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APPEALS CHAMBER

Before: Judge Luz del Carmen Ibáñez Carranza, Presiding
Judge Chile Eboe-Osuji
Judge Howard Morrison
Judge Piotr Hofmański
Judge Solomy Balungi Bossa

SITUATION IN THE REPUBLIC OF MALI

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

Confidential

Prosecution's Response to Defence's "Appeal of the Pre-Trial Chamber's 'Décision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense' (ICC-01/12-01/18-459)"

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I. INTRODUCTION

1. The Appeals Chamber should reject the Defence's appeal against Pre-Trial Chamber I's decision dismissing his challenge to the admissibility of the case for alleged lack of gravity.¹ The Defence does not show that the Chamber broadened the scope of his case,² or that it abused its discretion by considering certain allegedly irrelevant factors.³ The Pre-Trial Chamber considered only relevant factors. Moreover, contrary to the Defence's appeal, which is based on particular factors taken in isolation, the Pre-Trial Chamber assessed all relevant allegations as a whole in determining the gravity of his case.⁴ The Defence's appeal should be rejected in its entirety.

2. Determining gravity under article 17 of the Statute involves evaluating numerous factors and related information.⁵ Each factor is indicative, rather than determinative. All relevant factors must be assessed together, rather than piecemeal. A rigid assessment must be avoided. For instance, "the imposition of rigid standards primarily based on top seniority may result in neither retribution, nor prevention being achieved."⁶ Such inflexible approaches make the exclusion of many perpetrators from the reach of the Court more predictable, and "could severely hamper the preventive, or deterrent, role of the Court which is the cornerstone of the creation of the International Criminal Court."⁷

3. The Pre-Trial Chamber correctly found the case against Al Hassan to be of sufficient gravity under article 17 of the Statute to justify further action, by cumulatively considering in particular the following quantitative and qualitative factors:

¹ ICC-01/12-01/18-459-tENG ("Impugned Decision").

² ICC-01/12-01/18-475-Conf OA ("Al Hassan Appeal"), paras.8-48.

³ Al Hassan Appeal, paras.49-65.

⁴ Impugned Decision, paras.57-58.

⁵ ICC-01/13-98 OA2 2019, para.81.

⁶ ICC-01/04-169 OA, para.74.

⁷ ICC-01/04-169 OA, para.75.

- The nature and extent of the charged crimes, which constitute 13 counts of crimes against humanity and war crimes allegedly committed against the civilian population of Timbuktu and its region over a period of around 10 months;⁸
- The repercussions of the alleged crimes on the direct victims and on the population of Timbuktu as a whole, especially the victims of rape, sexual slavery and other inhumane acts in the form of forced marriages as well as the victim of amputation.⁹
- The discriminatory motive of the crimes allegedly committed against the population of Timbuktu on religious and/or gender-based grounds;¹⁰
- The vulnerability of certain victims;¹¹
- A large number of victims admitted to participate in the case;¹²
- The commission of the crimes a part of a widespread and systematic attack against the civilian population;¹³
- The significant role that Al Hassan allegedly played in the execution of the crimes, including through his contribution to the Islamic Police – an organ of repression established by the armed groups¹⁴ 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;¹⁵ and

⁸ Impugned Decision, para.57.

⁹ Impugned Decision, para.57.

¹⁰ Impugned Decision, para.57.

¹¹ Impugned Decision, para.57.

¹² Impugned Decision, para.57.

¹³ Impugned Decision, para.57.

¹⁴ Document Containing the Charges (DCC), para.4 (“Groups”).

¹⁵ Impugned Decision, para.57.

- Al Hassan's degree of intent and degree of participation in the crimes.¹⁶

4. Contrary to the Defence's *first ground of appeal*,¹⁷ the Impugned Decision correctly defined Al Hassan's case in assessing its gravity, including by considering allegations concerning the contextual elements of the crimes:

- First, allegations concerning the contextual elements are an integral part of the "case." They are thus relevant in assessing a case's gravity;¹⁸ and
- Second, and in any event, allegations concerning contextual elements were only one of many factors that the Pre-Trial Chamber considered. Even if they had been excluded from the Chamber's assessment, it would have had no impact on its conclusion that the case is of sufficient gravity.

5. Moreover, the Pre-Trial Chamber correctly relied on allegations relating to the crime of persecution, which were properly pled.¹⁹ It also correctly assessed the scope of victimisation, including by referring to the number of participating victims in the case, based on their victim applications forms.²⁰

6. The Chamber also properly evaluated the nature of Al Hassan's individual conduct, and provided a reasoned opinion, contrary to Al Hassan's *second ground of appeal*.²¹

- First, the Pre-Trial Chamber did not assess the nature of Al Hassan's individual conduct based on abstract notions or 'labels' such as his position within the Islamic Police or his mode of liability. To the contrary, it relied on the concrete content of his conduct and contribution to the alleged crimes;²²

¹⁶ Impugned Decision, para.57.

¹⁷ Al Hassan Appeal, paras.8-48.

¹⁸ Impugned Decision, para.53.

¹⁹ *Contra* Al Hassan Appeal, paras.22-40.

²⁰ *Contra* Al Hassan Appeal, paras.41-48.

²¹ *Contra* Al Hassan Appeal, paras.49-65.

²² *Contra* Al Hassan Appeal, paras.49-65.

- Second, the Defence incorrectly relies on the fact that the Pre-Trial Chamber declined to confirm the charges of co-perpetration under article 25(3)(a) of the Statute. However, the DCC, rather than the Confirmation Decision, delineated the scope of his case at the time of the Impugned Decision;²³ and
- Third, and in any event, the non-confirmation of some of the modes of responsibility alleged against Al Hassan does not vitiate the correctness of the Impugned Decision.²⁴ The Confirmation Decision did not erode the gravity of Al Hassan's case or his blameworthiness for the crimes. In the Confirmation Decision, the Chamber confirmed his criminal conduct under several modes,²⁵ and in so doing recognised that Al Hassan played an important role within the Islamic Police.²⁶

II. CONFIDENTIALITY

7. This response is filed as confidential pursuant to regulation 23bis(2) of the Regulations of the Court because the Al Hassan Appeal to which it responds has the same classification. The Prosecution will file a public redacted version of this response when the Defence submit a public redacted version of the appeal.

²³ *Contra* Al Hassan Appeal, paras.53-58 (citing the Confirmation Decision to challenge the Impugned Decision).

²⁴ *Contra* Al Hassan Appeal, paras.53-58.

²⁵ ICC-01/12-01/18-461-Conf, A) Conclusions factuelles.

²⁶ ICC-01/12-01/18-461-Conf, para.848.

III. SUBMISSIONS

(A) The Pre-Trial Chamber correctly defined the case against Al Hassan by considering relevant factors (*contra* Al Hassan's First Ground of Appeal)

(i) Dismissal *in limine* of unsubstantiated claims

8. As a preliminary matter, the Appeals Chamber should dismiss *in limine* several generalised claims of error that the Defence has raised without identifying the relevant material or the impact of the alleged error.²⁷ For instance, the Defence generally claims that the Pre-Trial Chamber “conflated the parameters of the case with its content,”²⁸ and that it allegedly took account of everything in the DCC, including ‘subsidiary’ or ‘peripheral’ facts in defining the gravity of the ‘case.’²⁹

9. However, apart from the three matters the Defence specifically challenges (i.e., alleged reliance by the Pre-Trial Chamber on allegations concerning the contextual elements; undefined or unpleaded incidents/crimes; and criminality in undisclosed victims applications), the Defence does not identify, or elucidate, the other alleged ‘peripheral’ or ‘subsidiary’ facts to which the Pre-Trial Chamber purportedly extended the case. Nor does the Defence elucidate the impact of the Chamber’s reliance on any such alleged unsubstantiated facts. The Prosecution’s response therefore focuses only on these three aspects. It requests the Appeals Chamber to dismiss *in limine* other unsubstantiated allegations of error.

10. But to be clear, the Impugned Decision did not rely on every allegation in the DCC as part of the ‘case,’ let alone as relevant to the assessment of the case’s gravity. To the contrary, it considered only that “*several aspects* of the Prosecution’s allegations in the case, as set out in the DCC are relevant to the determination of the

²⁷ See also ICC-01/05-01/13-2275-Red A A2 A3 A4 A5, para.72; ICC-01/04-01/10-283 OA, para.18; ICC-01/05-01/08-1019 OA4, paras.69-71.

²⁸ Al Hassan Appeal, para.10.

²⁹ Al Hassan Appeal, paras.11-12.

gravity of the case.”³⁰ It then specifically identified those particular aspects – summarised in paragraph 3 above – in its final determination of the case’s gravity.

(ii) The Pre-Trial Chamber correctly considered allegations related to the contextual elements of crimes against humanity

11. The Pre-Trial Chamber correctly considered allegations relating to the contextual elements of crimes against humanity in assessing the gravity of the case.³¹ The Defence’s appeal on this aspect should be dismissed.

(a) Contextual elements are an integral part of the case, and engage a person’s criminality

12. The Pre-Trial Chamber correctly recognised the relevance of the Prosecution’s allegations relating to the contextual elements of the crimes in examining the seriousness of the Prosecutor’s case.³² They “establish the context in which the alleged crimes are said to have occurred.”³³

13. Contextual elements are constituent elements of these crimes. They are part of the definition of the crimes and form an integral part of any case brought against a person charged with crimes at the ICC.³⁴ The DCC must plead the relevant facts, concerning contextual elements.³⁵ Allegations concerning contextual elements are thus relevant in assessing a case’s gravity under article 17 of the Statute.

14. The plain terms of the *chapeau* of crimes in article 7 of the Statute specifically state that “for the purpose of this Statute, “crimes against humanity” means any of

³⁰ Impugned Decision, para.57.

³¹ *Contra* Al Hassan Appeal, paras.17-21.

³² Impugned Decision, para.53.

³³ Impugned Decision, para.53; *Contra* Al Hassan Appeal, paras.17-21.

³⁴ Impugned Decision, para.53; ICC-01/05-01/08-424, para.85; ICC-02/05-02/09-1-Conf, para.5.

³⁵ ICC-01/05-01/08-3636-Red, para.117.

the following acts *when committed as part of a widespread or systematic attack against any civilian population, with knowledge of the attack.*"³⁶

15. Moreover, "[i]n the Elements of Crimes, the nexus element is one of the legal requirements for establishing the commission of acts such as murder and rape as crimes against humanity and is thus developed as a constituent element of each underlying offence."³⁷ Any charged act therefore is 'incomplete' without establishing a 'bridge' or 'nexus' with the contextual elements.

16. The nexus requirement also means that the underlying or charged offence and the contextual elements are not 'stand-alone' components of the case against a person charged with crimes at the Court. They are part and parcel of it. Indeed, although the underlying charged acts/offence "does not need to constitute the [widespread or systematic] attack", it must "form a part of the attack" or, "comprise [...] part of a pattern of widespread and systematic crimes directed against a civilian population."³⁸

17. An incident charged against a suspect will not be a crime against humanity if this nexus element is not demonstrated. Indeed, all other factors remaining constant, if many of the charged incidents lack this nexus, a Chamber may find a case against a person charged with offences to lack the requisite gravity on the basis that most of the charged crimes are mere ordinary crimes.

³⁶ Article 7(1); Emphasis added.

³⁷ ICC-01/05-01/08-424, para.85.

³⁸ [Prosecutor v. Kunarac et al, Judgement](#), IT-96-23-T and IT-96-23/1-T, 22 February 2001, para.417, citing *Prosecutor v. Tadić*, Judgement, IT-94-1-A, 15 July 1999, paras.248, 255.

(b) *Factors relevant to gravity assessment need not engage the person's conduct – in any event, contextual elements do so.*

18. The relevance of contextual elements in determining the gravity of a “case” is not undermined by an alleged absence of a suspected person's direct conduct in perpetrating them.³⁹

19. The reference to ‘case’ in the Court's legal framework is context specific.⁴⁰ As such, it is not only to be assessed through the lens of the suspect's own conduct. This is so when assessing a case's gravity under article 17 of the Statute. The factors relevant to this assessment are not limited to those that directly engage the acts and conduct of the charged person.⁴¹ In a similar way, some aggravating or qualitative factors in rule 145 of the Rules of Procedure and Evidence (“Rules”)⁴² which may contribute to the assessment of a case's gravity for purposes of sentencing, such as the circumstances of manner of commission, time and location of the alleged crimes and their impact on victims⁴³ need not be directly related to the person's conduct. In sentencing a convicted person, it is sufficient that an aggravating factor had a *relation* to the commission of the crime or the offender.⁴⁴

20. In any event, allegations concerning the contextual elements engage the suspected person's conduct.⁴⁵ The plain terms of the *chapeau* of article 7 specifically require that the suspect must perpetrate the charged acts “as part of a widespread or systematic attack against any civilian population, *with knowledge* of the attack.”⁴⁶ He must thus act at least knowingly.⁴⁷

³⁹ *Contra* Al Hassan Appeal, paras.8-21.

⁴⁰ See e.g., ICC-01/09-19, para.48 (“[t]he reference to a ‘case’ in article 53(1)(b) of the Statute does not mean that the text is mistaken but rather that the Chamber is called upon to construe the term ‘case’ in the context in which it is applied”).

⁴¹ *Contra* Al Hassan Appeal, paras.8-21.

⁴² The list of aggravating circumstances is not exhaustive. ICC-01/05-01/13-2276-Red A6 A7 A8 A9, para.156.

⁴³ ICC-02/11-02/11-185, para.11.

⁴⁴ See e.g., [Prosecutor v. Deronjić, Judgement on Sentencing Appeal](#), IT-02-61-A, 20 July 2005, paras. 123-124.

⁴⁵ *Contra* Al Hassan Appeal, paras.17-21.

⁴⁶ Article 7(1).

⁴⁷ Impugned Decision, para.53; ICC-01/05-01/08-424, para.74; ICC-01/05-01/08-3343, para.164.

(iii) The Pre-Trial Chamber correctly considered allegations related to the crime of persecution, which were properly pled (contra Al Hassan's Appeal, paras. 22-40)

21. The Pre-Trial Chamber correctly considered allegations relating to the crime of persecution that were pled with a sufficient level of specificity.⁴⁸ In particular, the Pre-Trial Chamber did not err in finding that it is unnecessary, especially at the confirmation of charges stage, to identify the victims, in particular for the case of the crime of persecution.⁴⁹

22. *First*, Al Hassan did not challenge the decision in which the Pre-Trial Chamber had identified a lower level of specificity required for the description of facts relating to the crime of persecution.⁵⁰ The present appeal, in substance, now challenges that decision belatedly. It should be dismissed on this basis alone.

23. *Second*, and in any event, although there is no requirement to conduct the gravity assessment in relation to acts committed against only identified victims, the Pre-Trial Chamber adopted a correct approach for delineating the victims of persecution.⁵¹

24. The degree of specificity and detail of the charges required under article 67(1)(a) of the Statute and regulation 52 of the Regulations of the Court depends on various factors, including the nature of the Prosecution's case and the forms of criminal responsibility alleged.⁵² The description of facts relating to crimes directed against a group or collectivity of people, as in the case of the crime of persecution, need not detail every incident or the identity each and every victim affected by the

⁴⁸ *Contra* Al Hassan Appeal, paras.22-40.

⁴⁹ Impugned Decision, para.55; ICC-01/12-01/18-143, para.30.

⁵⁰ ICC-01/12-01/18-143-tENG, para. 30.

⁵¹ Impugned Decision, paras.55, 56 (noting that as a crime directed against a group or community, the identity of victims need not be pleaded particularly at the time of confirmation of the charges).

⁵² ICC-01/04-01/06-3121-Red, para.122 (citing the ICTY's *Blaskić* Appeal Judgment, paras. 210-211). *Prosecutor v. Kupreskić*, Judgement, IT-95-16-A, 23 October 2001, ("[Kupreskić AJ](#)"), para.89.

crime. The principle that crimes directed at groups should not require pleading the identity of each specific victim finds support in the case-law of the *ad hoc* Tribunals.⁵³

25. In any case, the manner in which the alleged crimes occurred will affect the degree of specificity and detail to which they must be pleaded. For example, in *Lubanga*, the Appeals Chamber dismissed the Defence challenge in relation to the allegations based on the “pattern” of enlistment, conscription or participation in hostilities even though the DCC did not detail the dates, places and identity of each victim of this “pattern.”⁵⁴ Likewise, Trial Chamber VI in *Ntaganda* considered that: (i) “[s]ome 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)”; and (ii) charges relating to a specific type of criminal act (e.g. murder as a crime against humanity) can be framed by “narrowly confined temporal and geographical space and/or other parameters”, and “need not be framed at the level of individual criminal acts.”⁵⁵

26. The Prosecution’s case against Al Hassan as pleaded in the DCC was that persecution occurred continuously throughout the Groups’ period of control of Timbuktu and its region.⁵⁶ As such, requiring a high degree of specificity for the identities of victims or the dates of commission of the crimes is not just impracticable,⁵⁷ it is unnecessary.⁵⁸

⁵³ See e.g., [Gacumbitisi v. Prosecutor, Judgement](#), ICTR-2001-64-A, 7 July 2006, Separate Opinion of Judge Shahabuddeen, para.9 (“[W]hen an indictment alleges genocide, proof of any one killing is not a material fact as it would be in a case of murder; it is evidence of a material fact, namely, that the intent of the accused was the destruction of the group, as a group. Each individual killing does not have to be specifically referred to in the indictment”).

⁵⁴ ICC-01/04-01/06-3121-Red, para. 118-137 (also stating that details may be contained in auxiliary documents).

⁵⁵ ICC-01/04-02/06-2359, para. 40-41.

⁵⁶ DCC, para. 1088.

⁵⁷ [Kupreskić AJ](#), para.89.

⁵⁸ See [Ndindabahizi v. Prosecutor, Judgement](#), ICTR-01-71-A, 16 January 2007, paras.21-22 (the Appeals Chamber accepted a lower degree for pleading precise dates in a case where the Prosecution had alleged a series of attacks that had occurred over the course of several days).

27. *Third, and in any event*, in accordance with the Chamber's instructions⁵⁹, the DCC clearly identified the area of Timbuktu and its regions, and time-frames, within which the persecutory acts were perpetrated, and the necessary particulars to make out the elements of the crime.⁶⁰

28. Based on these clear delimitations, the Pre-Trial Chamber correctly identified the scope of criminality, or crimes. It thus did not base its gravity assessment on vague or nebulous allegations of criminality,⁶¹ and sufficiently defined the parameters of the case against Al Hassan which could be utilised to assess any "degree of overlap" between his domestic case and the case before the Court.⁶²

(iv) The Pre-Trial Chamber did not err in assessing the scope of victimisation (contra Al Hassan Appeal, 41-48).

29. The Pre-Trial Chamber did not err in determining the scope of victimisation by considering, among other matters, the significant number of victims that it had admitted to participate in the case based on victim application forms.⁶³

(a) The number of participating victims was relevant

30. *First*, the Defence does not show that the number of participating victims was an irrelevant factor in determining the scope of victimisation.⁶⁴

31. To the contrary, the number of participating victims was relevant in assessing the scope of victimisation, in particular given the particular context the Chamber relied upon them (for instance, concerning persecutory acts that were directed

⁵⁹ ICC-01/12-01/18-143-tENG, para. 30. It required the Prosecutor to endeavour to give, as precisely as possible, indications of place, time and approximate numbers of victims, as well as the indications necessary to satisfy the elements of such crimes.

⁶⁰ DCC, para.1088-1094.

⁶¹ *Contra* Al Hassan Appeal, para.22.

⁶² *Contra* Al Hassan Appeal, para.38.

⁶³ *Contra* Al Hassan Appeal, paras.41-48.

⁶⁴ *Contra* Al Hassan Appeal, paras.41-48. See e.g., ICC-02/11-01/15-915-Red OA9, para.56 (they may be material to defence preparation); ICC-01/05-01/08-2012-Conf, para.99.

against the people of Timbuktu⁶⁵), the specific stage of the proceedings and the *delimitations* the Chamber imposed in screening victim participation.⁶⁶ Participating victims provide an indication of the victims of the alleged crimes.

32. The Pre-Trial Chamber did not err in relying on victim applications in assessing the numbers of victims.⁶⁷ Such applications contain relevant material for such an exercise.⁶⁸ Rule 89(1) of the Rules specifically requires victim applications to identify information as to the incident, the location and the identity of the person believed to be responsible.⁶⁹

33. Their relevance is not vitiated, merely because they may fail to spell out the information with precision.⁷⁰ As noted by the Appeals Chamber, “written applications for participation of victims [...] shall contain, *to the extent possible*, inter alia [a] description of the incident, including its location and date and, *to the extent possible*, the identity of the person or persons the victim believes to be responsible.”⁷¹

34. In the present case, the Pre-Trial Chamber correctly circumscribed victim participation. The Defence does not show that the delimitations imposed by the Chamber were overly broad in identifying victims or by extending the scope of victims to anyone who was merely present in Timbuktu without having suffered harm from the suspect’s or his Groups’ criminality.⁷² Although victims may face several difficulties in providing the relevant information in their applications,⁷³ the Pre-Trial Chamber nevertheless identified the correct benchmarks that prevented

⁶⁵ Impugned Decision, para.57.

⁶⁶ ICC-01/12-01/18-146-tENG, e.g., paras.20-23; 33-35.

⁶⁷ *Contra* Al Hassan Appeal, paras.41-45.

⁶⁸ ICC-02/11-01/15-915-Red OA9, para.56 (confirming that victim applications may contain evidentiary material), *contra* Al Hassan Appeal, paras.42-43).

⁶⁹ Rule 89(1); ICC-02/11-01/15-915-Red OA9, para.56.

⁷⁰ *Contra* Al Hassan Appeal, paras.46-48.

⁷¹ ICC-02/11-01/15-915-Red OA9, para.56. Emphasis added.

⁷² *Contra* Al Hassan Appeal, paras.46-48.

⁷³ See e.g., ICC-01/12-01/18-146-tENG, paras.17, 31.

extending victims based merely on a person's presence in Timbuktu at the relevant time.⁷⁴

35. The Defence selectively presents the Pre-Trial Chamber's decision. For instance, if the victim applicant was unable to provide a date or an approximate date, he or she could provide the relevant information, such as the year 2012, coupled with other particulars, such as the word "Jihadists", or a reference to the occupation of Timbuktu.⁷⁵ But this was a case by case assessment. It required the Registry to carefully evaluate the intrinsic coherence of the victim applications to ascertain the overall context in which the alleged acts occurred.⁷⁶ Indeed, "the victims must provide sufficient information that, taken as a whole, supports the conclusion that the application for participation does fall within the time frame of the case at bar."⁷⁷

36. The Pre-Trial Chamber did not find mere presence or residence in Timbuktu in 2012 sufficient for an applicant to qualify as a victim.⁷⁸ The person must have directly witnessed a crime committed against someone else.⁷⁹ In such a situation, the Pre-Trial Chamber considered that the crime or its brutality may have had repercussions on their mental health.⁸⁰ Conversely, applicants were excluded if, for instance, "they did not see the attack but only heard gunfire from the direction of the camp (...) [T]he Chamber is of the view that the [victim]'s experience of the attack is too remote to satisfactorily establish that he suffered psychological harm as a result of it."⁸¹

37. Nor did the Pre-Trial Chamber rely on *anonymous* applications.⁸² Even if such applications are not impermissible, the mere fact that the Single Judge did not

⁷⁴ *Contra* Al Hassan Appeal, paras.46-48.

⁷⁵ ICC-01/12-01/18-37-tENG, para.23; *contra* Al Hassan's Appeal, para.46.

⁷⁶ ICC-01/12-01/18-146-tENG, paras.20-23, also referring to ICC-02/11-01/15-379, para.46; ICC-01/05-01/08-320, para.31; ICC-02/04-01/15-350, paras.13-14.

⁷⁷ ICC-01/12-01/18-146-tENG, paras.20-23.

⁷⁸ *Contra* Al Hassan Appeal, paras.46, 47.

⁷⁹ ICC-01/12-01/18-146-tENG, para.35.

⁸⁰ ICC-01/12-01/18-146-tENG, para.34.

⁸¹ Impugned Decision, para.35, citing ICC-02/05-03/09-89, para.34.

⁸² *Contra* Al Hassan Appeal, para.45.

require the Registry to transmit some applications (namely the “Group A Applications”) to the parties⁸³ did not render such applications anonymous.⁸⁴ Anonymity only arises when applications submitted to the Registry lack an applicant’s identity, something the Defence does not show.

(b) The number of participating victims was not the sole factor considered by the Chamber

38. Even assuming for the sake of argument that the Chamber should not have considered the number of victims admitted to participate in the proceedings to assess the scope of victimisation, it was only one of many factors informing the nature and scale of the charged crimes. Indeed, the Chamber referred not only to the counts (numbering 13 in total⁸⁵), but also some of the crimes constituting these counts, including rape, sexual slavery and forced marriages.⁸⁶ The DCC identified, *inter alia*, the significant number of victims underpinning these counts/crimes. It identified, *inter alia*: 10 victims of rape, sexual slavery and other inhumane acts in the form of forced marriages;⁸⁷ 22 victims of torture or other ill-treatment;⁸⁸ approximately 60 victims of passing of sentences without due process; and the destruction of 10 protected buildings.⁸⁹ It also pleaded that the crime against humanity of persecution affected the entire population of Timbuktu and its region, who were perceived not to be adhering to the religious vision of the Groups.⁹⁰

39. Given the cumulative factors considered by the Chamber, the Defence fails to show that the Chamber accorded undue weight to the number of participating victims.

⁸³ ICC-01/12-01/18-37-tENG, para.59; ICC-01/12-01/18-146-tENG, para.9 (Group A Applications covered “applicants who clearly qualify as victims”). Otherwise, the Registry was required to transmit to the parties all Group C Applications comprising “applications for whom the Registry could not make a clear determination for any reason.” ICC-01/12-01/18-37-tENG, para.59; ICC-01/12-01/18-146-tENG, para.9.

⁸⁴ *Contra* Al Hassan’s Appeal, para.46.

⁸⁵ Impugned Decision, para.57.

⁸⁶ Impugned Decision, para.57.

⁸⁷ DCC (Counts 8-12).

⁸⁸ DCC (Counts 1-5).

⁸⁹ DCC (Count 7).

⁹⁰ DCC, e.g., paras.1052, 1058, 1061, 1066.

40. Finally, even assuming the number of victims was limited (and in this case, they were not), this in its own would not render the case of marginal gravity. The number of victims (so-called “quantitative approach”) alone does not define the gravity of a case. Other factors – such as the nature of or the manner in which the crimes were perpetrated or their consequences for the victims (so-called “qualitative approach”) - are also relevant.⁹¹ In light of the Chamber’s findings regarding qualitative factors, including the impact of crimes, their discriminatory motive, and their manner of commission,⁹² the case would still have been deemed of sufficient gravity, regardless of the number of victims.

41. For the reasons set out above, the Defence’s first ground of appeal should be rejected.

B. The Pre-Trial Chamber properly exercised its discretion and provided a reasoned opinion (*contra* Al Hassan’s Second Ground of Appeal)

42. The Defence does not show the Pre-Trial Chamber incorrectly exercised its discretion on the facts of this case. He does not demonstrate that the Chamber’s exercise of discretion was based on an erroneous interpretation of the law.⁹³ Nor does he show that the Chamber exercised its discretion “on patently incorrect conclusions of fact,” or that the decision was “so unfair and unreasonable as to constitute an abuse of discretion.”⁹⁴

43. Contrary to the Defence allegations,⁹⁵ the Chamber properly exercised its discretion in assessing the gravity of this case, by considering and according due weight to relevant factors.⁹⁶

⁹¹ See e.g., ICC-01/11-01/17-13, para.31 (“[w]hile the number of victims in the case at hand is limited, the manner in which the crime was committed and publicized was cruel, dehumanizing and degrading. The victims were lined up on a public street, kneeling down and with their hands tied behind their back. They were shot dead one by one, in front of a crowd of onlookers who were chanting in apparent support for the killings”).

⁹² Impugned Decision, paras.57-58.

⁹³ ICC-01/04-01/06-3122, para.41

⁹⁴ ICC-01/04-01/06-3122, para.41.

⁹⁵ Al Hassan Appeal, paras.49-65.

(a) *The Pre-Trial Chamber properly assessed the nature and extent of Al Hassan's participation in the crimes and provided a reasoned opinion*

44. The Pre-Trial Chamber did not merely consider abstract notions or labels – pertaining to Al Hassan's position in the Islamic Police or his modes of liability, in assessing the gravity of his case.⁹⁷ Rather, it evaluated the actual content of his conduct and contribution to the alleged crimes, and provided a reasoned opinion by identifying with sufficient clarity the basis underpinning its decision. This included referring to the relevant parts of the DCC.⁹⁸

45. Indeed, the Chamber “noted 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.”⁹⁹ Moreover, the Chamber considered “Mr. Al Hassan's degree of intent and *degree of participation* in these crimes.”¹⁰⁰

46. This shows that the Chamber assessed the actual content of Al Hassan's contribution to the crimes, rather mere ‘labels’ such as his position within the Islamic Police, or his mode of responsibility in the abstract.

47. The relevant sections of the DCC cited in the Impugned Decision, in particular section 7.2.3, articulated in detail Al Hassan's contribution, beyond mere labels of his position as the *de facto commissaire* of the Islamic Police, or as a co-perpetrator.¹⁰¹ For instance, the DCC described six types of contributions that he made: (i) his role as the interface between the Organisation and the population¹⁰²; (ii) his contribution to

⁹⁶ Impugned Decision, paras.57-58.

⁹⁷ *Contra* Al Hassan Appeal, para.49-56.

⁹⁸ ICC-01/04-01/06-773 OA5, para.20; Impugned Decision, paras.57-58.

⁹⁹ Impugned Decision, para.57. Emphasis added.

¹⁰⁰ Impugned Decision, para.57. Emphasis added.

¹⁰¹ *Contra* Al Hassan Appeal, e.g., paras.49, 52, 54.

¹⁰² DCC, section 7.2.3.1.

the functioning of the Islamic Police, a key organ set up to implement the common plan of the Organisation¹⁰³; (iii) his key role in the repression of violations of new rules, as an investigator and by referring cases to the Islamic Tribunal¹⁰⁴; (iv) his involvement in the punishments inflicted on civilians¹⁰⁵; (v) his encouragement of other perpetrators and contribution to an environment permissive of crimes, by way of his status as *commissaire de facto* of the Islamic Police¹⁰⁶; and (vi) his control over other administrative aspects which contributed to the implementation of the common plan.¹⁰⁷

48. The examples cited by the Defence as showing that the DCC allegedly pleaded *de minimis* contributions to the crimes, are misconceived.¹⁰⁸ For instance, the alleged use of a specific technique for flogging did not vitiate the severity of the pain and suffering caused to the victims, which the Chamber recognised amounted to torture.¹⁰⁹ In any event, the Defence points to allegations in a piecemeal fashion, and fails to assess the degree of his intent and contribution to the crimes based on all the relevant factors considered as a whole.

49. Nor did the Pre-Trial Chamber place undue weight on the fact that Al Hassan had been cumulatively charged with 13 counts.¹¹⁰

50. Cumulative charges serve to describe the full culpability of the suspect and provide a complete picture of his or her criminal conduct.¹¹¹ Indeed, a person may even be *convicted* cumulatively if each charged crime contains a materially distinct element not found in the other(s). This means that such distinct element requires

¹⁰³ DCC, section 7.2.3.2.

¹⁰⁴ DCC, section 7.2.3.3.

¹⁰⁵ DCC, section 7.2.3.4.

¹⁰⁶ DCC, section 7.2.3.5.

¹⁰⁷ DCC, section 7.2.3.6.

¹⁰⁸ *Contra* Al Hassan Appeal, paras.59-61.

¹⁰⁹ ICC-01/12-01/18-461-Conf, para.278-280. *Contra* Al Hassan Appeal, para.59.

¹¹⁰ *Contra* Al Hassan Appeal, paras.62-65.

¹¹¹ *Prosecutor v. Krstić*, Judgement, IT-98-33-A, 19 April 2004 ("[Krstić AJ](#)"), para.217; *Prosecutor v. Dordević*, [Judgement](#), IT-05-87/1-A, 27 January 2014, para.831.

proof of a fact not required by the other(s).¹¹² As such, cumulative criminal responsibility may aggravate blameworthiness, and is thus relevant in assessing the gravity of a case. Indeed, cumulative convictions may impose additional stigma on the suspect and imperil his or her eligibility for early release.¹¹³

51. Given the nature and import of the cumulative charges in this case, the Pre-Trial Chamber correctly considered the fact that Al Hassan had been charged with 13 counts in assessing the gravity of his case. The Defence does not show that any of the charges is subsumed by any other.¹¹⁴

(b) The DCC and not the Confirmation Decision governed, and in any event, non-confirmation of charges as co-perpetrator under 25(3)(a) did not reduce the gravity of the case

52. The Defence incorrectly relies on the Confirmation Decision, in which the Pre-Trial Chamber declined to confirm the charges of co-perpetration under article 25(3)(a) of the Statute.¹¹⁵

53. *First*, the Pre-Trial Chamber had exercised its discretion under rule 58(2) of the Rules to not join Al Hassan's admissibility challenge to the confirmation proceedings. It rendered the admissibility decision before the confirmation decision. Therefore, the DCC, and not the Confirmation Decision,¹¹⁶ defined the parameters of Al Hassan's case.¹¹⁷

54. *Second*, and in any event, the Pre-Trial Chamber's ultimate decision not to confirm charges on the basis of co-perpetration under article 25(3)(a) of the Statute does not reduce the gravity of this case. The degree of blameworthiness under article

¹¹² ICC-01/05-01/13-2275-Red A A2 A3 A4 A5, paras.740, 748, 750-751 (citing *Delalić* Appeal Judgement, paras.409, 412-413). See also *Prosecutor v. Kunarac et al*, IT-96-23&IT-96-23/1-A, Judgement, 12 June 2002, ("*Kunarac et al* AJ"), para.168; *Musema v. Prosecutor, Judgement*, ICTR-96-13-A, 16 November 2001, paras.362-363.

¹¹³ *Kunarac et al* AJ, para.169; *Krstić* AJ, para.217.

¹¹⁴ *Contra* Al Hassan Appeal, para.62.

¹¹⁵ *Contra* Al Hassan Appeal, paras.53-57.

¹¹⁶ *Contra* Al Hassan's Appeal, paras.53-58 (referring to the Confirmation Decision to challenge the Impugned Decision).

¹¹⁷ Impugned Decision, paras.45-46.

25 of the Statute is not solely based on legal labels or *abstract* distinctions between commission in article 25(3)(a) of the Statute and other forms of participation in article 25(3)(b)-(d) of the Statute. It must be assessed *in concreto*. Indeed, while “the difference between committing a crime and contributing to the crime of others would normally reflect itself in a different degree of participation and/or intent within the meaning of rule 145(1)(c),”¹¹⁸ this “does not mean that the principal perpetrator of a crime/offence necessarily deserves a higher sentence than the accessory to that crime/offence.”¹¹⁹

55. Rather, “whether this is actually the case ultimately depends upon all the variable circumstances of each individual case.”¹²⁰ Because gravity transcends legal labels, accessories sometimes may be found to be more culpable than committers.

56. The Pre-Trial Chamber did not confirm all modes charged against Al Hassan. Nevertheless, the gravity of Al Hassan’s case remains high based on the confirmation of most of the allegations in the DCC regarding Al Hassan’s important role and functions within the Islamic Police, and his actual conduct and contribution to the crimes.¹²¹

57. For the reasons set out above, the Defence’s second ground of appeal should be rejected.

¹¹⁸ ICC-01/05-01/13-2276-Red A6 A7 A8 A9, para.60.

¹¹⁹ ICC-01/05-01/13-2276-Red A6 A7 A8 A9, para.60.

¹²⁰ ICC-01/05-01/13-2276-Red A6 A7 A8 A9, para.60.

¹²¹ ICC-01/12-01/18-461-Conf, A) Conclusions factuelles. See also paras.837-848.

IV.CONCLUSION

58. Based on the foregoing, the Appeals Chamber should dismiss Al Hassan's Appeal.



Fatou Bensouda, Prosecutor

Dated this 12th day of November 2019
At The Hague, The Netherlands