population.¹⁵⁹ Islamic police were involved in all aspects of the implementation of the armed groups’ common plan, such as the execution of sanctions imposed by the Islamic tribunal, notably floggings and one amputation. Islamic police were present at the destruction of mausoleums and other protected monuments. Its members were visible throughout the town, conducting patrols day and night, burning seized contraband such as alcohol and cigarettes.¹⁶⁰ The Islamic police occupied two of the most prominent buildings in Timbuktu, first the BMS, then the *Gouvernorat*, which was the most important administrative building in Timbuktu.¹⁶¹ As described under question 23, the police was in charge of the prison, issued permits for various activities, summonsed people, received and settled a variety of complaints, including those dealing with serious matters such as adultery, theft and murder. The Islamic police (**Al HASSAN**) also had the authority to investigate members of the Organisation itself, including complaints against the Émir of the police ADAMA,¹⁶² security battalion members,¹⁶³ and members of Ansar Dine.¹⁶⁴ (Indeed, the police also enabled crimes by not investigating or halting crimes even though they had the power to do so).¹⁶⁵ The Islamic police consisted of around 40 men, more than that of the Hesbah and had more equipment such as weapons and vehicles.¹⁶⁶ Newly arrived members of the armed groups registered with the Islamic police.¹⁶⁷

Question C.26¹⁶⁸: ‘Questions sur la responsabilité alléguée du suspect’

¹⁵⁸ Quel était le degré de contribution de la police islamique à la répression alléguée de la population civile de Tombouctou ? Veuillez indiquer les éléments de preuve à l’appui de votre réponse. La défense et les représentants légaux de victimes peuvent également faire des observations à ce sujet.

¹⁵⁹ T-007-CONF-FRA-ET, p.5, l.26–p.7, l.21;

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¹⁶⁵ See e.g. *Prosecutor v Stanisic and Zupljanin*, IT-08-91-A, Judgment, 30 June 2016, para.109-112.

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¹⁶⁸ À quelle date/période précise « Oumar Ould Mohamed Gulam Al Ghalawi » dit « Adam », qui selon le Procureur était le premier émir de la police islamique, a été remplacé par « Khaled Abou Souleymane », qui d’après le Procureur était le deuxième émir de la police islamique ? Veuillez indiquer les éléments de preuve étayant votre réponse. La défense et les représentants légaux de victimes peuvent également faire des observations à ce sujet.

59. According to **AL HASSAN** and [REDACTED], Khaled Abou SOULEYMANE replaced ADAMA as the Émir or chief of the Islamic Police in the latter part of the occupation of Timbuktu, or within the last two to three months of the occupation. The evidence is not specific on this issue. An estimated period would therefore be between November 2012 and January 2013.¹⁶⁹

Question C.27¹⁷⁰: ‘Questions sur la responsabilité alléguée du suspect’

60. Abou DHAR possessed some level of authority and responsibility (“*petit responsable*”) within the Islamic police. However he was subordinate to **AL HASSAN**. ADAMA, KHALED and **AL HASSAN** were deemed to be the leaders (“*grands responsables*”) of the Islamic police.¹⁷¹

Question C.28¹⁷²: ‘Questions sur la responsabilité alléguée du suspect’

61. [REDACTED] stated that training occurred in preparation for [REDACTED] attack.¹⁷³ [REDACTED] confirmed that there was training in November 2012.¹⁷⁴ [REDACTED] corroborates the timing provided by [REDACTED] explains that it was in the beginning of November [REDACTED]¹⁷⁵ [REDACTED]¹⁷⁶ [REDACTED] also described a meeting in November 2012 in which potential fighting was discussed.¹⁷⁷

Question C.29¹⁷⁸: ‘Questions sur la responsabilité alléguée du suspect’

¹⁶⁹

Au paragraphe 367 du DCC, le Procureur écrit « Abou Dhar faisait également rapport à l’émir de la Police ». Quelle était la position hiérarchique d’ « Abou Dhar » à la police islamique et quelle était sa position par rapport à celle de M. Al Hassan ? Veuillez indiquer les éléments de preuve pertinents afin d’étayer votre réponse. La défense et les représentants légaux de victimes peuvent également faire des observations à ce sujet.

¹⁷¹ T-003- ENG-CT, p.60, l.4-10; [REDACTED].

¹⁷² À quel moment les préparatifs pour [REDACTED] ont-ils eu lieu ? Veuillez indiquer les éléments de preuve pertinents afin d’étayer votre réponse. La défense et les représentants légaux de victimes peuvent également faire des observations à ce sujet.

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¹⁷⁸ Au paragraphe 282 du DCC, le Procureur affirme que M. Al Hassan pouvait donner et transmettre des ordres aux membres de la police islamique « lorsqu’il organisait le travail et distribuait les tâches ». M. Al Hassan ne détenait-il le pouvoir de donner des ordres que dans le contexte de la distribution des tâches ? Pouvez-vous présenter un ou plusieurs exemples, avec référence aux éléments de preuve pertinents, illustrant des ordres précis donnés par M. Al Hassan aux différents membres de la police islamique ainsi que la mise en exécution de ces ordres ? La défense et les représentants légaux de victimes peuvent également faire des observations à ce sujet.

62. In his position as the *de facto Commissaire*, **AL HASSAN** was the “man in charge” of the Islamic police together with ADAMA and KHALED.¹⁷⁹ **AL HASSAN** had authority over members of the Islamic police.¹⁸⁰ **AL HASSAN** also had the authority to issue orders.¹⁸¹ For instance, Abou DHAR, an important figure within the Islamic police [REDACTED] directly received orders from **AL HASSAN**.¹⁸² **AL HASSAN** instructed members of the Islamic police on the behaviour they should adopt when performing their tasks – in relation to people breaching the Organisation’s rules.¹⁸³ For instance, **AL HASSAN** [REDACTED] **AL HASSAN**. **AL HASSAN** [REDACTED] ¹⁸⁴ [REDACTED] **AL HASSAN** [REDACTED] ¹⁸⁵ **AL HASSAN** [REDACTED] ¹⁸⁶ **AL HASSAN** [REDACTED] ¹⁸⁷ When any event took place in Timbuktu which required the attention of the Islamic police, it was **AL HASSAN** who would proceed on-site, prepare a report and issue orders.¹⁸⁸ **AL HASSAN** gave orders prior to a flogging.¹⁸⁹ However, the Prosecution recalls that to demonstrate joint control over the organisation it is not necessary to prove that **AL HASSAN** had the power to issue orders. Such a power is only one potential way of demonstrating the manner in which he shared joint control.¹⁹⁰

Question C.30¹⁹¹: ‘Questions sur la responsabilité alléguée du suspect’

179 [REDACTED]
 180 [REDACTED]
 183 [REDACTED]
 184 [REDACTED]
 186 [REDACTED]
 187 [REDACTED]
 188 [REDACTED]
 189 [REDACTED]

¹⁹⁰ See e.g. Thomas Weigend, ‘Perpetration through an Organisation: The Unexpected Career of a German Legal Concept’, 9 Journal of International Criminal Justice 1, pp.95-101 (noting that under the theory as originally articulated, the touchstone is the dominance enjoyed by the perpetrator behind the perpetrator, not orders as such).

¹⁹¹ Outre ses fonctions relatives à l’organisation des patrouilles de la police islamique alléguées par le Procureur, M. Al Hassan aurait-il eu d’autres fonctions dans le cadre de l’organisation du travail des membres de la police islamique ? Veuillez présenter des exemples précis accompagnés des éléments de preuve pertinents à l’appui de vos affirmations. La défense et les représentants légaux de victimes peuvent également faire des observations à ce sujet.

63. As regards **AL HASSAN**'s functions relating to organising the work of the Islamic police beyond arranging and managing patrols, he ensured that this organ was properly functioning throughout the occupation. **AL HASSAN** himself stated: "*J'organisais le travail de la police*".¹⁹² **AL HASSAN** was first of all in charge of maintaining a register of the members of the Islamic police.¹⁹³ He was responsible for explaining to them their daily tasks.¹⁹⁴ [REDACTED] **AL HASSAN** [REDACTED].¹⁹⁵ He also carried out various administrative tasks. He compiled information on localities, processed applications from men seeking to join the armed groups, and stored copies of decisions of the tribunal.¹⁹⁶

Question C.31¹⁹⁷: 'Questions sur la responsabilité alléguée du suspect'

64. **AL HASSAN** possessed the authority to settle disputes on his own. For instance he mediated complaints where women were forced to remain with unwanted spouses.¹⁹⁸ [REDACTED]
[REDACTED]
[REDACTED] **AL HASSAN** as *commissaire* were the two leaders of the police present. **AL HASSAN** explained to the parties what was required under Sharia law. **AL HASSAN** was the one who settled the dispute despite **KHALED** being present.¹⁹⁹ Moreover, [REDACTED] **AL HASSAN** [REDACTED]
[REDACTED] **AL HASSAN** [REDACTED].²⁰⁰

Question C.32²⁰¹: 'Questions sur la responsabilité alléguée du suspect'

65. **AL HASSAN** had power to discipline members of the Islamic police.²⁰² [REDACTED]
[REDACTED] **AL HASSAN** [REDACTED]

¹⁹² [REDACTED].

¹⁹³ T-004-CONF-ENG-ET, p.11, l.8-9.

¹⁹⁴ [REDACTED].

¹⁹⁵ [REDACTED].

¹⁹⁶ T-004-CONF-ENG-ET, p.11, l.6-8.

¹⁹⁷ Au paragraphe 309 du DCC, le Procureur affirme que M. Al Hassan avait « le pouvoir d'arbitrer et de trancher des litiges ». Pouvez-vous présenter des exemples plus précis où M. Al Hassan aurait tranché un litige *seul* ainsi que les éléments de preuve pertinents à l'appui ? La défense et les représentants légaux de victimes peuvent également faire des observations à ce sujet.

¹⁹⁸ T-005-CONF-ENG-CT, p.82, l.19-p.83, l.4; DCC, para. 348.

¹⁹⁹ [REDACTED].

²⁰⁰ [REDACTED].

Le Procureur affirme au paragraphe 284 du DCC qu'« [M.] Al Hassan pouvait [...] prendre des mesures à l'encontre de membres de la [p]olice islamique s'agissant d'infractions les concernant ». M. Al Hassan avait-il un pouvoir disciplinaire à l'égard des autres membres de la police islamique ? Veuillez présenter des exemples précis et des éléments de preuve à l'appui de votre réponse. La défense et les représentants légaux de victimes peuvent également faire des observations à ce sujet.

²⁰² T-004-CONF-ENG-ET, p.4, l.23-25.

²⁰³ According to [REDACTED], **AL HASSAN** [REDACTED]
 [REDACTED].²⁰⁴ [REDACTED] **AL HASSAN** had to be followed. **AL HASSAN** could punish any police officer otherwise. Members of the Police were scared of being punished. **AL HASSAN** [REDACTED]
 [REDACTED]
 [REDACTED].²⁰⁵

Question C.33²⁰⁶: ‘Questions sur la responsabilité alléguée du suspect’

66. **AL HASSAN** decided on his own about the outcome of cases brought before him, including which ones to refer to the Tribunal. All the signed Islamic police reports collected by the Prosecution, but one, bear **AL HASSAN**’s signature only. The one with two signatures bears ADAMA’s in addition to **AL HASSAN**’s; ADAMA signed merely as a witness. These signed Islamic police reports amount to documentary evidence of **AL HASSAN**’s authority to act on his own.²⁰⁷ **AL HASSAN** admitted that when he signed, his signature sufficed.²⁰⁸ **AL HASSAN** classified the cases into different categories.²⁰⁹ He specifically referred the following types of cases to the tribunal: use of amulets or practice of magic, social cases, adultery, theft, civil cases, murder, a complaint against the Emir of the Police, ADAMA.²¹⁰ The signature of the reports and the referral of these cases, in particular the one concerning the Emir ADAMA, show that **AL HASSAN** took the decisions himself.²¹¹ **AL HASSAN** would decide if a stolen good was a private property or the property of the government and would therefore be registered as the property of Ansar Dine.²¹²

Question C.34²¹³: ‘Questions sur la responsabilité alléguée du suspect’

²⁰³ [REDACTED]
²⁰⁴ [REDACTED]
²⁰⁵ [REDACTED]

²⁰⁶ Pouvez-vous présenter un ou plusieurs exemples précis avec les éléments de preuve pertinents à l’appui où M. Al Hassan aurait décidé *seul* de la suite à donner à une affaire ou du renvoi d’une affaire devant le tribunal islamique ? La défense et les représentants légaux de victimes peuvent également faire des observations à ce sujet.

²⁰⁷ DCC, paras. 300 and 305; [REDACTED]
 [REDACTED]
 [REDACTED]

²⁰⁹ DCC, para 304 and 305; [REDACTED].

²¹⁰ DCC, para. 305.

²¹¹ [REDACTED]
²¹² [REDACTED]

²¹³ Au paragraphe 300 du DCC, le Procureur écrit «[d]e manière notable, tous les rapports de police signés collectés par [le Procureur] portent la seule signature [de M.] Al Hassan à l’exception de l’un d’entre eux qui porte aussi la signature d’Adama comme témoin». M. Al Hassan aurait-il été le seul individu qui rédigeait ce type de documents? Indiquez les éléments de preuve pertinents afin d’étayer votre réponse. La défense et les représentants légaux de victimes peuvent également faire des observations à ce sujet.

67. The Prosecution has no evidence indicating that anyone other than **AL HASSAN** and potentially the Emir of the Police drafted and signed the reports. Out of all of the Islamic police reports collected by the Prosecution, only one contained ADAMA's signature in addition to that of **AL HASSAN**. Even then, ADAMA signed as a witness in that particular report. Nevertheless, [REDACTED] both Khaled, as emir of the Islamic police, and **AL HASSAN** prepared documents on behalf of the Islamic police.²¹⁴

Question C.35²¹⁵: 'Questions sur la responsabilité alléguée du suspect'

68. **AL HASSAN** had autonomy. According to [REDACTED], **AL HASSAN** was the only member of the Islamic police [REDACTED] knew, who was one of the organ's leaders and who also interrogated suspects and prepared police reports. [REDACTED] added that **AL HASSAN** [REDACTED]
[REDACTED].²¹⁶ **AL HASSAN** could himself choose which member of the police to send on patrol.²¹⁷ When any event took place in Timbuktu which required the attention of the Islamic police, it was **AL HASSAN** who would proceed on-site, prepare a report and issue orders.²¹⁸ He could arrest or release someone. [REDACTED]
[REDACTED]
[REDACTED]. **AL HASSAN** [REDACTED]
[REDACTED]
[REDACTED].²¹⁹ [REDACTED] **AL HASSAN** to release a person who was arrested for smoking. **AL HASSAN** immediately released him.²²⁰ Moreover, according to [REDACTED]
[REDACTED], **AL HASSAN** managed the work of the police on a daily basis.²²¹ He could also exercise autonomy when referring cases to the Tribunal²²² and when acting in his work as an investigator.²²³ Moreover, he demonstrated his autonomy in the cases he dealt with himself – such as cases where he forced women to remain with unwanted husbands

²¹⁴ [REDACTED]

²¹⁵ Le Procureur affirme au paragraphe 278 du DCC que M. Al Hassan avait le pouvoir de « décid[er] seul de ces tâches ». Quel était le degré d'autonomie de M. Al Hassan vis-à-vis de l'organisation de son travail quotidien ? Illustrer toute réponse par un exemple concret avec des éléments de preuve à l'appui. La défense et les représentants légaux de victimes peuvent également faire des observations à ce sujet.

²¹⁶ [REDACTED]
²¹⁷ [REDACTED]
²¹⁸ [REDACTED]
²¹⁹ [REDACTED]
²²⁰ [REDACTED]
²²¹ [REDACTED]
²²² [REDACTED]
²²³ [REDACTED]

and debt cases.²²⁴ **AL HASSAN** even referred a complaint against Adama, the Emir of the Police to the tribunal.²²⁵

Question C.36²²⁶: ‘Questions sur la responsabilité alléguée du suspect’

69. **AL HASSAN**’s investigative powers included the following elements: He received complaints. He could summons suspects. He interrogated suspects, using torture and ill-treatment to extract confessions. He drafted and signed investigative reports, including in his capacity as an investigator. He sent his reports to the Islamic tribunal, a number of which led to judgments imposing corporal punishment. He also recommended punishment at least once to the Islamic tribunal.²²⁷ The cases he dealt with were not limited to the town of Timbuktu.²²⁸ These powers that he exercised were part of the investigation process in Timbuktu during the control of the Organisation.

Question C.37²²⁹: ‘Questions sur la responsabilité alléguée du suspect’

70. Some additional examples of meetings **AL HASSAN** had with high-profile members of AQIM and Ansar Dine are as follows:

) [REDACTED] **AL HASSAN** was in doubt about the executions of orders he would seek direct advice from either Abou Zeid or Yahia;²³⁰

) [REDACTED] meeting with Abou ZEID, Sanda Ould BOUMAMA and **AL HASSAN**;²³¹

) [REDACTED]
[REDACTED] **AL HASSAN** [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] **AL HASSAN** [REDACTED]
[REDACTED]²³²

²²⁴ [REDACTED].

²²⁵ [REDACTED].

²²⁶ Le Procureur affirme aux paragraphes 290 et suivants du DCC que M. Al Hassan enquêtait sur des affaires. Quels étaient les pouvoirs d’enquête que détenait M. Al Hassan ? Qu’entend le Procureur par le terme « enquêter » ?

²²⁷ T-005-CONF-ENG-CT, p.80, l.17-p.82, l.18; DCC, paras. 285-313, 388.

²²⁸ DCC, para. 157.

²²⁹ Le Procureur affirme au paragraphe 27 du DCC que M. Al Hassan « participait à des réunions de haut niveau ». Veuillez présenter des exemples précis avec les éléments de preuve pertinents à l’appui de « réunions de haut niveau » auxquelles M. Al Hassan aurait participé (autres que les faits cités au paragraphes 27 et 339 du DCC, [REDACTED])

[REDACTED], à savoir que M. Al Hassan aurait agi en tant qu’interprète pour Abou Zeid durant une réunion à la police islamique avec le comité de crise) ? La défense et les représentants légaux de victimes peuvent également faire des observations à ce sujet.

²³⁰ [REDACTED].

²³¹ [REDACTED].

²³² [REDACTED].

Question C.38²³³: ‘Questions sur la responsabilité alléguée du suspect’

71. Evidence provided [REDACTED] indicates that this meeting took place a few days [REDACTED].²³⁴

Question C.39²³⁵: ‘Questions sur la responsabilité alléguée du suspect’

72. **AL HASSAN** had the support of the hierarchy of the armed groups, in particular Iyad Ag GHALY, Abou ZEID, Yahya Abou AL HAMAM and the Emirs of the Police. This is evidenced by the following examples:
-) The fact that he was the *commissaire* implies that the hierarchy supported him;²³⁶
 -) **AL HASSAN**’s phone number was the first one listed on the signage of the Islamic Police at the BMS;²³⁷
 -) Unlike ADAMA who was replaced as the emir of the Islamic police by Khaled, **AL HASSAN** remained *commissaire* throughout the occupation.²³⁸ This clearly indicated that the superiors of the armed groups were satisfied with **AL HASSAN**’s work as *commissaire*;
 -) [REDACTED] **AL HASSAN** [REDACTED]²³⁹ and
 -) **AL HASSAN** was the one who spoke to the media on behalf of the Islamic Police.²⁴⁰
73. We refer to paragraphs 116 to 125 below regarding the second number potentially attributable to **AL HASSAN**.

Question C.40²⁴¹: ‘Questions sur la responsabilité alléguée du suspect’

²³³ Le Procureur affirme au paragraphe 27 du DCC que M. Al Hassan [REDACTED]. Précisez si possible la période (avec des éléments de preuve à l’appui) à laquelle ce fait se serait déroulé. La défense et les représentants légaux de victimes peuvent également faire des observations à ce sujet.

²³⁴ See [REDACTED].

²³⁵ Le Procureur affirme au paragraphe 27 du DCC que « [M.] Al Hassan bénéficiait clairement de la confiance et du soutien de la hiérarchie de l’organisation » ? Veuillez préciser quels sont les éléments de la « hiérarchie » visés dans cette phrase et présenter des exemples précis accompagnés des éléments de preuve pertinents démontrant la confiance et le soutien manifestés par la hiérarchie à l’égard de M. Al Hassan (outre l’analyse des appels téléphoniques qui est déjà présentée dans le DCC3). Veuillez également préciser le numéro de téléphone qui est visé à la phrase « [...] » et le deuxième numéro de la police islamique qu’il utilisait [...] » du paragraphe 27 du DCC. La défense et les représentants légaux de victimes peuvent également faire des observations à ce sujet.

²³⁶ [REDACTED].

²³⁷ T-004-CONF-ENG-ET, p.9, l.3-7.

²³⁸ T-003-ENG-CT, p.60, l.3-10.

²³⁹ [REDACTED].

²⁴⁰ T-004-CONF-ENG-ET, p.11, l.10-p.13, l.10.

²⁴¹ Le Procureur affirme au paragraphe 27 du DCC que M. Al Hassan « était en constante communication avec de hauts responsables pendant toute l’occupation ». Veuillez préciser qui sont les « hauts responsables » visés dans cette phrase et présenter des exemples précis accompagnés des éléments de preuve pertinents à l’appui

74. The leaders of the armed groups with whom **AL HASSAN** was in constant communication were Yahia ABOU Al HAMMAM, Abdallah AL CHINGUETTI both members of the Presidency, as well as with leaders of the main organs set up by the groups such as Mohammed MOUSSA, ADAMA and HOUKA HOUKA.²⁴²

Question C.41²⁴³: ‘Questions sur la responsabilité alléguée du suspect’

75. **AL HASSAN** had direct contact with all three individuals. [REDACTED]
[REDACTED] **AL HASSAN** [REDACTED].²⁴⁴ **AL HASSAN** would at times seek advice directly from Abou ZEID and Yahia Abou Al HAMMAM.²⁴⁵ Furthermore, Call Data Records confirm that **AL HASSAN** had contact with Yahia Abou Al HAMMAM.²⁴⁶

Question C.42²⁴⁷: ‘Questions sur la responsabilité alléguée du suspect’

76. This question is addressed to the Defence and the Legal Representative for Victims.

Question C.43²⁴⁸: ‘Questions sur la responsabilité alléguée du suspect’

77. The Prosecution refers to paragraph 1038 of the DCC where it is stated that ‘**AL HASSAN** a apporté son aide, son concours et/ou son assistance aux membres de l’Organisation en vue de faciliter la commission des *types de* crimes reprochés aux chefs d’accusation 1 à 6 et 13 à Tombouctou’.²⁴⁹ The Prosecution confirms that the reference to “*types de*” crimes in this passage was a misstatement. The Prosecution should have instead referred to “la *commission des crimes* reprochés aux chefs d’accusation 1 à 6 et 13 à Tombouctou” and requests the Chamber to consider this fact when it identifies the charges in its Confirmation Decision. If requested, the Prosecution will file a corrected, or, if necessary, an amended DCC for the purposes of correcting this error.
78. Nevertheless, the Prosecution reiterates²⁵⁰ that the assistance to the crime under article 25(3)(c),²⁵¹ or contribution to the crime or criminal incident under article 25(3)(d),²⁵²

illustrant cette « constante communication » (en plus de l’analyse des appels téléphoniques déjà présentée). La défense et les représentants légaux de victimes peuvent également faire des observations à ce sujet.

²⁴² [REDACTED]

M. Al Hassan était-il directement en contact avec « Iyad Ag Ghaly », « Abou Zeid » et « Yahia Abou Al Hammam »? Présentez des exemples concrets et des éléments de preuve pertinents à l’appui de votre réponse. La défense et les représentants légaux de victimes peuvent également faire des observations à ce sujet.

²⁴⁴ [REDACTED]

²⁴⁵ [REDACTED]

²⁴⁶ [REDACTED]

²⁴⁷ Selon le Procureur, la portée du « dessein commun » au sens de l’article 25-3- d-i et –ii « est la même que celle du plan commun » (paragraphe 418 du DCC). Quelle est la position de la défense et des représentants légaux des victimes sur cette interprétation ?

²⁴⁸ En application de l’article 25-3-d du Statut, le Procureur doit-il démontrer une contribution du suspect à chaque incident?

²⁴⁹ DCC, para.1038.

²⁵⁰ T-005-CONF-ENG-CT, p.92, l.13–p.95, l.16.

can be indirect in nature. Indeed, contrary to what the Defence asserts, other than the mode of liability of direct perpetration, it is not necessary to prove under any of the modes of liability that **AL HASSAN** ‘implemented’ crimes, executed the crimes, or made direct contributions to the realisation of the charged crimes.²⁵³

79. For instance under article 25(3)(d) the contributions can be by tacit, or explicit, encouragement.²⁵⁴ The Appeals Chamber in the Bemba Article 70 case confirmed that the assistance to the crime could be provided before, or even after, the commission of the crime. The Appeals Chamber determined: “that conduct can be said to have amounted to assistance in the commission of the crime because the principal perpetrator committed it, knowing that he or she would receive assistance in the aftermath”.²⁵⁵ Moreover the Appeals Chamber held that it is not necessary that the aider and abettor know all the details of the crime in which he or she assists.²⁵⁶

II. RESPONSE TO DEFENCE ASSERTIONS

A. SCOPE OF THE CHARGES

1. The degree of specificity required differs depending on the mode of liability charged and the nature of the crime

80. Contrary to the Defence’s assertions, the charges are pleaded with sufficient specificity and clarity.²⁵⁷ The Prosecution has provided the requisite detail based on information in its possession, regarding identities of victims, timing, and location of acts – in particular, detailing instances of **AL HASSAN**’s direct perpetration of crimes. Concerning the other modes of liability, other than direct perpetration, as required, the Prosecution provided details of the *relevant course of conduct* under each count, including examples of victims and the details of the crimes that those individuals suffered. Moreover, because of the nature of the crimes, it is only possible to provide examples of victims, for instance where crimes are of a continuing nature, or systematic forms of crimes that occurred within a defined temporal and geographical scope.

Different modes of liability

81. As regards the modes of liability, the Appeals Chamber in *Prosecutor v Lubanga* (‘Lubanga’) confirmed that the degree of specificity required to particularise the facts

²⁵¹ See e.g. ICC-01/05-01/13-2275-Red, para.1399.

²⁵² See e.g. ICC-01/04-01/07-3436, para.1635, fn.3598.

²⁵³ Defence Submissions, para.161-205; T-006-CONF-ENG-ET, p.26, l.16-19, p.36, l.19-p.37, l.8.

²⁵⁴ See e.g. ICC-01/04-01/07-3436, para.1635, fn.3598. See also T-005-CONF-ENG-CT, p.93, l.6-10.

²⁵⁵ ICC-01/05-01/13-2275-Red, para.1399.

²⁵⁶ ICC-01/05-01/13-2275-Red, para.1400.

²⁵⁷ Defence Submissions, chapter 1, paras. 9-24.

and circumstances underlying the charges differs depending on the form of individual criminal responsibility charged. For instances of direct perpetration of crimes, the material facts, such as the identity of the victim, timing and means used are pleaded in detail.²⁵⁸

82. Even in such cases of direct perpetration, the Appeals Chambers of the ICTR, ICTY and SCSL have found that there are situations where such detail need not be pleaded if the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity.²⁵⁹ In this instance, the Prosecution has sought to provide all details available.²⁶⁰
83. For the other modes of liability, other than direct perpetration, a different level and type of detail is required. As the Appeals Chamber in *Lubanga* confirmed, “*where it is alleged that the accused planned, instigated, ordered, or aided and abetted in the planning, preparation or the execution of the alleged crime, then the Prosecution is required to identify the ‘particular acts’ or ‘the particular course of conduct’ on the part of the accused which forms the basis for the charges in question*”.²⁶¹

Nature of the crimes

84. Due to the nature of the crimes perpetrated in Timbuktu, over a 10-month period, it is not possible to provide details concerning every individual criminal act that occurred. This is certainly the case as regards the continuing crimes such as the crimes of persecution, sexual slavery, forced marriages as a form of inhumane treatment and the rapes in the context of sexual slavery and forced marriages. It was also appropriate to provide examples only of the other categories of crimes, including torture and ill treatment, and passing of sentences by an irregularly constituted tribunal. This is because they were systematic forms of crimes, and were defined within the temporal and geographical scope of the charges.
85. Recently in *Prosecutor v Ntaganda* (“*Ntaganda*”), Trial Chamber VI recalled that whether the parameters are sufficiently specific to frame a charge in compliance with regulation 52(b) of the Regulations of the Court depends *inter alia* on the ‘*nature of the*

²⁵⁸ ICC-01/04-01/06-3121-Red, 1 December 2014, para. 122; citing *Prosecutor v Blaskic*, Appeal Judgment, IT-95-14-A, , 29 July 2004, paras. 210-211, 213. See also *Prosecutor v. Kupreskic et al*, Appeal Judgment, IT-95-16-A, , 23 October 2001, para. 89; *Prosecutor v Sesay et al.*, SCSL-04-15-A, Appeal Judgment, 26 October 2009, para.47-50.

²⁵⁹ See e.g. *Ndindabahizi v. Prosecutor*, Judgment, ICTR-01-71-A, 16 January 2007, para. 16. See also *Prosecutor v. Kupreskic et al*, Appeal Judgment, 26 October 2001, paras. 89-90; *Prosecutor v Sesay et al.*, SCSL-04-15-A, Appeal Judgment, 26 October 2009, para.52; *Rukundo v Prosecutor*, Judgment, , ICTR-2001-70-A, 20 October 2010, paras. 154, 155, 158, 159, 163-165.

²⁶⁰ See e.g. *Prosecutor v. Elizaphan Ntakirutimana & Gerard Ntakirutimana*, Judgment, , ICTR-96-10-A & ICTR-96-17-A, 13 December 2004, para. 74-78.

²⁶¹ Emphasis added. ICC-01/04-01/06-3121-Red, 1 December 2014, para. 122.

crime charged and the circumstances of the case’’.²⁶² Trial Chamber VI stated that certain charges can be properly framed only at the level of individual criminal acts and the scope of the charges are limited to those individual criminal acts confirmed. Nevertheless, Trial Chamber VI held as follow:

40. Some charges may be properly framed more broadly (e.g. deportation of ‘civilians’ across a range of times and places), and need not necessarily be framed as a specific incident or an aggregate of acts (e.g. deportation of identified persons at a particular time and place). If in such a case a pre-trial chamber nonetheless refers to one or more specific incidents, which by themselves may amount to individual criminal acts, then these only serve as examples of the conduct falling within the parameters. In other words, the acts or the references to any individual victims become evidential details for proving that crimes within these parameters occurred. In these cases, the individual criminal acts do not delimit the charge, and other acts that were not explicitly mentioned in the confirmation decision but are proven beyond reasonable doubt can be equally used to prove this charge, as long as they fall within the specific parameters of the charge as confirmed by the pre-trial chamber.

41. Further, the Chamber may consider whether a specific type of criminal act (e.g. murder as a crime against humanity) is committed in narrowly confined temporal and geographical space and/or other parameters. These charges can be framed by these parameters and need not be framed at the level of individual criminal acts, as long as they fall within the specific parameters of the charge as confirmed by the pre-trial chamber.

*42. The Chamber may also consider whether the crimes charged are of a continuous nature. As such, the conduct does not take place at one specific moment in time and the elements of the relevant crimes may therefore be fulfilled during a certain period, which can potentially occur over a prolonged period of time. Continuing crimes are, when the requisite elements are fulfilled, unlawful and remain unlawful over the entire period during which the elements continue to be met. Past cases from this Court and elsewhere have discussed sexual slavery and enlisting and conscripting children under the age of 15 as examples of potentially continuing crimes.*²⁶³

²⁶² ICC-01/04-02/06-2359, paras.35-38.

²⁶³ ICC-01/04-02/06-2359, para.38-42.

86. Consistent with these principles, in *Ntaganda*, both Pre-Trial Chamber I and Trial Chamber VI concluded that for the charges related to child soldiers, the exact locations in which the crimes occurred did not need to be specified, provided that the relevant acts occurred within the temporal and geographical framework of the charges.²⁶⁴
87. Also, both Chambers found that the material facts underlying the charges of murder were sufficiently specific, where it was stated that “... *at least* 200 civilians were killed in and around Mongbwalu by UPC/FPLC soldiers.” The Trial Chamber found it proven beyond reasonable doubt that a murdered Lendu woman, not specifically referred to in the DCC, fell within this formulation of the charges.²⁶⁵ The Trial Chamber also accepted as falling within the scope of the charges other instances of murder not specifically mentioned in the DCC but where the language of the charges was worded broadly and made it clear that only examples were being provided.²⁶⁶
88. Different Chambers of this Court and of the *ad hoc* international tribunals have also confirmed that where the case involves mass criminality it may be impracticable to provide a high degree of specificity in relation to matters such as the precise number of victims, their identities, identity of direct perpetrators, the dates, or the means by which each of the crimes was carried out. In those instances, the Prosecution has been required to provide the greatest degree of specificity that is possible in the circumstances,²⁶⁷ and the best understanding of its case based on the information in its possession.²⁶⁸
89. Contrary to the Defence’s assertions, the fact that in some instances the Prosecution provided only approximate dates within the period of the charges is not too imprecise²⁶⁹, in particular where the individual incidents were examples only or part of repeated acts that occurred within the temporal period of the charges.²⁷⁰

2. Chapter 9 of the DCC describes the material facts and circumstances underlying the charges

²⁶⁴ ICC-01/04-02/06-450, 6 February 2015, para. 72. *See also* ICC-01/04-02/06-2359, paras.1110-1113.

²⁶⁵ ICC-01/04-02/06-309, para.36, 38-44; ICC-01/04-02/06-2359, para. 865.

²⁶⁶ *See e.g.* ICC-01/04-02/06-2359, paras.41-42, 868-870, 938, 968-969, 1110-1113.

²⁶⁷ ICC-01/04-01/10-465-Red, 16 December 2011, para. 112; ICC-01/05-01/08-3343, 21 March 2016, para. 43; ICC-01/05-01/08-424, 15 June 2009, paras. 134. *See also* *Prosecutor v. Kupreškic et al*, Appeal Judgement, 26 October 2001, para. 89-90; *Prosecutor v. Elizaphan Ntakirutimana & Gerard Ntakirutimana*, Judgement, ICTR-96-10-A & ICTR-96-17-A, 13 December 2004, para. 73.

²⁶⁸ *See e.g.* *Prosecutor v Sesay et al.*, SCSL-04-15-A, Appeal Judgment, 26 October 2009, para.60.

²⁶⁹ Defence Submissions, para.9-10.

²⁷⁰ *See e.g.* *Nahimana et al v. Prosecutor*, ICTR-99-52-A, 28 November 2007, para. 38; *Ndindabahizi v. Prosecutor*, Judgement, ICTR-01-71-A, 16 January 2007, para. 20; *Prosecutor v. Ndindabahizi*, Judgement and Sentence, ICTR-2001-71-I, 15 July 2004, para. 34.

90. The Defence refers to 51 key allegations described in annex 5 and states that they are not supported by any evidence.²⁷¹ This is incorrect. All of the allegations described in annex 5 are the key material facts and circumstances underlying the charges as summarised in chapter 9 of the DCC, clearly entitled: “[e]xpose des faits matériels et des chef d’accusation”. All of the material facts underlying the charges summarised in this section are supported by evidence contained in the preceding chapters 1 to 8. The Prosecution summarised the material facts and circumstances underlying the charges, and separated them from the evidence and subsidiary facts, to ensure that there was the necessary clarity and notice provided to the Suspect of the charges against him.
91. The Prosecution recalls that the material facts underlying the charges “refers to the factual allegations which support each of the legal elements of the crime charged. These factual allegations must be distinguished from the evidence put forward by the Prosecutor at the confirmation hearing to support a charge...as well as from background or other information that...does not support the legal elements of the crime charged”.²⁷²
92. The Prosecution requests that for the sake of clarity and to avoid any confusion, in the confirmation of charges decision, there is a section outlining the key material facts and circumstances underlying the charges without references to evidence.

3. Cumulative charges and alternative modes of liability

93. The crimes of rape and sexual slavery, and the crime of forced marriage as a form of inhumane treatment, are distinct crimes with at least one material element not contained in the other, and should all be confirmed as cumulative charges. Moreover, the Chamber should confirm all of the alternative modes of liability as charged under article 25(3)(a), (b), (c) and (d).
94. First, it is a question of the different mandates of the Pre-Trial Chambers and Trial Chambers. As Pre-Trial Chamber II recalled in *Prosecutor v Ongwen*,²⁷³ when the relevant evidentiary standard is met, the Prosecutor should “be allowed to present cumulative charges at trial and deference shall be given to the Trial Chamber, which, following a full trial, will be better placed to resolve questions of concurrence of offences”.²⁷⁴ Pre-Trial Chamber II reasoned that: “questions of concurrence of offences are better left to the determination of the Trial Chamber. Indeed, article 61(7) of the Statute mandates the Chamber to decline to confirm charges only when the evidence

²⁷¹ Defence Submissions, paras. 39-42.

²⁷² See e.g. ICC-01/04-01/06-3121-Red, 1 December 2014, para. 121, also citing ICC-01/04-01/06-2205, fn.163. See also Chambers Practice Manual, p.11-12.

²⁷³ ICC-02/04-01/15-422-Red, para.33, footnote 13.

²⁷⁴ ICC-02/04-01/15-422-Red, para.33.

does not provide substantial grounds to believe that the person committed the charged crime and not when one possible legal characterisation of the relevant facts is to be preferred over another, equally viable. When the Prosecutor meets the applicable burden of proof, the Chamber shall confirm the charges as presented’’.²⁷⁵ Accordingly, if there is sufficient evidence, then it should be for the Trial Chamber ultimately to decide on the concurrence of the offences and appropriate modes of liability, after hearing the totality of the evidence at the end of the trial.

95. Second, the Defence is factually and legally incorrect to assert that rape and sexual slavery should not be confirmed as charges because they are subsumed within the crime of forced marriage as a form of inhumane treatment.²⁷⁶ The three crimes have distinct material elements.
96. Pre-Trial Chamber II in *Ongwen* rejected a similar Defence challenge to cumulative charging, recalling that: ‘‘certain crimes under the Statute may, *although based on the same set of facts*, be not alternative to each other, but concurrently lead to a conviction. Notably, this is the case when each of these crimes requires proof of a *distinct legal element or offends a different protected interest*.’’²⁷⁷ Pre-Trial Chamber II further rejected the Defence arguments that the crimes of sexual slavery and forced marriage as a form of inhumane treatment did not have distinct material elements. The Prosecution recognises that in *Ongwen*, the Defence argued that the crime of ‘forced marriage’ as inhumane treatment was subsumed within sexual slavery, while the Defence in this case argues sexual slavery and rape are subsumed within ‘forced marriage’ as inhumane treatment. Nevertheless, Pre-Trial Chamber II’s finding that these crimes have distinct material elements and different protected interests are equally applicable to the charges in this case. Pre-Trial Chamber II further decided that ‘‘forced marriage as another inhumane act *differs from the other crimes...and notably from the crime of sexual slavery, in terms of conduct, ensuing harm, and protected interests*.’’²⁷⁸ Indeed while forced marriage ‘‘will generally be committed in circumstances in which the victim is also sexually or otherwise enslaved by the perpetrator’’,²⁷⁹ Pre-Trial Chamber II found that the central element of forced marriage is a different one, namely: ‘‘the imposition of ‘marriage’ on the victim, i.e. the imposition, regardless of the victim, of duties that are associated with marriage, as well as of a social status of the perpetrator’s ‘wife’.[...] What matters is that *the so-called ‘marriage’ is factually imposed on the victim, with the*

²⁷⁵ ICC-02/04-01/15-422-Red, para.30.

²⁷⁶ Defence Submissions, paras. 30.

²⁷⁷ Emphasis added. ICC-02/04-01/15-422-Red, para.32.

²⁷⁸ Emphasis added. ICC-02/04-01/15-422-Red, para.92.

²⁷⁹ Emphasis added. ICC-02/04-01/15-422-Red, para.92.

consequent social stigma.[...] Indeed, forced marriage [...] violates the independently recognised basic right to consensually marry and establish a family”.²⁸⁰

97. In contrast, sexual slavery and the ‘exercise of ownership’ over the victim and her loss of personal liberty, which lie at the heart of that crime, may be committed regardless of whether there is any imposition of a ‘marriage’ or forced conjugal union. In turn, core features of the crime of rape are the acts of bodily penetration performed in coercive circumstances. In sum, there are different material elements of the crimes and different harms arising from them: forced marriage results in a forced conjugal union and consequential stigma impacting on the right to consensually marry and form a family; sexual slavery results in a loss of personal liberty and autonomy (including sexual autonomy) with the perpetrator exercising ownership over the victim; whilst rape, as advanced, involves the specific instances of bodily invasion by penetration in coercive circumstances, with a resultant loss of physical and sexual integrity.²⁸¹
98. Ultimately, Pre-Trial Chamber II decided that the Prosecutor be allowed to present cumulative charges at trial²⁸², and confirmed on the basis of the same set of facts the separate charges of rape, sexual slavery, enslavement, torture, forced pregnancy, outrages upon personal dignity, and forced marriage as a form of inhumane treatment.²⁸³
99. Finally, cumulative charges and alternative modes of liability ensure that the most advance notice is provided to the Suspect of the charges and potentially different forms of his criminal liability. The Appeals Chamber confirmed, in both *Prosecutor v Lubanga*²⁸⁴ and *Prosecutor v Katanga*,²⁸⁵ that a Trial Chamber may, based on the same facts and circumstances, modify the legal characteristics of the facts, including modes of liability, under regulation 55. However, in *Ongwen* Pre-Trial Chamber II considered that it was incorrect of the Defence to argue that cumulative charging should be avoided because it was possible to ‘re-characterise crimes at trial’ under regulation 55. Pre-Trial Chamber II considered that the provision “does not address or otherwise concern situations in which the same set of facts could constitute simultaneously more than one crime under the Statute, ie those situations warranting cumulative charging or cumulative convictions.”²⁸⁶

²⁸⁰ Emphasis added. ICC-02/04-01/15-422-Red, para.93-95. See also para. 89-90 citing *Prosecutor v Sesay, Kallon and Gbao*, SCSL-04-15-A, Appeal Judgment, 26 October 2009, para.736; *Prosecutor v Brima, Kamara and Kanu*, SCSL-2004-16-A, Appeal Judgment, 22 February 2008 (‘AFRC Appeal Judgment’), para. 196; Extraordinary Chambers in the Courts of Cambodia, *Case 002 Closing Order*, 15 September 2010, para.1443.

²⁸¹ ICC-02/04-01/15-422-Red, para.93-94.

²⁸² ICC-02/04-01/15-422-Red, para.33.

²⁸³ ICC-02/04-01/15-422-Red, pp.97-98.

²⁸⁴ ICC-01/04-01/06-2205, 8 December 2009, para.77.

²⁸⁵ ICC-01/04-01/07-3363, 27 March 2013, para.22, 104.

²⁸⁶ ICC-02/04-01/15-422-Red, para.31.

100. Regardless of whether or not it is possible to rely upon Regulation 55 to re-characterise the charges, it is in the interests of a fair trial to provide full notice of potential charges and modes of liability from the outset. This is a common approach in complex criminal cases, and one which has been adopted consistently both in international criminal courts, as well as in many common law and civil law jurisdictions.

B. NATURE OF THE EVIDENCE

1. The Prosecution's reliable and credible evidence demonstrates substantial grounds to believe that AL HASSAN committed the charged crimes

101. Contrary to Defence assertions,²⁸⁷ the DCC provides reliable and credible evidence that demonstrates *at least* substantial grounds to believe that **AL HASSAN** committed the charged crimes. In particular, this wealth of evidence includes: [REDACTED]
[REDACTED]
[REDACTED]; [REDACTED]
[REDACTED]
[REDACTED]; satellite pictures; reports from the Malian army; various expert reports including regarding the overall context; as well as, witness statements [REDACTED]

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Ability to rely upon insider evidence [REDACTED]

102. Insider witness evidence is intrinsically of potential high relevance and value because of the unique position in which such witnesses are able to provide information regarding the Organisation. [REDACTED] provides invaluable evidence relevant to the Chamber's determination of the truth, [REDACTED]
[REDACTED]
[REDACTED].
103. The Defence raises speculative, unsubstantiated and incorrect claims regarding the credibility and reliability of [REDACTED] concerning **AL HASSAN**, and based on [REDACTED] taken out of context.²⁸⁹
104. First, contrary to what the Defence implies [REDACTED]
[REDACTED] [REDACTED]. [REDACTED]

²⁸⁷ Defence Submissions, paras. 38-74.

²⁸⁸ T-003-ENG-CT, p.43, l.23-p.44, l.3.

²⁸⁹ Defence Submissions, para.51.

- [REDACTED]
- [REDACTED] 290
- [REDACTED]
- [REDACTED] 291
105. Moreover [REDACTED] must provide truthful, full and complete information. Additionally, [REDACTED] 292
- [REDACTED]
- [REDACTED]
106. Second, although, [REDACTED] 293 the evidence remains nonetheless credible and reliable, and can be relied upon for the limited scope and purpose of the confirmation of charges proceedings, which is not meant to be a “mini-trial” or “trial before the trial”. 294 [REDACTED]
- [REDACTED]. Further it is legally incorrect to assert that in these circumstances only evidence that is corroborated can be relied upon. Indeed, rule 63(4) of the Rules of procedure and evidence prohibits Chambers from “impos[ing] a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court...” 295 [REDACTED]’s credible and reliable evidence on key aspects including concerning the role of the Suspect within the Islamic police is corroborated by other Prosecution evidence including other witnesses such as [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED] and the Suspect himself.
107. Third, it is equally speculative and unfounded for the Defence to claim that [REDACTED] “had a clear incentive during such interviews [REDACTED] [REDACTED] [REDACTED] to augment that of the Islamic police and Mr. **AL HASSAN**”. 296 [REDACTED] did provide evidence regarding the Islamic police and **AL HASSAN** from the outset. 297 Instead, as the Defence acknowledges, 298 [REDACTED] in which specific

²⁹⁰ Defence Submissions, para.50-51, [REDACTED].

²⁹¹ [REDACTED].

²⁹² [REDACTED].

²⁹³ Defence Submissions, para.50, 52, 57.

²⁹⁴ ICC-01/04-01/07-717, para.64. *See also e.g.* ICC-01/04-01/10-514, para.47.

²⁹⁵ *See e.g.* ICC-01/04-01/06-3121-RED, para. 218 (see also para. 148); ICC-01/04-02/06-2359, para.75-76.

²⁹⁶ Defence Submissions, para.56.

²⁹⁷ [REDACTED]

²⁹⁸ Defence Submissions, para.61.

²⁹⁹ Defence Submissions, para.61.

questioning concerning **AL HASSAN** only occurred [REDACTED]

[REDACTED]²⁹⁹

108. Fourth, the Defence makes equally baseless and unsupported allegations [REDACTED] “was so keen to help the Prosecution obtain a conviction against Mr. **AL HASSAN**... that he went above and beyond the role of a witness in providing a personal account of what he had experienced”,³⁰⁰ or that he “moulded his testimony concerning Mr. **AL HASSAN** and the hierarchy of the police... to conform to the contents of Prosecution exhibits...”.³⁰¹ No evidence has been provided to support these spurious allegations.
109. Fifth, the Defence is wrong in asserting [REDACTED] is a “quasi-Prosecution intermediary”.³⁰² [REDACTED] an intermediary or contact person with other witnesses for the Prosecution.
110. Finally, the Defence [REDACTED] evidence in its entirety should be afforded very little weight citing general cautionary statements regarding insider witnesses drawn from accomplice cases,³⁰³ but without providing any evidence or concrete concerns applicable to this witness. Moreover, in contrast to the accomplice cases relied upon, [REDACTED] [REDACTED] more detailed incriminatory evidence against **AL HASSAN** [REDACTED] [REDACTED]. In any event, as Chambers of this Court have consistently found, even where a Chamber has reservations concerning the credibility of a witness it can rely on that evidence where it is corroborated by other reliable evidence.³⁰⁴

Media, NGO reports, IGO reports, and anonymous summaries

111. Contrary to what the Defence asserts, the Prosecution has not relied “exclusively on indirect evidence comprised of media articles, and NGO/IGO reports” to support material facts and circumstances underlying the charges.³⁰⁵ Examples provided in annexes 2 and 3 constitute supporting evidence or subsidiary facts³⁰⁶, or are not the sole evidentiary basis for the fact asserted.³⁰⁷ Similarly, the Prosecution has not relied upon anonymous summaries as the sole evidence to support material facts and circumstances underlying the charges. Examples provided were again of supporting evidence or subsidiary facts³⁰⁸ or instances where the anonymous summary was not the sole

²⁹⁹ [REDACTED].

³⁰⁰ Defence Submissions, para.59.

³⁰¹ Defence Submissions, para.62.

³⁰² Defence Submissions, para.50, 58-59.

³⁰³ Defence Submissions, para.50, 53-56.

³⁰⁴ See e.g. ICC-01/04-02/06-2359, para. 77. See also ICC-01/04-01/07-3436, para.83-85.

³⁰⁵ Defence Submissions, para.46; Annexes 2 and 3.

³⁰⁶ See e.g. Defence Submissions, Anx 2: row 2.

³⁰⁷ See e.g. Defence Submissions, Anx 3: row 14.

³⁰⁸ See e.g. Defence Submissions, Anx 2: row 98 and 141

evidentiary basis for the fact asserted.³⁰⁹ Additionally, the use of evidence such as media, NGO and IGO reports, and anonymous summaries, is consistent with article 61(5), and the more limited scope and purpose of confirmation of charges proceedings.³¹⁰

2. The Defence wrongly claimed that the Prosecution relied on factual inaccuracies and was misleading in its presentations

112. The Defence wrongly claimed that the Prosecution relied on factual inaccuracies or was misleading during its presentations at the confirmation hearing, and made unsubstantiated and unacceptable assertions that: ‘*you cannot entirely trust the OTP.*’³¹¹
113. First, Defence refers to the Prosecution allegation that **AL HASSAN** himself used torture to conduct his investigations. The Defence referred to **AL HASSAN**’s admissions that the Islamic police tortured people by beating them, stating that this did not support the contention that **AL HASSAN** himself tortured people.³¹² However, the Prosecution did not rely upon the Suspect’s admissions alone on this point but was based on an analysis of the evidence as a whole. In particular, [REDACTED] confirmed that from what he knew and had witnessed, when the police thought that a person was refusing to confess to something that they had done they would use methods “like beating and other things”.³¹³ [REDACTED] said that all the police – **AL HASSAN** included - beat people if they thought he had committed a crime and was refusing to confess.³¹⁴ Moreover, there was a report signed by **AL HASSAN** that acknowledged that during the interrogation described, torture methods were used.³¹⁵
114. Second, the Defence refers to [REDACTED], for the purposes of evidencing the ‘course of conduct’ amounting to an attack on civilians for the purposes of the contextual elements of crimes against humanity.³¹⁶ Contrary to what the Defence implies, the legal requirement to prove an “attack” against the civilian population,

³⁰⁹ See e.g. [REDACTED].

³¹⁰ ICC-01/04-01/07-717, para.64. See also e.g. ICC-01/04-01/10-514, para.47; ICC-01/05-01/08-1386, para.80.

³¹¹ T-006-CONF-ENG-ET, p.18, l.20-p.20, l.15.

³¹² T-006-CONF-ENG-ET, p.18, l.20-p.19, l.19.

³¹³ [REDACTED].

³¹⁴ [REDACTED].

³¹⁵ [REDACTED].

requires proof of a ‘*course of conduct*’ amounting to the multiple commission of acts.³¹⁷ Trial Chamber III in *Bemba* confirmed that the requirement to prove a multiple commission of acts “indicates a quantitative threshold requiring ‘more than a few’, ‘several’, or ‘many’ acts [...]. The number of the individual types of acts referred to in article 7(1) is, however, irrelevant provided that each of the acts *fall within the course of conduct* and *cumulatively* satisfy the required quantitative threshold”.³¹⁸ Accordingly, the test is whether the acts, cumulatively, amounted to a course of conduct that constituted an attack on the civilian population.

115. Third, contrary to the Defence arguments, the Prosecution’s presentation regarding the call data records (“CDR”) is accurate and based on disclosed evidence.³¹⁹ There are two telephone numbers (first ending [REDACTED] and second number ending [REDACTED] that are attributable to **AL HASSAN**.

Telephone number [REDACTED]

116. The first telephone number ending [REDACTED] is the number relied upon in the Prosecution’s presentation detailing **AL HASSAN**’s contacts with co-perpetrators and members of the common plan and his movements near crime scenes.³²⁰
117. As regards this key telephone number [REDACTED] found in the CDR: the prefix 223 is the country code of Mali.³²¹ The remaining [REDACTED] comprise the actual telephone number, which appears on the Islamic police sign at the time where it was located at the BMS.³²²
118. There are key grounds for attributing this number ending [REDACTED] to **AL HASSAN**: namely his own admissions, evidence of other witnesses and documentary evidence, and the numerous calls made to close family members.
119. First, contrary to what the Defence claimed,³²³ **AL HASSAN** admitted that this phone number [REDACTED] belonged to him,³²⁴ and that this subsequently became the official

³¹⁷ See e.g. ICC-01/05-01/08-3343, para.149-150; [REDACTED]; ICC-01/05-01/08-424, para.76;

³¹⁸ Emphasis added. ICC-01/05-01/08-3343, para.150.

³¹⁹ T-006-CONF-ENG-ET, p.20, l.18-p.25, l.9.

³²⁰ T-006-CONF-ENG-ET, p.20, l.18-p.24, l.7.

³²¹ See <http://www.indicatif-pays.com/indicatif-mali.html>

³²² See e.g. [REDACTED]. See also See [REDACTED] where it is stated that « *Les clients* [REDACTED] *dont les numéros commencent par* [REDACTED] ». ».

³²³ T-006-CONF-ENG-ET, p.22, l.1-17.

³²⁴ [REDACTED]

number of the Islamic police.³²⁵ He explained that he bought the SIM card for this number himself at the market even before the armed groups arrived in Timbuktu.³²⁶

120. Second, this is supported by evidence from other witnesses. For instance, as follows. Witness [REDACTED] indicates that when he wanted to contact the *commissaire* of the Islamic police he dialled the phone number ending [REDACTED].³²⁷ Documentary evidence provided by witness [REDACTED] indicates that the number was attributable to **AL HASSAN**. [REDACTED] provided the Prosecution with a number of sticky notes left behind by the Islamic police at the BMS, which later served as the *Hesbah* headquarters when the Islamic police moved to the Gouvernorat.³²⁸ These pieces of paper recorded the numbers of various individuals, including **AL HASSAN**,³²⁹ other members of the common plan such as Abou Tahla,³³⁰ Sanda Ould Boumama³³¹, Al Mahdi,³³² and other key contacts relevant to the Organisation.³³³
121. Third, the CDR show hundreds of calls with this number of **AL HASSAN** to or from his close family members – including his mother, father and brother - whom it is highly unlikely that other members of the Organisation would be regularly calling.

-) The CDR from [REDACTED] indicate that **AL HASSAN** used the number [REDACTED] to call his mother,³³⁴ whose phone number was [REDACTED].³³⁵
-) The CDR from [REDACTED] indicate that **AL HASSAN** used the number [REDACTED] to call his father [REDACTED].³³⁶ **AL HASSAN** himself said that [REDACTED] was the number of his father.³³⁷
-) The CDR from [REDACTED] indicate that **AL HASSAN** used the number [REDACTED] to call his brother [REDACTED],³³⁸ whose number was [REDACTED].

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See e.g.

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See

[REDACTED] showing contact with Al Hassan's brother, [REDACTED] showing contacts with Al Hassan's father and [REDACTED] showing contacts with Al Hassan himself.

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For attribution see

[REDACTED] showing 564 contacts between Al Hassan and his father [REDACTED]. Contacts can be easily found in Excel by filtering results using the phone numbers of interest.

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³³⁹ [REDACTED] **AL HASSAN**'s [REDACTED] [REDACTED] was also linked to the Organisation. [REDACTED]

³⁴⁰ [REDACTED] The regularity and frequency of the calls to this number support an argument that it was **AL HASSAN**, and not other members of the Organisation making those calls.

122. The evidence also demonstrates that **AL HASSAN** used this phone number to call many people at the *Hesbah* or at the prison in the course of his work, including various co-perpetrators and members of the common plan such as **AL MAHDI**, Yahia Abou **AL HAMMAM**, and Abou **TAHLA**.³⁴¹ First, although **AL HASSAN** stated that members of the Islamic police also used his number,³⁴² he admitted that he was the one carrying the phone with him.³⁴³ Second, CDR [REDACTED] indicate that **AL HASSAN** used the number ending [REDACTED] to call key co-perpetrators, fellow members of the common plan, and members of the Organisation throughout the whole period of events.³⁴⁴

123. The following provides the attribution of phone numbers used by 10 of the co-perpetrators of the common plan: Sanda Ould **BOUMAMA**: phone number [REDACTED];³⁴⁵ phone number [REDACTED];³⁴⁶ Yahia Abou **AL HAMMAM**: phone number [REDACTED];³⁴⁷ **HOUKA HOUKA**: phone number [REDACTED];³⁴⁸ Oumar Ould **HAMAMA**: phone number [REDACTED];³⁴⁹ **ADAMA**: phone number [REDACTED];³⁵⁰ **AL MAHDI**: phone number [REDACTED];³⁵¹ phone number [REDACTED];³⁵² Mohamed **MOUSSA**: phone number [REDACTED];³⁵³ Abou **TALHA**:

³³⁹ [REDACTED] showing 591 contacts between **Al Hassan** and his brother [REDACTED]

³⁴¹ [REDACTED] indicating **AL MAHDI** having the numbers [REDACTED] Yahia Abou **AL HAMMAM** having the number [REDACTED] and Abou **TAHLA** having the numbers [REDACTED] and [REDACTED] Contacts can be found in the Excel form of this document by filtering results using the phone numbers of interest.

³⁴² [REDACTED]
³⁴³ [REDACTED]
³⁴⁴ [REDACTED]
³⁴⁵ [REDACTED]
³⁴⁶ [REDACTED]
³⁴⁷ [REDACTED]
³⁴⁸ [REDACTED]
³⁴⁹ [REDACTED]
³⁵⁰ [REDACTED]
³⁵¹ [REDACTED]
³⁵² [REDACTED]

phone number [REDACTED],³⁵⁴ phone number [REDACTED],³⁵⁵ Abou DHAR (Abou THAR): phone number [REDACTED],³⁵⁶ and YOUSSEF: phone number [REDACTED].³⁵⁷

124. In particular, The CDR reveal that **AL HASSAN** made or received calls using the number ending [REDACTED], *inter alia* the following co-perpetrators on their numbers: [REDACTED] (attributed to Yahia Abou AL HAMMAM); [REDACTED] (attributed to Abou DHAR); [REDACTED] and [REDACTED] (both attributable to Sanda Ould BOUMAMA); and [REDACTED] (attributable to ADAMA).³⁵⁸
125. The Prosecution observes that the CDR indicate that **AL HASSAN** made approximately 15,000 of calls during the events, which corresponds to a regular use of a phone similar to other CDR records of inhabitants of Timbuktu at the time that the Prosecution has disclosed.³⁵⁹ This is contrary to the Defence assertion that 50,000 calls were made and that this suggested that the phone was shared and used by several people.³⁶⁰

Telephone number [REDACTED]

126. As regards the second telephone number [REDACTED], the attribution of this number to **AL HASSAN** is not as clear. In any event the Prosecution has not relied upon this phone number in any way to demonstrate **AL HASSAN**'s contacts with co-perpetrators or presence at crime scenes. Indeed, it is likely that it was being used by other members of the Organisation for the following reasons: Only one source suggests that this number belongs to **Al HASSAN**.³⁶¹ This number appears to have been mostly inactive during the period of events.³⁶² When it was active there were occasions when it was located in areas where **AL HASSAN** was not physically present at the time.³⁶³ For instance, on the day the [REDACTED] number was used by a caller in Gao on 20 June 2012 (as

³⁵³ [REDACTED]
³⁵⁴ [REDACTED]
³⁵⁵ [REDACTED]
³⁵⁶ [REDACTED]
³⁵⁷ [REDACTED]
³⁵⁸ [REDACTED] provides two numbers ([REDACTED] and [REDACTED] for Sanda Ould BOUMAMA, spokesperson of Ansar Dine, one number for ADAMA ([REDACTED]).

³⁵⁹ See [REDACTED]. This is based on an average figure. Amongst members of the common plan, random checks show for instance that Sanda Ould BOUMAMA called or received approximately 34,000 calls, HOUKA HOUKA about 10,000, Al MAHDI about 7,500 and Mohamed MOUSSA about 6,000.

³⁶⁰ [REDACTED]
³⁶¹ [REDACTED]
³⁶² See [REDACTED] showing 11 calls to Al Hassan's main number ending [REDACTED] 27 June 2012 and only one other call on 29 June 2012 and [REDACTED] stating that the number was used 3 days in April 2012, a month and 20 days in June-July 2012 and later in March-August 2013.

³⁶³ See [REDACTED].

Defence states),³⁶⁴ **AL HASSAN** is visible in video footage in Timbuktu at a flogging holding his [REDACTED] phone on that day same day.³⁶⁵ Accordingly, it is likely that another person was likely using the phone ending [REDACTED].³⁶⁶

127. Fourth, the Defence makes spurious and unfounded allegations that the Prosecution used “tricks to convince the Bench of the rightness of the cause”.³⁶⁷ For instance, showing video footage at the same time as the audio-recording of the same event was to ensure sound could be heard for visual images and not for the purposes of “manipulation of evidence”.³⁶⁸ Equally unacceptable and unfounded allegations were made concerning an alleged “tête-à-tête between the Pre-Trial Chamber and the Prosecution”.³⁶⁹ There were no uncited filings as claimed;³⁷⁰ instead the example to which the Defence was referring was the number of a disclosure package (and which the Defence has received).³⁷¹

C. CRIMES

1. *The crime against humanity of persecution*

The Chamber must apply a cumulative assessment of the underlying acts

128. Contrary, to what the Defence implies, for the crime of persecution it is not correct to analyse underlying acts in a piecemeal way to assess whether individual acts are linked to crimes under article 7(1)³⁷² or any other crime within the jurisdiction of the Court.³⁷³ Instead, it is the totality of the acts and their cumulative effect that must be assessed when determining whether the acts combined amount to the crime of persecution.³⁷⁴ For instance, the ECCC in the *Duch* case held that: “[T]he crux of the analysis lies not in determining whether a specific persecutory act or omission *itself* breaches a human right that is fundamental in nature. Rather, it lies in determining whether or not the

³⁶⁴ See T-006-CONF-ENG-ET, p.23, l.13-19.

³⁶⁵ See e.g. video MLI-OTP-0009-1749 at 00:05:33:20 and CDR presentation, ICC-01/12-01/18-HNE-1-Conf, slide 28.

³⁶⁶ Although the Prosecution observes that the Defence was wrong to state that the destruction of the Sidi Mahmoud mausoleum took place on 20 June 2012, and not on 30 June 2012. See T-006-CONF-ENG-ET, p.22, lines 19-25.

³⁶⁷ T-006-CONF-ENG-ET, p.17, l.17-p.18, l.19.

³⁶⁸ T-006-CONF-ENG-ET, p.18, l.11-15.

³⁶⁹ T-006-CONF-ENG-ET, p.30, l.25-p.32, l.15.

³⁷⁰ T-006-CONF-ENG-ET, p.31, l.9-10; T-003-FRA-ET, p.31, l.7-17.

³⁷¹ T-003-FRA-ET, p.31, l.17.

³⁷² Defence Submissions, para.30, 183.

³⁷³ Article 7(1)(h) refers to persecution “in connection with any act referred to in this paragraph *or any crime within the jurisdiction of the Court*”. Emphasis added.

³⁷⁴ DCC, paras.878-881. See also T-005-CONF-ENG-CT, p.21, l.8-p.22, l.1. Citing also ICC-01/04-02/06-2359, para.991-994.

persecutory acts or omissions, when considered cumulatively and in context, result in a gross or blatant breach of fundamental rights...”.³⁷⁵

129. Similarly, Trial Chamber VI in *Prosecutor v Ntaganda* stated: “[t]he determination as to which acts will result in the severe deprivation of one or more individuals’ fundamental rights must be made on a case-by-case basis. For the purpose of this assessment, the Chamber will examine the acts ‘in their context and with consideration of their cumulative effect’ in order to ascertain whether taken alone *or in conjunction with other acts*, they resulted in the ‘gross or blatant denial’ of fundamental rights.”³⁷⁶ The Chamber went on to consider the acts taken alone. However, the facts of this case are very different to that in *Ntaganda* and necessitate consideration of the acts in conjunction with one another, which in combination constitute a severe deprivation of fundamental rights contrary to international law.

The applicable legal framework is international law not national law

130. The language of Article 7(1)(g) and (h) of the Statute and Article 7(1)(h) in the Elements of the Crimes clearly states that persecution means a severe deprivation of fundamental rights contrary to “international law”.³⁷⁷ The Defence wrongly asserts that the phrase “*generally applicable international law*” mentioned in the introduction to article 7 of the elements of the crimes, must include Islamic law or Sharia law, because of the reference to international law as recognised by the principal legal systems of the world.³⁷⁸ However, the language of article 7 and the definition of persecution is unambiguous. The reference is to ‘international law’ as recognised by the principal legal systems, not the application of the national laws of those legal systems. In particular international law does not mean national laws or legal systems including Islamic law or Sharia law. Indeed the introduction of the elements of article 7, relied upon by the Defence, is prefaced with a reminder of the need for a strict interpretation of the applicable laws: “[s]ince article 7 pertains to international criminal law”.³⁷⁹
131. Article 7(1)(h) uses a different, more exacting standard to create a residual category of prohibited discriminatory grounds: “other grounds that are universally recognised as impermissible under international law”. This is closer to the original formulation for the ‘deprivation of fundamental rights’ standard proposed by some delegates to the Preparatory Commission negotiations on the Elements of Crimes:

³⁷⁵ *Prosecutor v Kaing Guek Eav alias Duch*, Appeal Judgement, 3 February 2012, para 257.

³⁷⁶ Emphasis added. ICC-01/04-02/06-2359, para.992.

³⁷⁷ Article 7(2)(g) defines persecution as “the intentional and severe deprivation of fundamental rights contrary to international law”, while Element One of the crime of persecution in the Elements of Crimes also refers to “contrary to international law”.

³⁷⁸ Defence Submissions, paras.32-37.

³⁷⁹ Emphasis added.

132. Some delegates wanted to ensure that persons would not be held criminally liable at the ICC for failing to observe values or norms recognised in some states but not others. They wanted to clarify the term, stating “such fundamental rights should be those which are recognised and accepted on a universal level, that is to say, those rules applicable *vis-à-vis* the State, either because they constitute international custom as a source of international law or because the State has accepted them through its conventional obligations”.³⁸⁰
133. The ILC commentary to the 1996 Draft Code when defining persecution referred to “the denial of the human rights and fundamental freedoms to which every individual is entitled without distinction as recognised in the Charter of the United Nations (articles 1 and 55) and the International Covenant on Civil and Political Rights (article 2).”³⁸¹ Ultimately the Rome Statute refers to ‘international law’, therefore encompassing a broader range of international law (including international human rights law, international humanitarian law, and international criminal law).
134. While neither the Statute nor the Elements define the phrase ‘international law’, article 21 provides some guidance that ‘international law’ is different to national laws of States. Article 21(1)(c) refers to instances the Court may have recourse to the national laws or legal systems of the world “provided that those principles are not inconsistent with this Statute and with *international law* and *internationally recognised* norms and standards”.³⁸² Moreover, article 21 establishes a hierarchy for the applicable sources of law for the purposes of judicial interpretation. Article 21(1)(b) recognises “applicable treaties and the principles and rules of international law” ahead of “general principles of law derived... from national laws... including, as appropriate, the national laws of States that would normally exercise jurisdiction” in Article 21(1)(c).
135. Additionally, Article 21(3) sets out a separate “internationally recognised human rights” standard for the interpretation of laws by the judges of the Court, stating that the application and interpretation of the law must be “without any adverse distinction founded on grounds such as gender... age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status”. This is the standard against which any legal interpretation by the judges must be

³⁸⁰ H Brady and R Liss, ‘The Evolution of Persecution as a Crime Against Humanity’ in M Bergsmo, WL Cheah, T Song, P Yi (eds), *Historical Origins of International Criminal Law: Volume 3*, FICHL Publication Series No 22 (2015), at p545-546. This higher universal-recognition standard was not ultimately applied to the ‘deprivation of fundamental rights’ requirement in Element One, only the more general standard of ‘contrary to international law’.

³⁸¹ The Rome Statute of the International Criminal Court, A Commentary, Third Edition, Triffterer/Ambos eds., C.H. Beck, Hart, Nomos, 2016, p.275.

³⁸² Emphasis added.

measured, meaning that it would not be possible for a Chamber to interpret the Elements of Crimes or apply an international or domestic legal provision in a way which would, in and of itself, be inconsistent with internationally recognised human rights or give rise to adverse distinction on the grounds of gender, religion or political opinion.

136. The ICTY and ICTR unambiguously relied upon international human rights treaty norms when defining persecution. For instance, in *Prosecutor v Tadić*, the Trial Chamber held that persecution is a “form of discrimination that is intended to be and results in an infringement of an individual’s fundamental rights”, and requires “the violation of the right to equality in some serious fashion that infringes on the enjoyment of a basic or fundamental right”.³⁸³ The Chamber noted the commentary to the International Law Commission’s Draft Code of Crimes Against the Peace and Security of Mankind, which identified the “common characteristic” of persecution as “the denial of the human rights and fundamental freedoms to which every individual is entitled without distinction as recognised in the Charter of the United Nations (Arts 1 and 55) and the International Covenant on Civil and Political Rights (Art 2)”.³⁸⁴
137. The *Kupreški* case was more specific in identifying the source of such basic fundamental rights. The Trial Chamber identified the *actus reus* of persecution as “the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law”. The Chamber referred to specific international legal instruments.³⁸⁵
138. *Kupreški* clearly tied the ‘denial of a fundamental right’ element of the crime of persecution to the standards derived from and recognised by international human rights treaties. This ‘international customary or treaty law’ standard was adopted and endorsed in all subsequent case law from the ICTY and ICTR, including by the Appeals Chamber in *Krnjelac*,³⁸⁶ *Kvo ka*,³⁸⁷ *Nahimana*,³⁸⁸ *Popović*,³⁸⁹ and *Šešelj*.³⁹⁰

³⁸³ *Prosecutor v Tadić*, Trial Judgment, 7 May 1997, para 697.

³⁸⁴ International Law Commission, Draft Code of Crimes Against the Peace and Security of Mankind, UN Doc A/51/332, p49 para 11.

³⁸⁵ *Prosecutor v Kupreški*, Trial Judgment, 14 January 2000, para 621. The Chamber clarified: “[I]n order to identify those rights whose infringement may constitute persecution, more defined parameters for the definition of human dignity can be found in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948, the two United Nations Covenants on Human Rights of 1966 and other international instruments on human rights or on humanitarian law. Drawing upon the various provisions of these texts it proves possible to identify a set of fundamental rights appertaining to any human being, the gross infringement of which may amount, depending on the surrounding circumstances, to a crime against humanity.”

³⁸⁶ *Prosecutor v Krnjelac*, Appeal Judgment, 17 September 2003, para 185: “denies or infringes upon a fundamental right laid down in international customary or treaty law”.

³⁸⁷ *Prosecutor v Kvo ka et al*, Appeal Judgment, 28 February 2005, para 319: “the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law”.

139. The victims were entitled to protections of international human rights law. Although it is not necessary or relevant to prove, as the Court is required to apply international legal standards, the victims are also domestically entitled to such protections. Mali has signed and ratified the key international human rights treaties and without reservation.³⁹¹

2. *The passing of sentences by irregularly constituted courts under article 8(2)(c)(iv)*

140. In its written submissions, the Defence suggested that the *actus reus* of article 8(2)(c)(iv) only covers the “judicial act of imposing a particular sentence” or the “carrying out of executions”, in the sense of carrying out the death penalty.³⁹² This is incorrect, unsupported, and plainly inconsistent with the structure of article 8(2)(c)(iv), as well as the underlying protections of common article 3. In particular, if the carrying out of “executions” is understood to mean the imposition of the death penalty, restricting the concept of “passing sentence” only to judicial figures would mean that there is no prohibition of *non*-judicial figures purporting to impose ‘summary punishment’. This would defeat a core protection of common article 3 and article 8(2)(c)(iv).

141. The Defence has also suggested that the *mens rea* for article 8(2)(c)(iv)—at least insofar as it applies to the passing of sentence by irregularly constituted courts—requires proof that the perpetrator had “awareness as concerns the specific procedures that were applied in each case”,³⁹³ and that the *mens rea* requirement should be “interpreted in such a manner so as to exclude the conduct of a non-lawyer”.³⁹⁴ This interpretation, however, is based on certain post-World War Two prosecutions under customary international law, and not common article 3 or Additional Protocol II—treaties which were subsequently enacted in light of the perceived deficiencies of the pre-existing

³⁸⁸ *Prosecutor v Nahimana et al*, Appeal Judgment, 28 November 2007, para 985: “denies or infringes upon a fundamental right laid down in international customary or treaty law”.

³⁸⁹ *Prosecutor v Popović et al*, Appeal Judgment, 30 January 2015, para 762: “denied or infringed upon a fundamental right laid down in international customary or treaty law”.

³⁹⁰ *Prosecutor v Šešelj*, Appeal Judgment, 11 April 2018, para 159: “denies or infringes upon a fundamental right laid down in international customary or treaty law”.

³⁹¹ Including the International Covenant on Civil and Political Rights and the 1976 Optional Protocol, the International Covenant on Economic Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol, the Convention Against Torture, the Convention on the Rights of the Child and its Optional Protocol, the African Charter of Human and Peoples’ Rights and its associated Maputo Protocol on the Rights of Women, and the African Charter on the Rights and Welfare of the Child. Mali is a monist system. Article 116 of the Malian Constitution states that international treaties “that are properly ratified or approved have, from the time of their publication, superior authority over laws of the State”. In addition, the Preamble states that the “Sovereign People of Mali... subscribe to the Universal Declaration of the Rights of Man... and to the African Charter of the Rights of Man and the People”. Contrast, Defence Submissions, para.33-35.

³⁹² Defence Submissions, para. 203, 251.

³⁹³ Defence Submissions, para. 251.

³⁹⁴ Defence Submissions, para. 253.

treaty regime, and which in turn informed the elaboration of article 8(2)(c)(iv) at this Court. Nothing in the terms of common article 3 or Additional Protocol II suggests any intention to restrict from their material scope the conduct of “non-lawyers”.

142. Nor is such a conclusion necessarily implied by the *mens rea* requirement in element 5 for article 8(2)(c)(iv). To the contrary, and consistent with the general principle that it need not be proved that a perpetrator made a particular value judgement unless expressly required,³⁹⁵ footnote 59 of the Elements of the Crimes for this crime emphasises the “cumulative effect” of the denial of relevant guarantees. This strongly suggests that it is not awareness of the particulars of relevant guarantees, or their legal significance, that must be established, but only the consequent overall *effect* of their denial upon the proceedings concerning the victim(s). In the context of this case, 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.

3. *The attacks on cultural property under article 8(2)(e)(iv)*

143. At least for the purpose of religious, historical, and similar objects (colloquially, cultural property), the term “attack” in article 8(2)(e)(iv) has a “special meaning” in the sense of the Vienna Convention, which differs from other uses of the term “attack” in article 8.³⁹⁶ Consequently, a perpetrator violates this provision if they direct a violent act against a protected cultural object *irrespective* of which party to the conflict has control over that object at the material time.
144. This conclusion is inescapable once the “established framework of international law” concerning the protection of cultural objects is taken into account, as expressly required by the *chapeau* of article 8(2)(e) and the Appeals Chamber.³⁹⁷ There is simply no other way to interpret the Statute correctly, in light of the established framework of international law.
145. In its written submissions, the Defence adopted a contrary view taken in a recent academic paper,³⁹⁸ acknowledged in the DCC.³⁹⁹ However, that view is unconvincing

³⁹⁵ *Elements of Crimes*, General Introduction, para. 4.

³⁹⁶ See DCC, paras. 687-703. During the confirmation hearing, in the interests of conforming to the Pre-Trial Chamber’s schedule, the Prosecution recalled that it might make brief further legal submissions in writing to elaborate on this aspect of the DCC: T-004-CONF-ENG-ET, p.89, 1.8-10. These written submissions are in place of those planned oral submissions: e.g. ICC-01/12-01/18-402-AnxA (reference group “B”).

³⁹⁷ See ICC-01/04-02/06-1962 OA5, para. 53. See also ICC-01/04-02/06-2359, para. 1136 (fn. 1347: recalling the “different underlying rules” of international law governing the protection of “cultural objects”).

³⁹⁸ See e.g. ICC-01/12-01/18-394-Red (“Defence Submissions”), paras. 136-137. See also fns. 153, 183.

³⁹⁹ See e.g. DCC, fn. 1721 (citing W. Schabas, ‘Al Mahdi has been convicted of a crime he did not commit,’ [2017] 49(1) *Case Western Reserve Journal of International Law* 75 (“Schabas (2017)”).

when examined in any detail—and this applies in particular to the central premise that the drafters of the Statute intended article 8(2)(e)(iv) to give effect *only* to the prohibition in article 27 of the Hague Regulations (concerning the conduct of hostilities), but *not* article 56 (concerning occupation).⁴⁰⁰ This minority opinion is based on a speculative and unsupported inference concerning the significance of the drafters' choice to accept the language proposed by one State, rather than other alternative formulations, which is entirely inconsistent with the comprehensive protection afforded to cultural objects under conventional and customary law. Moreover, even if it were to be established that any particular State had indeed wished article 8(2)(e)(iv) to be construed so narrowly, it is only the *collective intention* of the drafters which is material for the purpose of interpreting the Statute.⁴⁰¹

146. The notion that the drafters considered they only had a *binary* choice between giving effect in the Statute to article 27 or article 56 of the Hague Regulations is counterintuitive and unconvincing. Not only does the drafting history explicitly suggest that some States took the contrary view,⁴⁰² but many of the same States which are Parties to the Statute have also agreed to be bound by other treaties which already require comprehensive protection of cultural property in armed conflict. For example, 70% of ICC States Parties—including Mali—have additionally ratified the 1954 Hague Convention, Additional Protocol I, and Additional Protocol II.⁴⁰³ A further 26% of ICC States Parties, while not having ratified the 1954 Hague Convention, have nonetheless

⁴⁰⁰ See e.g. Schabas (2017), pp. 83-88, *especially* p. 88 (“The *travaux préparatoires* indicate that the drafters were familiar with two models or types of provision governing cultural property, one applicable to the conduct of hostilities and the other to persons and property that have fallen under the control of one of the parties. The second of the two, derived from article 56 of the 1907 Hague Regulations, figured in the Statute of the [ICTY], and was actively considered at the initial sessions of the Preparatory Committee. It was also adopted by the [ILC] in the 1996 draft Code of Crimes. However, consensus subsequently emerged around a draft proposed by the United States, where the word ‘attacks’ was employed, that was based on the alternative whose ancestor was article 27 of the Hague Regulations”).

⁴⁰¹ See e.g. ICC-01/09-01/11-1938-Red-Corr, para. 18. See further ICJ, *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, [1995] ICJ Rep 6, Dissenting Opinion of Judge Schwebel, p. 27; R. Gardiner, *Treaty Interpretation*, 2nd Ed. (Oxford: OUP, 2015), p. 113 (quoting *Arbitration regarding the Iron Rhine (Ijzeren Rijn) Railway (Belgium/Netherlands)* (2005) XXVII RIAA 35, p. 63, para. 48).

⁴⁰² See DCC, para. 698 (*especially* text accompanying fn. 1749).

⁴⁰³ These (86) States are: Afghanistan, Albania, Argentina, Australia, Austria, Bangladesh, Barbados, Belgium, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Cambodia, Canada, Chad, Chile, Colombia, Costa Rica, Côte d’Ivoire, Croatia, Cyprus, Czech Republic, Democratic Republic of Congo, Denmark, Djibouti, Dominican Republic, Ecuador, El Salvador, Estonia, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Honduras, Hungary, Ireland, Italy, Japan, Jordan, Latvia, Liechtenstein, Lithuania, Luxembourg, Madagascar, Mali, Mauritius, Mongolia, Montenegro, the Netherlands, New Zealand, Niger, Nigeria, North Macedonia, Norway, Palestine, Panama, Paraguay, Peru, Poland, Portugal, the Republic of Moldova, Romania, San Marino, Senegal, Serbia, the Seychelles, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Tajikistan, Tunisia, the United Kingdom, the United Republic of Tanzania, Uruguay, and Venezuela. In addition, Mexico has ratified the 1954 Hague Convention and Additional Protocol I, but not Additional Protocol II.

still ratified Additional Protocol I and Additional Protocol Protocol II alone.⁴⁰⁴ Just two ICC States Parties—the Marshall Islands and Andorra—have ratified the Statute alone, but not any of these other treaties.

147. Five particular considerations demand the conclusion that the drafters collectively intended article 8(2)(e)(iv) of the Statute to reflect the comprehensive protection afforded by international law to cultural property, giving effect to the spirit of *both* article 27 *and* article 56 of the Hague Regulations. These support the arguments already contained in the DCC as to the proper interpretation of the term “attack” in article 8(2)(e)(iv).
148. First, the vast majority of academic commentators accept unequivocally that article 8(2)(e)(iv) of the Statute gives effect *both* to article 27 *and* article 56 of the Hague Regulations.⁴⁰⁵ Indeed, Schabas himself appeared to be of such a view, at least back in 2016.⁴⁰⁶ The small minority of other commentators who consider that article 8(2)(e)(iv) is limited to the scope of article 27 of the Hague Regulations do not address the broader contextual arguments in these submissions.⁴⁰⁷
149. Second, Schabas makes too much of the reference to article 27 of the Hague Regulations in two footnotes, appearing in documents by the US national delegation and the Preparatory Committee, respectively.⁴⁰⁸ Notwithstanding the language of article 8(2)(e)(iv) itself—which must be interpreted on its own merits⁴⁰⁹—these footnotes offer no rational basis to infer that the drafters intended to *exclude* the effect of article 56 of the Hague Regulations. Rather, the reference to article 27 seems to have been intended to explain the derivation of one proposed formulation from an alternative, which was

⁴⁰⁴ These (32) States are: Antigua and Barbuda, Belize, Cabo Verde, the Central African Republic, the Union of the Comoros, Congo, Cook Islands, Dominica, Fiji, Grenada, Guyana, Iceland, Kenya, Lesotho, Liberia, Malawi, the Maldives, Malta, Namibia, Nauru, the Republic of Korea, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Sierra Leone, Suriname, Timor-Leste, Trinidad and Tobago, Uganda, Vanuatu and Zambia.

⁴⁰⁵ See DCC, para. 699 (fn. 1750: citing commentators such as Dörmann, Arnold and Wehrenberg, Pfirter, Schabas, and Achou). See also Y. Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge: CUP, 2014) (“Dinstein”), p. 183, mn. 577.

⁴⁰⁶ Compare W. Schabas, *The International Criminal Court: a Commentary on the Rome Statute*, 2nd Ed. (Oxford: OUP, 2016) (“The prohibition [in articles 8(2)(b)(ix) and 8(2)(e)(iv)] originates in articles 27 *and* 56 of the 1907 Hague Regulations”, emphasis added, citing Achou), with, e.g., Schabas (2017), p. 84 (“In finalizing article 8, [the drafters] quite deliberately used article 27, *not* article 56, as the model [for articles 8(2)(b)(ix) and 8(2)(e)(iv)]”, emphasis added).

⁴⁰⁷ See DCC, para. 699 (fn. 1752: citing commentators such as Fenrick and O’Keefe).

⁴⁰⁸ Schabas (2017), p. 86 (“a footnote indicated that the United States proposal on cultural property was based on article 27 of the [Hague] Regulations”, citing “Draft consolidated text, UN Doc. A/AC/249/1997/WG.1/CRP.2, p. 4, fn. 12” and “Decisions taken by the Preparatory Committee at its session held from 11 to 21 February 1997, UN Doc. A/AC.249/1997/L.5, pp. 8-9”).

⁴⁰⁹ See e.g. DCC, para. 689.

based on article 85(4)(d) of Additional Protocol I⁴¹⁰—and which, indeed, was not adopted.⁴¹¹ But there is no concrete evidence that the drafters considered that the obligations in article 56 of the Hague Regulations were no longer good law, or that they did not wish similar protections to be incorporated in the Statute. The only basis for Schabas’ inference to this effect is the (unexplained) earlier decision not to proceed with the proposal of the Japanese delegation (based on article 3(d) of the ICTY Statute, which in turn uses similar language to article 56).⁴¹²

150. Third, customary international law has rejected any rigid distinction in the special protection afforded to cultural property in armed conflict—and, in so doing, has also demonstrated the open texture of the language of the Hague Regulations, at least in the context of the legal practice of the following century concerning cultural property.
151. For example, while it is true that article 3(d) of the ICTY Statute closely resembles article 56 of the Hague Regulations, it is not clear *why* the ICTY Statute was drafted in this way.⁴¹³ Significantly, the ICTY has consistently interpreted this provision to establish jurisdiction not only over conduct falling under article 56, but also over conduct falling under article 27 of the Hague Regulations.⁴¹⁴ For example, in *Strugar*, convictions were entered for attacks on cultural property, in Dubrovnik, in the conduct of hostilities⁴¹⁵—which would have been impossible if the ICTY’s jurisdiction had been understood to be limited to article 56 of the Hague Regulations.
152. Thus, while the drafters of the ICC Statute declined to borrow the terminology of article 56 for article 8(2)(e)(iv), modern customary international law illustrates that the terms

⁴¹⁰ See Decisions taken by the Preparatory Committee at its session held from 11 to 21 February 1997, UN Doc. A/AC.249/1997/L.5, pp. 8-9. In this document—which is based upon the US proposal cited by Schabas—the Preparatory Committee presented for consideration two alternative approaches to the protection of cultural objects in international armed conflict under B(2)(d), each marked in square brackets. The first of these proposals uses language taken from article 85(4)(d) of Additional Protocol I. The second of these proposals uses language taken from article 27 of the Hague Regulations, as noted in footnote 20 (which is the footnote to which Schabas refers). Subsequently, in the same document, under B(4)(l), a duplicate provision is again listed, with a footnote (footnote 29) indicating this provision may be redundant (“This has also been covered in paragraph B.2(d)”). For non-international armed conflict, section C(2)(n) introduces a single proposal relating to cultural objects based on a *third* alternative formulation, and on this occasion not explained by a footnote of any kind, but which appears to refer to the approach in article 16 of Additional Protocol II (as illustrated by the reference to “the cultural or spiritual heritage of peoples”). At no point in this document is any reference at all, positive or negative, made to article 56 of the Hague Regulations. See also DCC, para. 698 (text in fn. 1746).

⁴¹¹ Compare e.g. Statute, art. 8(2)(e)(iv), with Additional Protocol I, art. 85(4)(d). Notably, the Statute omits elements which are required by article 85(4)(d) of Additional Protocol I, such as “special protection [...] by special arrangement, for example within the framework of a competent international organisation” and “causing as a result extensive destruction”.

⁴¹² See Schabas (2017), p. 86.

⁴¹³ See e.g. Schabas (2017), p. 88 (citing Report of the Secretary-General Pursuant to Paragraph (2) of Security Council Resolution 808 (1993), UN Doc. S/25704 (1993), paras. 41-44). The cited passage relates to general matters, and does not specifically explain the formulation of article 3(d) of the ICTY Statute.

⁴¹⁴ See e.g. ICTY, *Prosecutor v. Strugar*, IT-01-42-T, Judgment, 31 January 2005 (“*Strugar* TJ”), paras. 298-312; *Prosecutor v. Kordić and Kerkez*, IT-95-14/2-T, Judgment, 26 February 2001, paras. 358-362.

⁴¹⁵ See e.g. *Strugar* TJ, paras. 214, 317, 327, 330. This conviction was upheld on appeal: see e.g. ICTY, *Prosecutor v. Strugar*, IT-01-42-A, Judgment, 17 July 2008, para. 277.

of article 56 are no longer, of themselves, clearly associated with one approach to the protection of cultural property or another. In this context, the drafters' choice to use different terminology in article 8(2)(e)(iv), emanating from article 27 of the Hague Regulations, cannot be taken as a reliable guide to their view of the substantive obligations that would be imposed.

153. Fourth, therefore, the most significant consideration for ascertaining the intent of the drafters—quite apart from its significance in its own right, as a statutory requirement under article 8(2)(e)—is the established framework of international law. Just as the ICTY concluded, this framework reveals a comprehensive protection for cultural objects in armed conflict, with no material distinction made in the nature of the protection during the conduct of hostilities or when an object is under the control of a party to the conflict. In considering this framework, it is not only appropriate but *necessary* to consider the regime pertaining to international armed conflict⁴¹⁶—simply because the protections in non-international armed conflict developed from roots in the law of international armed conflict.

154. While the DCC already lays out some of the key milestones in the development of the comprehensive prohibition of cultural property in armed conflict,⁴¹⁷ which must have informed the intention of the drafters of the Statute,⁴¹⁸ it is also important to observe that:

) Even in the Hague Regulations, which clearly make separate provision for cultural objects in the conduct of hostilities and in territory under occupation, these provisions nonetheless worked together to provide comprehensive protection. Nothing in the Hague Regulations suggested that the drafters considered one protection to be meaningful or desirable without the other. The 1954 Hague Convention not only introduced the (highly significant) term “acts of hostility”, as described in the DCC,⁴¹⁹ but united the protections afforded to cultural objects in

⁴¹⁶ *Contra* Defence Submissions, paras. 118-121, 132.

⁴¹⁷ *See* DCC, para. 694.

⁴¹⁸ Subsequent developments—while obviously not an indicator of what the drafters necessarily had in mind when drafting the Statute—are also consistent with this approach. *See e.g.* Second Protocol to the 1954 Hague Convention, art. 15(1) (prohibiting “attacks” on relevant cultural objects but in the context of a provision which also prohibits “destruction” and “vandalism” of such objects); ICRC, *Customary International Humanitarian Law, Volume I: Rules* (Geneva/Cambridge: ICRC/CUP, 2005), rule 38(A) (requiring “[s]pecial care” to be taken in “military operations to avoid damage” to cultural objects). *Compare* rules 1, 6-7, 10-14, 19-22, 30, 33, 35-37, 38(B), etc (using the term “attack” to refer to the conduct of hostilities). *See also* Dinstein, p. 162, mn. 514 (“Attacks are a subset of military operations”).

⁴¹⁹ *See* DCC, paras. 694-695.

armed conflict in a *single* comprehensive provision,⁴²⁰ which regulates both the conduct of hostilities *and* territory under occupation.⁴²¹

) Additional Protocol I—which, again, materially employs in article 53 the term “acts of hostility” rather than “attack”⁴²²—found it necessary to make no additional reference at all to the protection of cultural property in territory under occupation. This clearly suggests the drafters’ understanding of the comprehensive approach adopted in the 1954 Hague Convention, and the significance of the term “acts of hostility”.⁴²³

) Additional Protocol II, applying in non-international armed conflict, adopts the language (“acts of hostility”) and approach (a single comprehensive provision) of Additional Protocol I in protecting cultural property.⁴²⁴

155. Fifth, and finally, an interpretation of article 8(2)(e)(iv) which only gives effect to article 27 of the Hague Regulations plainly leads to illogical results. While recognising that cultural property requires special protection within the established framework of international law, it would confine that protection *only* to the conduct of hostilities—and then depart from that established framework by failing to provide that same special protection once cultural property has fallen under the control of a party to the conflict. Absent clear evidence, such an apparent illogicality cannot be ascribed to the intent of the drafters.

D. INDIVIDUAL CRIMINAL RESPONSIBILITY

1. Article 25(3)(a): The criminal element of the common plan

156. As regards the Suspect’s liability as a direct and indirect co-perpetrator under article 25(3)(a),⁴²⁵ the common plan does not need to be directed to criminal activity. It suffices that there is a critical element of criminality, so that implementation of the plan

⁴²⁰ See 1954 Hague Convention, art. 4, *especially* art. 4(1) (State Parties’ obligation “to respect cultural property situated within their own territory as well as within the territory of other [States] Parties by [...] refraining from any act of hostility directed against such property”), 4(3) (States Parties’ obligation “to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property”).

⁴²¹ See *e.g.* 1954 Hague Convention, art. 4(3) (prohibiting the “requisitioning” of “movable cultural property situated in the territory of another [State] Party”). This state of affairs could only arise in occupied territory. See *also* art. 5 (entitled “Occupation”, but whose obligations are ancillary to the primary obligations in article 4).

⁴²² See Additional Protocol I, art. 53 (prohibiting “any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples”).

⁴²³ See DCC, paras. 694–695.

⁴²⁴ See Additional Protocol II, art. 16 (prohibiting “any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples”).

⁴²⁵ *Contra* Defence Submissions, para.142. Defence is incorrect to state that “common plan liability” falls under article 25(3)(c) and (d), as well as article 25(3)(a).

will in the ordinary course of events lead to the commission of one or more crimes under the Statute.⁴²⁶

157. In this case, the critical element of criminality of the plan was the use of ‘‘any means, including by conduct’’ - in particular criminal conduct, by which the Organisation imposed their ideological and religious vision and asserted their power and control over the town of Timbuktu, its region and its civilian population, as well as the criminal consequences (as crimes resulted in the ordinary course of events of implementing the plan). In particular, the criminal element of the plan was the use of a coercive environment and violent and destructive imposition of the Organisation’s power and control, and own ideological and religious beliefs different to that of the local population.⁴²⁷
158. Contrary to what the Defence has argued, the criminal element of the plan was not about implementing Sharia law.⁴²⁸ It is the imposition of the Organisation’s own vision of ideology and religion (which included their own interpretation of Sharia law) and the means used to secure that imposition, which resulted in crimes that provides the criminal element of the plan. In this context it is irrelevant what that belief system was and whether it was practiced in any other country in the world.⁴²⁹
159. Indeed, under international law,⁴³⁰ it was not lawful for any members of the Organisation (Ansar Dine, AQMI, or the institutions they created), to impose their own ideology and a set of related stricter rules and laws instead of the pre-existing Malian national laws and judicial system that should have been applied.⁴³¹
160. Contrary to what the Defence states that evidence of ‘‘anterior events... has no legal or evidential relevance’’,⁴³² Chambers of this Court have consistently confirmed that evidence pre-dating and post-dating the common plan can be used as evidence relevant to establishing its existence.⁴³³

Article 25(3)(a): AL HASSAN was aware that rape would occur in the ordinary course of events of implementation of the common plan

⁴²⁶ See ICC-01/04-01/06-2842, paras 984-986; ICC-01/05-01/13-1989-Red, para 67; ICC-01/04-01/06-803-tEN, para 344.

⁴²⁷ *Contra* Defence Submissions, para. 142-144 that there is no criminal element.

⁴²⁸ Defence Submissions, para.144.

⁴²⁹ *Contra* Defence Submissions, para.144.

⁴³⁰ Including public international law and the principles of State sovereignty, international human rights law and international humanitarian law, as described at T-004-CONF-ENG-ET, p.40, l.16-p.53, l.13; ICC-01/12-01/18-412+AnxA.

⁴³¹ See DCC, para. 486-488. See also T-004-CONF-ENG-ET, p.40, l.16-p.53, l.13; ICC-01/12-01/18-412+AnxA.

⁴³² Defence Submissions, para.146.

⁴³³ ICC-01/04-01/06-2842, para. 1135, 984, 988; ICC-01/05-01/13-2275-Red, para.1306; ICC-01/05-01/13-1989-Red, para.66; ICC-01/04-01/06-803-tEN, para.345; ICC-01/09-02/11-382-Red, para.399; ICC-01/09-01/11-373, para.301.

161. **AL HASSAN** must have been aware that rape would occur in the ordinary course of events of implementing the common plan,⁴³⁴ where: (a) the plan was to secure and assert the Organisation's power and total control and impose their own ideology; (b) in implementing that plan, the Organisation's armed men were given powers over nearly every aspect of the inhabitants' lives – even their intimate sex lives (when enforcing their no-adultery rules); (c) they were prohibited from having sex outside of marriage and were instead encouraged to “marry” local women and girls to satisfy their sexual wants; (d) they were encouraged to have sex within marriage regardless of how short term the ‘marriage’ was and without steps being taken to ensure those ‘marriages’ were consensual; (e) indeed, the system of “marriages” supported by the leadership was inherently coercive – these were not individuals approaching a prospective spouse and family unarmed and alone within a consensual framework of “traditional forms of Islamic marriage”,⁴³⁵ with money for dowries coming from the individual or their family. Instead, these were forced unions forged through intimidation in the context of a city under control of armed groups feared by everybody and seen publically to use violence. The usual pattern of these ‘marriages’ was armed men with other armed colleagues - and at times even with their own leaders (known as the wielders of power in the city) - appearing at the family home or propositioning victims in the streets, with offers of money financed by the Organisation. In some instances, there was physical violence used from the outset if the victim or parent refused.⁴³⁶ The so-called marriages were a façade for allowing sexual intercourse between members of the Organisation with local women and girls in line with the Organisation's ideology.
162. In the context of that global and continuous coercive environment and system, **AL HASSAN** must have been aware that non-consensual relations – and non-consensual sex within those ‘relations’ - would occur in the ordinary course of events. There was no “dissonance” with the common plan⁴³⁷ – rape was a virtually certain consequence of implementing that plan. The one example of the man punished who raped a local woman is consistent with this plan and consistent with IYAD's claim that they were there to promote “virtue” and prevent “vice” – because the culprit was punished for *adultery* for having sex outside of marriage.⁴³⁸

⁴³⁴ *Contra* Defence Submissions, para.148-153.

⁴³⁵ *Contra* Defence Submissions, para.149.

⁴³⁶ See Section 8.5 of the DCC. *See also e.g.* T-005-CONF-ENG-CT, p.5, l.2-p.15, l.17; [REDACTED]

Contra Defence Submissions, para.147-148.

⁴³⁸ *Contra* Defence Submissions, para.148-149.

163. In this inherently coercive context where no steps were taken to ensure ‘marriages’ were consensual, or that sex within those marriages was consensual - and the men were granted absolute power over their victims – **AL HASSAN** must have also been aware that in the ordinary course of events these perpetrators would force their victims to do whatever they wanted, even if it meant having sex with other men.⁴³⁹ Neither **AL HASSAN** or any other leader punished their men for treating victim ‘wives’ in this way. Indeed, the fact that the leadership did nothing even though this would have violated their own rules regarding adultery is not the only glaring example of these double standards. The entire repressive system they imposed – with the oppressive and brutal methods they encouraged and used to enforce their rules against all locals [REDACTED] [REDACTED] - demonstrates the double standards of IYAD’s alleged vision for Ansar Dine of ‘[REDACTED]’,⁴⁴⁰
164. Contrary to what the Defence argues, **AL HASSAN**’s role in negotiating dowries is not an indication of the consensual nature of the arrangements⁴⁴¹ but the fact that he was involved in the marriage system as a leader demonstrates his knowledge of the inherently non-consensual nature of the system.

F. OTHER MATTERS

1. AL HASSAN’s alleged character

165. Whether any individual in Timbuktu viewed **AL HASSAN** as a likeable person⁴⁴² is irrelevant to the question of whether he committed or intended the crimes for which he has been charged. However, as the Defence has raised the issue of his alleged character, the Prosecution observes for instance, that: (a) **AL HASSAN** himself indicated to the Prosecution that he feared returning to Timbuktu as people knew him and that he worked with the jihadists;⁴⁴³ and, (b) [REDACTED] described how women in particular were unhappy that they were forced to remain with unwanted husbands; and that it was **AL HASSAN** who was responsible for this.⁴⁴⁴

2. The Tuareg rebellion

⁴³⁹ *Contra* Defence Submissions, para.150.

⁴⁴⁰ [REDACTED].

⁴⁴¹ Defence Submissions, para.235.

⁴⁴² *Contra* Defence arguments at T-006-CONF-ENG-ET, p.13, l.1-6; p.16, l.14-p.17, l.9.

⁴⁴³ [REDACTED].

⁴⁴⁴ [REDACTED].

166. The circumstances of the Tuareg rebellion are relevant as incriminatory evidence demonstrating the existence of a conflict and as general background context.⁴⁴⁵ However, **AL HASSAN**'s motivations in connection with the Tuareg rebellion are wholly irrelevant as a defence or the question of whether he intended and committed crimes.⁴⁴⁶ For example, as the ICTY Appeals Chamber reiterated: "motive is generally irrelevant in criminal law".⁴⁴⁷

III. CONCLUSION

167. The Prosecution asks the Chamber to confirm all 13 counts, on the basis of all alternative modes of liability as requested, as there are substantial grounds to believe that Mr. **Al HASSAN** is individually criminally responsible for all crimes as charged.

168. This filing is classified as confidential under regulation 23bis(1) as it includes witness-related information. A public redacted version will be filed separately.



Fatou Bensouda
Prosecutor

Dated this 24 July 2019

At The Hague, The Netherlands

⁴⁴⁵ [REDACTED]

⁴⁴⁶ *Contra* Defence arguments at T-006-CONF-ENG-ET, p.13, l.9-p.14, l.13.

⁴⁴⁷ See e.g., *Prosecutor v Tadic*, Judgment, 15 July 1999, Case No. IT-95-1-A, paras.269-270, 272. The ICTY Appeals Chamber reiterated that: "motive is generally irrelevant in criminal law, as the Prosecution pointed out [...] 'For example, it doesn't matter whether or not an accused steals money in order to buy Christmas presents for his poor children or to support a heroin habit. All we're concerned with is that he stole and he intended to steal.[...] motives are simply irrelevant in criminal law'. [...] Under customary law, 'purely personal motives' do not acquire any relevance for establishing whether or not a crime against humanity has been perpetrated."