



Original: **French**

No.: **ICC-01/12-01/18**
Date: **27 September 2019**

PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Reine Adélaïde Sophie 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 Document

**Decision on the Admissibility Challenge raised by the Defence
for Insufficient Gravity of the Case**

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

Office of the Prosecutor

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Mr James Stewart

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Legal Representatives of Victims

Mr Seydou Doumbia
Mr Mayombo Kassongo
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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

States' Representatives

Competent authorities of the
Republic of Mali

**Office of Public Counsel for the
Defence**

REGISTRY

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Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Detention Section

**Victims Participation and Reparations
Section**

Other

Pre-Trial Chamber I (“Chamber”) of the International Criminal Court (“Court”) issues this decision concerning the Defence application made under articles 17(1)(d) and 19 of the Rome Statute (“Statute”).

I. Procedural history

1. On 20 March 2018, the Prosecutor filed an application seeking the issuance of a warrant for the arrest of Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (“Mr Al Hassan”).¹
2. On 27 March 2018, the Chamber, acting pursuant to article 58 of the Statute, issued a warrant for Mr Al Hassan’s arrest (“Warrant of Arrest”).²
3. On 31 March 2018, Mr Al Hassan was surrendered to the Court; he is currently in custody at its detention centre in The Hague.³
4. On 22 May 2018, the Chamber issued its decision on the Warrant of Arrest (“Decision on the Warrant of Arrest”),⁴ finding the case against Mr Al Hassan admissible.
5. On 11 May 2019, the Prosecutor, acting in accordance with article 61(3) of the Statute, filed an amended and corrected version of the Document Containing the Charges against Mr Al Hassan (“DCC”).⁵

¹ *“Requête urgente du Bureau du Procureur aux fins de délivrance d’un mandat d’arrêt et de demande d’arrestation provisoire à l’encontre de M. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud”*, 20 March 2018, ICC-01/12-01/18-1-Secret-Exp. A confidential version, *ex parte* Office of the Prosecutor and the Defence Team for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (ICC-01/12-01/18-1-Conf-Exp-Red2) and a public redacted version (ICC-01/12-01/18-1-Red) of the application were filed on 31 March 2018.

² *“Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud”*, 27 March 2018, reclassified as public on 31 March 2018, ICC-01/12-01/18-2-tENG.

³ ICC-01/12-01/18-11-US-Exp.

⁴ *“Decision on the Prosecutor’s Application for the Issuance of a Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud”*, 22 May 2018, ICC-01/12-01/18-35-Conf-Exp-Red-tENG, para. 39. A public redacted version was issued that day.

⁵ ICC-01/12-01/18-335-Conf-Corr. The Prosecutor filed a public redacted version on 2 July 2019 (ICC-01/12-01/18-Corr-Red).

6. On 7 June 2019, the Defence for Mr Al Hassan (“Defence”) submitted its observations (“Defence Observations”)⁶ on arrangements for the confirmation hearing (“Hearing”). The Defence stated its intention to bring a challenge to the admissibility of the case under articles 17(d) and 19 of the Statute and moved that any Prosecution response thereto be made orally at the Hearing.⁷

7. On 13 June 2019, the Prosecutor filed a request concerning the procedure to be followed in the event of a Defence challenge to the admissibility of the case,⁸ asking the Single Judge to reject the Defence motion to limit any Prosecution submissions on the admissibility of the case to oral submissions at the Hearing.⁹ The Prosecutor also asked the Single Judge to direct the Defence to file its challenge to the admissibility of the case by 21 June 2019 should the Chamber think fit to receive observations from the Prosecution on admissibility before the Hearing.¹⁰ In the alternative the Prosecutor sought leave to file written submissions within a reasonable time after the Hearing.¹¹

8. On 19 June 2019, the Legal Representatives of Victims filed a response to the Defence Observations,¹² applying to the Chamber for reasonable time to respond in writing to the Defence admissibility challenge if and when made.¹³

9. On 21 June 2019, the Single Judge handed down his “*Décision portant calendrier relatif au dépôt d’observations*”¹⁴ determining that written observations from the Prosecutor, the Government of Mali and the Legal Representatives of Victims on the admissibility of the case would be invited if and when the Defence filed its challenge.¹⁵

⁶ “Defence Observations on the Confirmation of Charges Hearing”, ICC-01/12-01/18-365.

⁷ Defence Observations, paras. 2-3.

⁸ “Prosecution’s request for setting a procedure for the Defence’s potential admissibility challenge”, ICC-01/12-01/18-373.

⁹ Prosecutor’s Request in Response to the Defence Observations, paras. 2 and 16.

¹⁰ Prosecutor’s Request in Response to the Defence Observations, paras. 6, 14 and 16.

¹¹ Prosecutor’s Request in Response to the Defence Observations, paras. 6, 14 and 16.

¹² “*Réponse des Représentants légaux au document de la Défense intitulé ‘Defence Observations on the Confirmation of Charges Hearing’ (ICC-01/12-01/18-365)*”, ICC-01/12-01/18-380.

¹³ Response of the Legal Representatives of Victims to the Defence Observations, para. 14.

¹⁴ ICC-01/12-01/18-381.

¹⁵ ICC-01/12-01/18-381, para. 20.

10. On 4 July 2019, the Defence lodged its submissions under rule 121(9) of the Rules of Procedure and Evidence (“Rules”) in which it challenged the admissibility of the case (“Defence Application Challenging the Admissibility of the Case” or “Defence Application”).¹⁶

11. On 8 July 2019, the Single Judge made an order¹⁷ directing the Prosecutor, the Government of Mali and the Legal Representatives of Victims to submit observations not exceeding 20 pages in response to the Defence Application by 30 July 2019, and directing the Defence to submit written observations in reply not exceeding 20 pages, should it so wish, by 6 August 2019.¹⁸

12. From 8 to 17 July 2019 the Hearing was held in the presence of the Prosecution, the Defence and the Legal Representatives of Victims.¹⁹

13. On 25 July 2019, the Prosecutor filed her observations in response to the Defence Application (“Prosecution Observations”).²⁰

14. On 30 July 2019, the Legal Representatives of Victims submitted their observations in response to the Defence Application (“Observations of the Legal Representatives of Victims”).²¹

15. On 31 July 2019, the Registrar transmitted the Malian authorities’ observations on the Defence Application (“Observations of the Government of Mali”).²²

¹⁶ “Submissions for the confirmation of charges”, ICC-01/12-01/18-394-Conf, paras. 256-286. The Defence filed a public redacted version on 9 July 2019 (ICC-01/12-01/18-394-Red).

¹⁷ “Ordonnance portant calendrier relatif au dépôt d’observations en lien avec l’exception d’irrecevabilité soulevée par la défense”, ICC-01/12-01/18-400.

¹⁸ “Ordonnance portant calendrier relatif au dépôt d’observations en lien avec l’exception d’irrecevabilité soulevée par la défense”, ICC-01/12-01/18-400, para. 20 and p. 8.

¹⁹ “Ordonnance portant calendrier de l’audience de confirmation des charges”, 24 June 2019, ICC-01/12-01/18-385 and “Ordonnance modifiant l’Ordonnance portant calendrier de l’audience de confirmation des charges”, 27 June 2019, ICC-01/12-01/18-390.

²⁰ “Prosecution’s observations in response to the Defence’s admissibility challenge”, ICC-01/12-01/18-432-Conf. The Prosecutor filed a public redacted version on 1 August 2019 (ICC-01/12-01/18-432-Red).

²¹ “Observations en réponse à l’exception d’irrecevabilité soulevée par la défense”, ICC-01/12-01/18-439.

²² “Transmission des Observations des Autorités Maliennes en lien avec l’Exception d’Irrecevabilité soulevée par la Défense”, ICC-01/12-01/18-441 and confidential annex ICC-01/12-01/18-441-Conf-Anx.

16. On 6 August 2019, the Defence submitted its observations in reply to the observations of the Prosecutor, the Government of Mali and the Legal Representatives of Victims (“Defence Observations”).²³

II. Analysis

A. The parties and participants’ submissions

1. Submissions of the Defence

17. The Defence, in its application challenging the admissibility of the case, contends that the case against Mr Al Hassan is inadmissible under article 17(1)(d) of the Statute because it is not of sufficient gravity to justify further action by the Court.²⁴

18. Specifically, the Defence submits that the limited scope of the charges against Mr Al Hassan, his low rank and his relatively minor role in the events that took place in Timbuktu in 2012 mean that the Prosecutor has not established that the case concerning Mr Al Hassan satisfies the quantitative and qualitative criteria to be of sufficient gravity for trial before the Court.²⁵

19. The Defence begins by arguing that, in assessing the gravity of the case, the Chamber must confine its analysis to the scope of the specific charges laid in the DCC and disregard allegations that go to the contextual elements of the alleged crimes.²⁶ It contends that the events with which the suspect has not been charged but which are described for the purpose of establishing that the conditions in articles 7 and 8 of the Statute have been met must not be considered by the Chamber here.²⁷

20. Next, solely on the basis of the acts with which the suspect is charged in the DCC, the Defence proceeds to submit that the *Al Hassan* case does not satisfy the

²³ “Defence Reply on Admissibility Challenge (Gravity)”, ICC-01/12-01/18-449-Conf. The Defence filed a public redacted version on 5 September 2019 (ICC-01/12-01/18-449-Red).

²⁴ Defence Application, para. 256; Defence Observations in Reply, para. 1.

²⁵ Defence Application, paras. 257-258 and 286.

²⁶ Defence Application, para. 259.

²⁷ Defence Application, para. 259.

quantitative gravity criterion relating to the number of victims; the case is in fact minor, especially by comparison with the other cases that the Court has tried.²⁸ In particular, the Defence points out that the Prosecutor does not allege that any civilians died as a result of Mr Al Hassan's actions and alleged participation in the common plan, and emphasizes that the alleged crimes appear to have been committed sporadically over a period of 10 months.²⁹ The Defence goes on to say that the case is limited in geographic scope in that it concerns only events alleged to have taken place in Timbuktu.³⁰

21. In addition, the Defence submits that Mr Al Hassan's low rank militates against trying him before the Court.³¹ In its view, although the Prosecutor alleges that Mr Al Hassan was the "*commissaire de facto*" of the Islamic police", the use of the term "*de facto*" betrays the fact that no such position existed in the actual hierarchy of the Islamic Police and that it is in reality a title contrived by the Prosecutor in order to cast Mr Al Hassan in a role and artificially bolster the case.³² The Defence asserts that, from the Prosecutor's description in the DCC, Mr Al Hassan had only a very minor, administrative role which does not warrant action by the Court.³³

22. In that respect, the Defence says that the International Criminal Tribunal for the former Yugoslavia (ICTY) declined to try multiple cases that were, on the face of it, of greater gravity than *Al Hassan* and decided to refer them to domestic jurisdictions on account of their insufficient gravity and the low rank of the accused.³⁴ Likewise, Mr Al Hassan's low rank in the Islamic Police does not justify action by the Court.³⁵

23. As for the qualitative criteria, the Defence argues that the allegations relating to Mr Al Hassan's alleged conduct are not of sufficient gravity to justify action by the

²⁸ Defence Application, paras. 263-264.

²⁹ Defence Application, para. 263.

³⁰ Defence Application, para. 265.

³¹ Defence Application, paras. 266-272.

³² Defence Application, para. 266.

³³ Defence Application, para. 269.

³⁴ Defence Application, paras. 270-272.

³⁵ Defence Application, para. 272.

Court.³⁶ In support, the Defence asserts that the section of the DCC dedicated to Mr Al Hassan's individual criminal responsibility is repetitive and inflates a handful of acts and instances of conduct.³⁷ Specifically, although Mr Al Hassan is charged on the basis of article 25(3)(a) of the Statute with having personally whipped three persons, the Defence argues that Mr Al Hassan is not shown to have played a significant or decisive role in the decision to punish the three persons and adds that Mr Al Hassan is only one of many who are alleged to have meted out the punishment.³⁸

24. Apart from the few events for which Mr Al Hassan is charged on the basis of article 25(3)(a) of the Statute, it is the Defence's submission that the Prosecutor charges Mr Al Hassan for his involvement with the Islamic Police in general and so the acts she describes as establishing Mr Al Hassan's criminal conduct are mostly those of a police administrator.³⁹ According to the Defence, the mere fact that a person stands accused of having a part in an alleged common plan does not automatically mean that the case is of sufficient gravity to be admissible before the Court.⁴⁰ By way of comparison, the Defence says, some cases before the ICTY which, on the face of it, appear to be of greater gravity than that against Mr Al Hassan were nonetheless referred to national jurisdictions for insufficient gravity and were not tried by the ICTY.⁴¹

25. Moreover, the Defence contends that the Prosecutor's arguments on the gravity of the case rely on a flawed conception of the nature of the charges brought in the case in that the Chamber is invited to base its assessment of gravity on allegations that fall outside the scope of the Statute or the scope of requirements for the charges prescribed by article 67(1)(a) of the Statute and regulation 52 of the

³⁶ Defence Application, para. 273.

³⁷ Defence Application, para. 273.

³⁸ Defence Application, para. 274.

³⁹ Defence Application, para. 277.

⁴⁰ Defence Application, para. 278.

⁴¹ Defence Application, paras. 279-281.

Regulations of the Court.⁴² In that regard, the Defence underscores that the assessment of the admissibility of a case must be conducted on the basis of a proper definition of the scope of the case against the suspect, and must thus be restricted to specific incidents or a specific course of conduct, which are defined in time and space with a sufficient degree of precision and are specifically attributed to Mr Al Hassan.⁴³ The Defence consequently submits that the gravity of the suspect's conduct cannot be assessed solely vis-à-vis the types of crimes included in the charges, but that such assessment must include an evaluation of conduct vis-à-vis the alleged role of the perpetrator in the conduct in question.⁴⁴

26. It goes on to say that the Chamber should confine its analysis of gravity to incidents for which charges were laid with a sufficient degree of precision to define the parameters or contours of the case, thus excluding the allegations identified by the Defence as being overly vague or open-ended.⁴⁵ It is the Defence's view that, if thus restricted to an analysis of Mr Al Hassan's conduct and his alleged contributions to the charged incidents, the scope of the case is small and lacking in gravity.⁴⁶

27. Lastly, the Defence submits that the Chamber's findings in the *Al Mahdi* case do not apply to an assessment of the gravity of the acts *sub judice*.⁴⁷ Accordingly, the Defence asserts that the Chamber is not bound by any decision in the *Al Mahdi* case with regard to the gravity of the case but that it must make its own assessment.⁴⁸

⁴² Defence Observations in Reply, para. 2.

⁴³ Defence Observations in Reply, paras. 3-4.

⁴⁴ Defence Observations in Reply, para. 10.

⁴⁵ Defence Observations in Reply, para. 12.

⁴⁶ Defence Observations in Reply, para. 13.

⁴⁷ Defence Application, paras. 283-285.

⁴⁸ Defence Application, para. 285.

2. Submissions of the Prosecutor

28. The Prosecutor considers that, on the basis of quantitative and qualitative criteria, the *Al Hassan* case is of sufficient gravity, within the meaning of article 17(1)(d) of the Statute, to justify further action by the Court.⁴⁹

29. First, the Prosecutor submits that the *Al Hassan* case meets the quantitative gravity criterion.⁵⁰ Specifically, the Prosecutor recalls that the charges against Mr Al Hassan comprise 13 counts of crimes against humanity and war crimes committed against the civilian population of Timbuktu and its region over a period of nearly 10 months.⁵¹

30. The Prosecutor then contends that the Defence's arguments on the quantitative criterion are based on an incomplete or inaccurate representation of the charges in the case.⁵² The Prosecutor further submits that the crimes with which Mr Al Hassan is charged cover a wide geographical and temporal scope: some of the incidents occurred in the wider Timbuktu region and the crimes were committed over several months; specifically, the crime of persecution was committed on a continuous basis throughout the period that Timbuktu and its region were under the control of the armed groups.⁵³ In comparison, the Prosecutor points out that other cases in which the geographical and temporal scope was more focused have been found to be of sufficient gravity to justify further action by the Court.⁵⁴

31. The Prosecutor also explains that the crimes with which Mr Al Hassan is charged meet the qualitative criteria of gravity on account of their violent and repressive nature and their extensive impact on the direct victims and the community.⁵⁵ To illustrate her point, the Prosecutor submits that the attacks directed against the mausoleums caused grave moral and economic harm to the victims and

⁴⁹ Prosecution Observations, paras. 1, 8.

⁵⁰ Prosecution Observations, paras. 9-14.

⁵¹ Prosecution Observations, para. 9.

⁵² Prosecution Observations, paras. 10-11.

⁵³ Prosecution Observations, paras. 12-13.

⁵⁴ Prosecution Observations, para. 14.

⁵⁵ Prosecution Observations, paras. 15-21.

the community in Timbuktu and its region.⁵⁶ The Prosecutor recalls that the destruction of the mausoleums was found to be of significant gravity in the *Al Mahdi* case and points out that the charges against Mr Al Hassan are broader than those against Mr Al Mahdi.⁵⁷

32. The Prosecutor further argues that the crimes with which Mr Al Hassan has been charged were committed in an organized manner through the establishment by the armed groups of various organs which institutionalized the commission of the crimes. Furthermore, according to the Prosecutor some of these crimes, specifically whipping and amputation, were committed in a cruel, humiliating and degrading manner.⁵⁸ The Prosecutor goes on to state that the crimes were committed in the context of a widespread and systematic attack directed against the civilian population of Timbuktu and its region.⁵⁹

33. Moreover, the Prosecutor maintains that Mr Al Hassan's conduct demonstrates certain aggravating factors in that he abused his position as the *de facto commissaire* of the Islamic Police and committed crimes against vulnerable victims, crimes on the basis of religion and gender, and crimes of particular cruelty.⁶⁰

34. The Prosecutor argues that Mr Al Hassan played a significant role in the commission of the crimes.⁶¹ She asserts that by requesting the Chamber to assess the gravity of the case on the basis of Mr Al Hassan's alleged role as a "minor police administrator" the Defence is inviting the Chamber to conduct an assessment which is erroneous in two respects.⁶² First, the Prosecutor considers that the Chamber must make its assessment of the gravity of the case on the basis of the "most serious crimes" as required by the Court's statutory regime and in keeping with the Appeals Chamber's previous rulings, rather than on the basis of the "persons most

⁵⁶ Prosecution Observations, para. 16.

⁵⁷ Prosecution Observations, paras. 2, 17.

⁵⁸ Prosecution Observations, para. 23.

⁵⁹ Prosecution Observations, para. 24.

⁶⁰ Prosecution Observations, para. 25.

⁶¹ Prosecution Observations, paras. 26-35.

⁶² Prosecution Observations, para. 26.

responsible”.⁶³ Second, the Prosecutor recalls that, under rule 58(1) of the Rules of Procedure and Evidence (“Rules”), the determination of the admissibility of a case precedes consideration of the merits of the case, and that the Chamber’s assessment of the admissibility of the case and consideration of the merits of the case are not to be conflated – as the Defence has done, especially in relation to Mr Al Hassan’s alleged role in the commission of the crimes.⁶⁴

3. Submissions of the Legal Representatives of Victims

35. The Legal Representatives of Victims submit that none of the reasons advanced by the Defence, even taken in isolation, are founded; the Defence’s admissibility challenge should therefore be rejected.⁶⁵

36. First, the Legal Representatives of Victims contend that the Defence has no basis for arguing that the Chamber’s analysis of the gravity of the case must exclude all the contextual elements that are unconnected to the charges laid against the suspect in the DCC.⁶⁶ On that matter, the Legal Representatives of Victims recall that in the Situation on the Registered Vessels of Comoros, Greece and Cambodia, Pre-Trial Chamber I held that the Court has the authority to consider all necessary information, including as concerns extra-jurisdictional facts for the purpose of establishing crimes within its competence as well as their gravity.⁶⁷ In the case at bar, they proceed to argue, all of the contextual elements are related to events that directly or indirectly concern Mr Al Hassan, owing to his presence in the *locus in quo* throughout the material time and to his direct or indirect role in those events.⁶⁸

37. The Legal Representatives of Victims further state that the Defence argument that the *Al Hassan* case does not satisfy the quantitative gravity criterion is

⁶³ Prosecution Observations, para. 27-30.

⁶⁴ Prosecution Observations, paras. 32-34.

⁶⁵ Observations of the Legal Representatives of Victims, para. 58, p. 18.

⁶⁶ Observations of the Legal Representatives of Victims, paras. 31-32, 34.

⁶⁷ Observations of the Legal Representatives of Victims, para. 33.

⁶⁸ Observations of the Legal Representatives of Victims, paras. 34-35.

contradicted by the case record, in particular the number of participating victims.⁶⁹ On that point, the Legal Representatives of Victims underscore that the harm caused to an entire population, the destruction of a city and its soul, the humiliation which has left permanent scars, the transgenerational harm and the indelibility of the crimes that still engender trauma to this day are proof of the gravity of the crimes.⁷⁰ Furthermore, the manner in which the crimes were committed is a decisive factor in the assessment of the gravity threshold in the case, especially given the public nature of the punishments, the aim to cause humiliation and the particular violence and cruelty of the sexual violence crimes.⁷¹

38. The Legal Representatives of Victims also submit that the fact that the crimes were committed over a 10-month period is not a valid ground for contesting the gravity of the case, and even less so when taken in conjunction with the other factors for consideration.⁷² Recalling that the Court has previously had occasion to rule on events that took place over shorter periods of time and in smaller areas, the Legal Representatives of Victims submit that the very nature of the crimes in the case suffices to establish the gravity of the *Al Hassan* case.⁷³

39. Moreover, the Legal Representatives of Victims argue that the matter of Mr Al Hassan's rank is not decisive, in that the exercise, at this juncture, is to assess his responsibility for the crimes committed.⁷⁴ It is the case that Mr Al Hassan's responsibility and role in each of the crimes charged have been amply established throughout the DCC and it can no longer be reasonably claimed that the acts attributed to Mr Al Hassan are the routine acts of a police administrator or that the extent and impact of his contribution to the crimes are factually minimal.⁷⁵

⁶⁹ Observations of the Legal Representatives of Victims, paras. 36, 39, 47.

⁷⁰ Observations of the Legal Representatives of Victims, para. 40.

⁷¹ Observations of the Legal Representatives of Victims, paras. 42-43.

⁷² Observations of the Legal Representatives of Victims, para. 44.

⁷³ Observations of the Legal Representatives of Victims, paras. 45-47.

⁷⁴ Observations of the Legal Representatives of Victims, para. 51.

⁷⁵ Observations of the Legal Representatives of Victims, para. 51.

40. Lastly, the Legal Representatives of Victims recall that, in its Decision on the Warrant of Arrest, the Chamber had regard to the *Al Mahdi* case in determining that the *Al Hassan* case was of sufficient gravity within the meaning of article 17(1)(d) of the Statute.⁷⁶ They therefore consider that nothing precludes the Chamber from having regard, in the present decision, to considerations relevant to the assessment of the gravity threshold that might have been analysed in other cases, in particular in the *Al Mahdi* case.⁷⁷

B. Applicable law

41. The Single Judge has regard to articles 17(1)(d), 19 and 61 of the Statute and rules 58, 59, 122(2), 145(1)(c) and 145(2)(b) of the Rules.

42. The Defence, pursuant to article 19 of the Statute, challenges the admissibility of the case against Mr Al Hassan on the ground that the case is not of sufficient gravity, within the meaning of article 17(1)(d) of the Statute, to justify further action by the Court.

43. The Chamber notes that under article 17(1) of the Statute “the Court shall determine that a case is inadmissible where: [...] (d) [it] is not of sufficient gravity to justify further action by the Court.”

44. The Chamber also has regard to article 19 of the Statute, which provides:

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.
2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:
 - (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58; [...]
3. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82. [...]

⁷⁶ Observations of the Legal Representatives of Victims, para. 55.

⁷⁷ Observations of the Legal Representatives of Victims, para. 56.

45. The Chamber recalls that the parameters of a “case” are those set in the document that is statutorily envisaged as defining the allegations against the person at a given stage of proceedings.⁷⁸ Here, that document is the DCC, which contains the charges on which the Prosecutor is moving the Chamber to commit Mr Al Hassan to a Trial Chamber.

46. As made clear in rule 58(1) of the Rules, any issue as to the admissibility of a case or the jurisdiction of the Court must be resolved before consideration of the merits of such case. Therefore, the Chamber must dispose of a challenge to the admissibility of the case before deciding whether to confirm the charges pursuant to article 61(7) of the Statute.⁷⁹ Only if the case is found to be admissible will the Chamber decide, on the basis of the available evidence, whether there are substantial grounds to believe that Mr Al Hassan committed each of the crimes charged. In other words, the Chamber must first address the issue as to whether the case against Mr Al Hassan, as pleaded by the Prosecutor in her DCC, is of “sufficient gravity” to justify further action on its part.

47. The Chamber has regard to the Court’s previous decisions on the interpretation of the criterion of gravity within the meaning of article 17(1)(d) of the Statute. For instance, in *Abu Garda* Pre-Trial Chamber I held that “the gravity in a given case should not be assessed only from a quantitative perspective, i.e. by considering the number of victims; rather, the qualitative dimension of the crime should also be taken into consideration.”⁸⁰ Pre-Trial Chamber II has further said in this regard that “it is not the number of victims that matter but rather the existence of some aggravating or qualitative factors attached to the commission of crimes,

⁷⁸ See, in particular, *The Prosecutor v. Charles Blé Goudé*, “Decision on the Defence challenge to the admissibility of the case against Charles Blé Goudé for insufficient gravity”, 12 November 2014, ICC-02/11-02/11-185 (French version notified on 27 January 2015), para. 10.

⁷⁹ See, in particular, *The Prosecutor v. Charles Blé Goudé*, “Decision on the Defence challenge to the admissibility of the case against Charles Blé Goudé for insufficient gravity”, 12 November 2014, ICC-02/11-02/11-185 (French version notified on 27 January 2015), para. 9; *The Prosecutor v. Abdullah Al-Senussi*, “Decision on the admissibility of the case against Abdullah Al Senussi”, 11 October 2013, ICC-01/11-01/11-466-Red, para. 66(iii).

⁸⁰ *The Prosecutor v. Bahr Idriss Abu Garda*, “Decision on the Confirmation of Charges”, 8 February 2010, ICC-02/05-02/09-243-Red (French version notified on 16 March 2010), para. 31.

which makes it grave.”⁸¹ In this sense, factors such as the nature, scale and manner of commission of the alleged crimes, and their impact on victims, are significant indicators of the gravity of a case.⁸²

48. The Pre-Trial Chambers have consistently held that some of the factors listed in rule 145(1)(c) of the Rules for the purpose of the determination of the sentence may be of relevance to the assessment of the gravity of a case.⁸³ The rule refers to, *inter alia*,

the extent of the damage caused [...] to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location.

For the purposes of determining whether a case is of sufficient gravity, regard has also been had to the existence of any of the aggravating circumstances listed in rule 145(2)(b) of the Rules,⁸⁴ *inter alia*, the “[c]ommission of the crime where the

⁸¹ Pre-Trial Chamber II, Situation in the Republic of Kenya, “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation in the Situation in the Republic of Kenya”, 31 March 2010, ICC-01/09-19-Corr (French version notified on 6 April 2011), para. 62.

⁸² See, for example, *The Prosecutor v. Charles Blé Goudé*, “Decision on the Defence challenge to the admissibility of the case against Charles Blé Goudé for insufficient gravity”, 12 November 2014, ICC-02/11-02/11-185 (French version notified on 27 January 2015), para. 11; Pre-Trial Chamber II, *The Prosecutor v. Uhuru Muigai Kenyatta*, “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, 23 January 2012, ICC-01/09-02/11-382-Red (French version notified on 11 December 2014), para. 50.

⁸³ See, for example, *The Prosecutor v. Charles Blé Goudé*, “Decision on the Defence challenge to the admissibility of the case against Charles Blé Goudé for insufficient gravity”, 12 November 2014, ICC-02/11-02/11-185 (French version notified on 27 January 2015), para. 12; *The Prosecutor v. Bahr Idriss Abu Garda*, “Decision on the Confirmation of Charges”, 8 February 2010, ICC-02/05-02/09-243-Red (French version notified on 16 March 2010), para. 32; Pre-Trial Chamber II, Situation in the Republic of Kenya, “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation in the Situation in the Republic of Kenya”, 31 March 2010, ICC-01/09-19-Corr (French version notified on 6 April 2011), para. 62; Pre-Trial Chamber II, *The Prosecutor v. Uhuru Muigai Kenyatta*, “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, 23 January 2012, ICC-01/09-02/11-382-Red (French version notified on 11 December 2014), para. 50; Pre-Trial Chamber III, Situation in the Republic of Côte d’Ivoire, “Corrigendum to ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire’”, 15 November 2011, ICC-02/11-14-Corr (French version notified on 8 February 2012), para. 205.

⁸⁴ See, for example, *The Prosecutor v. Charles Blé Goudé*, “Decision on the Defence challenge to the admissibility of the case against Charles Blé Goudé for insufficient gravity”, 12 November 2014, ICC-02/11-02/11-185 (French version notified on 27 January 2015), para. 12; Pre-Trial Chamber II, Situation in the Republic of Kenya, “Decision Pursuant to Article 15 of the Rome Statute on the

victim is particularly defenceless”, the “[c]ommission of the crime with particular cruelty or where there were multiple victims” and the “[c]ommission of the crime for any motive involving discrimination”.

C. Determination of the Chamber

49. The Chamber notes that the Defence relies on four main arguments to submit that the case against Mr Al Hassan is not of sufficient gravity:

- (i) Mr Al Hassan’s alleged role in the events is that of a low-ranking police administrator who should not be brought before a court whose task is to try the persons most responsible for the most serious crimes;⁸⁵
- (ii) The evidence which is supposed to establish that the conditions of articles 7 and 8 of the Statute have been met cannot be taken into consideration in assessing the gravity of the case;⁸⁶
- (iii) The actual scope of the *Al Hassan* case is limited to a small number of incidents alleged to have occurred within Timbuktu city limits and scattered over a period of 10 months; in that respect, only the victims identified must be taken into account in considering the quantitative gravity criterion in the case;⁸⁷ and
- (iv) Mr Al Hassan’s alleged conduct as described by the Prosecutor does not demonstrate the necessary aggravating or qualitative factors to meet the gravity threshold.⁸⁸

50. First, as regards the Defence’s first ground concerning Mr Hassan’s alleged role in the events⁸⁹ – that of a low-ranking police administrator – the Chamber has regard in any event to the previous rulings of the Appeals Chamber, which has held

Authorization of an Investigation into the Situation in the Republic of Kenya”, 31 March 2010, ICC-01/09-19-Corr (French version notified on 6 April 2011), para. 62.

⁸⁵ Defence Application, paras. 258, 266-272.

⁸⁶ Defence Application, paras. 258-261.

⁸⁷ Defence Application, paras. 258, 262-265.

⁸⁸ Defence Application, paras. 258, 273-282.

⁸⁹ Defence Application, paras. 258, 266-272.

that the exclusion of certain categories of perpetrators from the exercise of the jurisdiction of the Court, especially those not considered to be “the highest ranking”, “could severely hamper the preventive, or deterrent, role of the Court which is a cornerstone of the creation of the International Criminal Court.”⁹⁰ Indeed, according to the Appeals Chamber, “[h]ad the drafters of the Statute intended to limit its application to only the most senior leaders suspected of being most responsible they could have done so expressly.”⁹¹ The Appeals Chamber has also considered that, in interpreting article 17(1)(d) of the Statute, to rely on the procedural law and practice of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) is flawed.⁹² In law, the purpose of article 17(1)(d) of the Statute is not to oblige the Court to choose only the most serious cases, but merely to oblige it not to prosecute cases of marginal gravity.

51. Moreover, as said above and consonant with the Court’s settled view,⁹³ the Chamber recalls that it must determine the admissibility of the case before considering whether there is sufficient evidence to confirm the charges. Such determination is made on the basis of the DCC submitted by the Prosecutor without delving into the evidence put forward to sustain those charges. To do otherwise would amount to conflation by the Chamber of the inquiry into admissibility with that into the merits of the case.⁹⁴

⁹⁰ Appeals Chamber, “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’”, 13 July 2006, ICC-01/04-169 (unsealed on 23 September 2008 and French version notified on 8 January 2007), para. 75.

⁹¹ Appeals Chamber, “Judgment on the Prosecutor’s appeal against the Decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’”, 13 July 2006, ICC-01/04-169 (unsealed on 23 September 2008 and French version notified on 8 January 2007), para. 79.

⁹² Appeals Chamber, “Judgment on the Prosecutor’s appeal against the Decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’”, 13 July 2006, ICC-01/04-169 (unsealed on 23 September 2008 and French version notified on 8 January 2007), para. 80.

⁹³ See, above, para. 46.

⁹⁴ See, in particular, *The Prosecutor v. Charles Blé Goudé*, “Decision on the Defence challenge to the admissibility of the case against Charles Blé Goudé for insufficient gravity”, 12 November 2014, ICC-02/11-02/11-185 (French version notified on 27 January 2015), para. 17.

52. In that sense, contrary to what the Defence argues in connection with its first ground,⁹⁵ the Chamber cannot exclude certain aspects of the Prosecutor's allegations on the basis of a purported lack of evidence, as to do so would amount to assessing the available evidence and would, therefore, be part of the determination on the merits of the charges presented by the Prosecutor. Rather, as explained above, the Chamber will entertain only the Prosecutor's allegations against Mr Al Hassan and not the question whether they are sufficiently supported by the available evidence – that question will be determined in the decision on the confirmation of charges.

53. Likewise, as regards the Defence's second ground,⁹⁶ the Chamber considers that it cannot "exclude" the Prosecutor's allegations related to the contextual elements of the alleged crimes from its consideration of the gravity of the case. The determination of the gravity of the case must be based on all relevant aspects of the Prosecutor's allegations against Mr Al Hassan considered as a whole.⁹⁷ In that respect, the Chamber notes that the contextual elements of crimes against humanity and war crimes are part of the constituent elements of the crimes and enable a distinction to be made between "ordinary" crimes and international crimes falling under the Court's jurisdiction. Thus, persons prosecuted before the Court are specifically charged with having had knowledge of the existence of a widespread or systematic attack directed against a civilian population, or of the existence of an armed conflict, and with having nevertheless committed one or more of the crimes that were a part of that attack or armed conflict. Accordingly, the Chamber considers that the facts alleged by the Prosecutor to establish the contextual elements, while not necessarily taken into consideration as individual incidents alleged against Mr Al Hassan, constitute an integral part of the charges brought against him and establish the context in which the alleged crimes are said to have occurred.

⁹⁵ See, in particular, Defence Application, para. 268.

⁹⁶ See, in particular, Defence Application, paras. 258-261.

⁹⁷ See, in particular, *The Prosecutor v. Charles Blé Goudé*, "Decision on the Defence challenge to the admissibility of the case against Charles Blé Goudé for insufficient gravity", 12 November 2014, ICC-02/11-02/11-185 (French version notified on 27 January 2015), para. 19.

54. Turning to the Defence's third and fourth grounds,⁹⁸ the Chamber recalls that an assessment of the gravity of a case is based on certain factors,⁹⁹ which comprise all the relevant aspects of the Prosecutor's allegations against Mr Al Hassan, considered as a whole.

55. The Chamber notes in that respect the Defence's submission that only the acts committed against identified persons may be taken into account in considering the quantitative criterion of gravity, particularly as regards the crime of persecution.¹⁰⁰ The Chamber points out nonetheless that in its decision of 5 October 2018,¹⁰¹ which the Defence did not appeal, it made a determination on the necessity for the Prosecutor to identify the victims in the DCC:

Nonetheless, the Chamber is of the view that the degree of specificity expected from the Prosecutor in her description of the facts depends on the nature of the crimes in question and the circumstances of the case brought by the Prosecutor before the Chamber. Where crimes such as torture or rape are concerned, the Prosecutor must describe the criminal acts in issue, stating the date and place of the acts, along with the number of victims, or at the very least a clear estimate of that number, and their identities as far as at all possible. However, where by their nature the crimes are directed against a group or collectivity of people, as in the case of the crime of persecution, a like degree of specificity cannot be expected of the Prosecutor's description of the facts; nonetheless, the Prosecutor must endeavour to pinpoint as much as possible places, times and approximate numbers of victims and to provide the necessary particulars to make out the elements of the crimes.

56. It is the Chamber's view that it is unnecessary, especially at the confirmation of charges stage, to identify the victims, in particular in the case of the crime of persecution.

57. Given the factors to be taken into account, the Chamber considers that several aspects of the Prosecutor's allegations in the case, as set out in the DCC, are relevant to the determination of the gravity of the case. In particular, the Chamber has regard to the nature and scale of the charged crimes, which amount to 13 counts of crimes against humanity and war crimes allegedly committed against the civilian

⁹⁸ Defence Application, paras. 258, 262-265, 273-282.

⁹⁹ See, above, paras. 47 and 48.

¹⁰⁰ Defence Application, para. 263.

¹⁰¹ "Decision on the Defence Request concerning the Time Limit for the Prosecutor to File the Document Containing a Detailed Description of the Charges", 5 October 2018, ICC-01/12-01/18-143, para. 30.

population in Timbuktu and its region over a period of around 10 months.¹⁰² The Chamber also has regard to the Prosecutor's allegations as to the repercussions of the alleged crimes on the direct victims and on the population of Timbuktu as a whole, especially the victims of the crimes of rape, sexual slavery, and other inhumane acts in the form of forced marriages.¹⁰³ Specifically, the Chamber also notes the Prosecutor's allegations concerning the amputation of P-0552, which had tragic consequences for the victim.¹⁰⁴ Likewise, the Chamber notes the Prosecutor's allegations concerning the discriminatory motive of the crimes allegedly committed against the population of Timbuktu on religious and/or gender-based grounds,¹⁰⁵ and the vulnerability of certain victims.¹⁰⁶ The Chamber further sees that a large number of victims have been admitted to participate in the case (882 to date).¹⁰⁷ The Chamber likewise notes the allegation that the crimes at bar were committed as part of a widespread and systematic attack against the civilian population.¹⁰⁸ The Chamber also takes note of the significant role that the Prosecutor attributes to Mr Al Hassan in the execution of said crimes, not least through his contribution to the Islamic Police, an organ of repression established by the armed groups to cement their power and control over the civilian population of the city of Timbuktu and its region and thereby to impose on it their own ideological and religious vision by any means.¹⁰⁹ Lastly, the Chamber also takes note of Mr Al Hassan's degree of intent and degree of participation in these crimes.¹¹⁰

58. The Chamber is of the view that these allegations, taken as a whole and in the light of the factors for consideration in the assessment of gravity, make the case brought by the Prosecutor against Mr Al Hassan sufficiently grave within the

¹⁰² See DCC, para. 159, sections 7 and 9.

¹⁰³ See, for example, DCC, paras. 779-787.

¹⁰⁴ See, in particular, DCC, paras. 547-549, 605-607.

¹⁰⁵ See DCC, section 8.6, in particular sections 8.6.2.1 and 8.6.3.1.

¹⁰⁶ See, for example, DCC, paras. 474-476, 575-576, 588, 609.

¹⁰⁷ *"Décision relative à la participation des victimes à la procédure"*, 1 July 2019, ICC-01/12-01/18-391-Conf-Exp, para. 38. A public redacted version of the decision was filed that day, ICC-01/12-01/18-391-Red.

¹⁰⁸ See DCC, section 6.

¹⁰⁹ See, in particular, DCC, sections 4.3.1, 5 and 7.2.3; paras. 211-212, 251.

¹¹⁰ See, in particular, DCC, section 7; paras. 398, 403-404, 413-414, 420.

meaning of article 17(1)(d) of the Statute to justify further action by the Court. This finding is without prejudice to the determination, in accordance with article 61(7) of the Statute, on whether there are substantial grounds to believe that Mr Al Hassan committed each of the crimes charged, which will be addressed in a separate decision.

FOR THESE REASONS, the Chamber

REJECTS the admissibility challenge which the Defence raised for insufficient gravity.

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

[signed]

Judge Péter Kovács
Presiding Judge

[signed]

Judge Marc Perrin de Brichambaut

[signed]

Judge Reine Adélaïde Sophie Alapini-Gansou

Dated this 27 September 2019