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PRE-TRIAL CHAMBER I

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

SITUATION IN THE REPUBLIC OF MALI

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

Public
With Public Annex 1 and Confidential Annexes 2 to 7

Public redacted version of "Submissions for the confirmation of charges"

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

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Introduction

1. The case against Mr. Al Hassan should be dismissed, with prejudice, at the earliest juncture possible. It is evidentially and legally unsound; the product of a blinkered investigation into allegations that do not belong before the International Criminal Court, launched against an accidental defendant, who appears to have been hoovered up in the Prosecution's quest to fill empty cells, at a time when the Court lacked any new judicial activity.

2. The first hurdle to confirmation arises from the unacceptably vague and deficient nature of the Prosecution's charges. Rather than charging criminal incidents, the Prosecution has attempted to charge broad categories and types of crimes. Several incidents have no meaningful identifying information concerning the alleged victims, perpetrators and locations: their nebulous nature renders them impossible to either prove or disprove at trial.

3. The second obstacle arises from the fundamentally unreliable and weak quality of the evidence relied upon by the Prosecution to establish its charges. The evidence cited in the Document Containing the Charges ('the DCC') is supposed to constitute the *crème de la crème* of the Prosecution's case. But even before any witnesses have been cross-examined or any Defence evidence tendered, it is clear that this body of Prosecution evidence is incapable of sustaining a confirmation, let alone a conviction. The Prosecution has repeated the errors of the past, by attempting, once more, to substantiate the elements of the offences with media articles, NGO reports, and anonymous hearsay. The Prosecution has also engaged in whole-scale cherry-picking as concerns the specific evidence from witness statements that it has cited. It has used de-contextualised quotes, which do not represent an accurate reflection of the witness's testimony, and which are directly contradicted either by the same witness, or by the weight of Prosecution evidence on the issue in question. The lynchpin of the Prosecution case is also an insider, who after receiving considerable benefits for his testimony, concocted a case based on speculation, and what his 'heart' told him to be true, after he had read Prosecution disclosure.

4. The third, and equally insurmountable hurdle concerns the Prosecution's decision to charge allegations that are not crimes under the Rome Statute. It is rather trite, but nonetheless apposite, to emphasise that the ICC is not a human rights court writ large. And yet, the Prosecution has charged Mr. Al Hassan in connection with human rights violations that have no concrete nexus to an armed conflict, or a widespread or systematic attack against a civilian population.

5. The core allegation of the Prosecution's case also rests on the premise that the installation of Sharia law is synonymous with the commission of war crimes and crimes against humanity. This premise is legally and factually creative, but wrong. And if accepted, this premise will inveigle the ICC into a clash of civilizations, which will undermine any prospect of advancing the universalisation of the Rome Statute and the corollary extension of its protection to victims of war crimes and crimes against humanity. Put simply, the Court cannot fulfil its mandate to adjudicate "the most serious crimes of concern to the international community as a whole", if its protections are diluted, and its resources expended, through allegations that belong before a human rights commission, rather than the highest forum for adjudicating individual criminal responsibility.

6. The fourth impediment concerns the Prosecution's failure to demarcate and establish any culpable conduct on the part of Mr. Al Hassan. Mr. Al Hassan is not just a 'little fish' – he is plankton within the Timbuktu eco-system. He was part of the civilian population in Timbuktu, and had no role in the decision making apparatus of Ansar Dine: he neither influenced nor controlled the charged crimes. The Prosecution's case concerning the hierarchical structure of Ansar Dine and the Islamic Police is based on a multitude of contradictions: the Prosecution even confessed to its key witness that:[1]

> *you know better than us, but even from our understanding we will never be able to establish an exact structure in TOMBOUCTOU and not exact date on when certain things happened, you agree with that?*

[1] [REDACTED]

7. Fifth, even if the Pre-Trial Chamber were to find that the necessary level of proof has been substantiated for some or all of the charges, the gravity threshold is not met. The ICC was not established to prosecute patrolling police officers, or to condemn specific religious values.

8. Finally, the Defence underscores that this brief is submitted on the express understanding that it cannot be viewed as a concession on fact or law, for the purposes of the trial phase. A brief is not a statement or signed declaration. And, given that the Defence has not received full disclosure, the limited time available, and the difference in the standard of proof between pre-confirmation and trial, no inferences can be drawn from the fact that the Defence has not responded to certain points, or has focussed instead, on whether the alleged facts would attract criminal responsibility under the Statute. The burden rests exclusively on the Prosecution, through all phases of the case, and the silence of the Defence or defendant on a particular point cannot be used to determine his guilt or innocence.[2] The Defence has referred to certain evidence in order to highlight the internal inconsistencies and weaknesses in the Prosecution case: the fact that the Defence has cited particular items of Prosecution evidence cannot, therefore, be construed as a concession as concerns the admissibility and reliability of such items.

Chapter 1: Charges, which are overly vague/not clearly pleaded, must be dismissed

1.1 Unacceptably vague language

9. Regulation 52 of the Regulations of the Court ('RoC') provides that the DCC must include "a statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court".

10. Notwithstanding this requirement, the language employed in the charging section of the DCC is unacceptably vague as concerns the following allegations:

[2] Article 67(1)(g) of the Statute.

a. DCC, para. 1024: "la conduite d'enquêtes et d'interrogatoires et le renvoi d'affaires au tribunal islamique".
b. DCC, para. 1038: "**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. **AL HASSAN** entendait adopter ce comportement et avait conscience que les membres de l'Organisation commettraient à Tombouctou, dans le cours normal des événements, **les types de crimes** reprochés aux chefs d'accusation 1 à 6 et 13."
c. DCC, para. 1039: "**AL HASSAN** a intentionnellement apporté sa contribution à la commission **des types de crimes** reprochés aux chefs d'accusation 1 à 13 […]";
d. DCC, para. 1046: "Parmi les nombreux membres de la population civile condamnés et sanctionnés, il existe **par exemple au moins** 11 cas d'individus flagellés et un cas d'un individu dont la main droite a été amputée dans le cadre de l'exécution des peines prononcées par le tribunal islamique";
e. DCC, para. 1056: "Il s'agit **par exemple** des cas suivants";
f. DCC, para. 1056: "**un jour entre avril 2012 et janvier 2013** à Yoboutao, Abou BACCAR Al CHINGUETTI (Firaoun) a fouetté un homme nommé [REDACTED].";
g. DCC, para. 1058: "**dont au moins les** 19 personnes suivantes";
h. DCC, para. 1058: "un homme nommé [REDACTED] **entre environ avril 2012 et janvier 2013**";
i. DCC, para. 1058 : "**dont au moins les** 22 personnes suivantes";
j. DCC, para. 1061: "L'Accusation est en possession de 36 jugements écrits par le tribunal islamique qui concernent **plus de 50 personnes, tels que listés ci-dessous**";
k. DCC, para. 1061: "[REDACTED], le [REDACTED], contre [REDACTED]";
l. DCC, para. 1063 : "prononçant des condamnations sans jugement préalable par un tribunal régulièrement constitué, **à savoir notamment pour**";
m. DCC, paras. 1063, 1066: "P-0542 **entre environ avril 2012 et janvier 2013**";
n. DCC, paras. 1063, 1066: "**un homme nommé** [REDACTED] **entre environ avril 2012 et janvier 2013 pour avoir violé les règles des Groupes**";
o. DCC, para. 1066: "basé **au moins sur** 36 jugements du tribunal islamique condamnant **plus de 50** personnes";
p. DCC, para. 1066 : "**notamment** les neuf personnes suivantes";
q. DCC, paras. 1085, 1087, 1092 in their entirety – due to the absence of information concerning dates of incidents, the identity of the perpetrators, and the relevant conduct of Mr. Al Hassan.

11. The pre-confirmation phase in this case has lasted for over 15 months: the Prosecution has had more than sufficient time to investigate and define the contours of its case against Mr. Al Hassan. It is therefore impermissible and unduly prejudicial to retain any language, which would allow the Prosecution to

introduce uncharged incidents through the back door, or to otherwise "mould its case" against Mr. Al Hassan, depending on how its evidence unfurls at trial.[3]

1.2 Open-ended, vague language

12. As set out above, key accusations are pock-marked with vague, open-ended phrases ('par example', 'dont au moins les', 'des types de crimes') which appear to have the sole purpose of allowing the Prosecution to expand the scope of the charges to encompass as yet unknown allegations related to areas outside of Timbuktu.[4] Apart from the fact that the level of vagueness in such claims is self-evidently deficient, the level of detail in the accompanying evidential analysis also fails to satisfy the requisite level of specificity for charges. Neither the Prosecution pleadings nor the Prosecution evidence reveal a clear and detailed basis for expanding the charges to include other locations. For example, in paragraph 295 of the DCC, the Prosecution claims that, "les enquêtes d'**Al HASSAN** ne se limitaient pas aux faits commis dans la seule ville de Tombouctou. Il s'occupait aussi d'affaires dans toute la région de Tombouctou, par exemple à Léré ou Goundam". The cited evidence nonetheless fails to provide additional clarity insofar as it does not refer to the commission of war crimes or crimes against humanity in these areas, nor does it refer to any conduct on the part of Mr. Al Hassan taking place in these areas.[5]

13. It would therefore be fundamentally contrary to Article 67(1)(a) to give the Prosecution free reign to expand the charges at some future point, through the use of language, which is untrammelled by any clear connection to particular incidents in particular locations.

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[3] *Katanga*, ICC-01/04-01/07-1547-tENG, para. 23: "it is incumbent upon the Prosecutor to present, during the pre-trial phase, all of the facts and circumstances relating to his case. To hold otherwise would be to call into question the very purpose of a pre-trial phase, at the close of which the charges are fixed and settled. Such a solution would, moreover, render useless the months of work devoted by the Pre-Trial Chamber to preparing the case for trial and, to a large extent, would make it pointless even to hold a confirmation hearing where evidence is presented, and at the close of which the trial is supposed to commence. As the ad hoc international criminal tribunals have stressed, the Prosecutor "is expected to know [his] case before it goes to trial. It is not acceptable for the Prosecut[or] to omit the material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds." See also ICTR, *Prosecutor v. Kanyarukiga*, ICTR-02-78-A, Appeals Chamber, Judgement, 8 May 2012, para. 73; ICTY, *Prosecutor v. Dordević*, IT-05-87/1-A, Appeals Chamber, Judgement, 27 January 2014, para. 575.
[4] See for example, DCC, para. 1058: "Tombouctou et de sa région".
[5] Cf [REDACTED].

14. The ICC Appeals Chamber has recently deprecated the use of phrases, such as 'including but not limited to', and further explained that "[s]imply listing the categories of crimes with which a person is to be charged or stating, in broad general terms, the temporal and geographical parameters of the charge is not sufficient to comply with the requirements of regulation 52(b) of the Regulations of the Court and does not allow for a meaningful application of article 74(2) of the Statute."[6]

15. Indeed, given that Regulation 52(b) requires the DCC to set out "the time and place of the alleged crimes", it should be self-evident that the DCC should set out, and exhaustively define the criminal incidents that will be prosecuted at trial, and not just the 'types of crimes' that will be brought before the Court. Any ambiguity on this point would be contrary to Mr. Al Hassan's right to receive timely notice concerning the nature, cause, and content of the charges against him.[7]

16. This language should therefore be struck from the DCC, with the result that Mr. Al Hassan can only be charged and prosecuted in connection with those incidents that are set out explicitly in Section 9 of the DCC, and for which there is sufficient detail to comply with the requirements of Article 67(1) and Regulation 52 of the RoC.

1.3 Absence of critical details concerning the identity of victims, perpetrators, dates and locations

17. For several incidents, in particular, those set out in paragraphs 1085, 1087, 1092, the Prosecution has provided an extremely broad and vague time-range, in combination with either no, or very little information concerning the identity of the perpetrators, the nexus to the common plan, and the culpable conduct of Mr. Al Hassan. The absence of such information renders it impossible to initiate a meaningful defence on the part of Mr. Al Hassan – "it reduces the defence of the accused to a mere blanket denial; he will be unable, for example, to set up any meaningful alibi, or to cross-examine the witnesses by reference to surrounding

[6] *Bemba*, ICC-01/05-01/08-3636-Red, paras. 109-110.
[7] See *Ruto and Sang*, ICC-01/09-01/11-522, Separate Opinion, Judge Christine Van den Wyngaert, para. 40.

circumstances such as would exist if the acts charged had been identified by reference to some more precise time or other event or surrounding circumstance."[8]

18. The allegations set out in sections 9.4.4 and 9.4.5 of the DCC are particularly vague in nature as concerns the facts and circumstances that are relevant to Mr. Al Hassan's alleged culpability. In particular, the 'catch-all' phrases interwoven into paragraph 1092 concerning broad undated, un-located, unidentified, and unexplained acts of persecution fail the basic pre-requisites of Regulation 52, and cannot be considered as a safe or sound basis for a future prosecution.

19. This vagueness is also not 'cured' by the accompanying arguments, or evidence cited elsewhere. To the contrary, there is no logical nexus between the common plan and these acts, and the Prosecution has provided no clear case as to how Mr. Al Hassan's role in the Islamic police contributed to particular acts of sexual violence. More of the perpetrators are unidentified, and the allegation that some were wearing a vest also sheds no further light in the absence of clear evidence as to who would wear such a vest: for example, [REDACTED] informed the Prosecution that they were worn infrequently, and he was unable to explain who would wear them.[9]

20. The lack of any identifying information concerning the individual perpetrators in these sections further impedes the Defence from establishing – one way or the other – whether Mr. Al Hassan could have known of the alleged incidents, and whether his particular role in the common plan contributed to the conduct of the perpetrators. This falls foul of the requirement that the material facts must elucidate the defendant's particular link to the charged incidents.[10] This situation

[8] ICTY, *Prosecutor v. Krnojelac*, IT-97-25, Trial Chamber, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 40.
[9] [REDACTED].
[10] *Lubanga*, ICC-01/04-01/06-3121-Red, para. 123: "In light of the foregoing, the Appeals Chamber finds that, in order to be able to prepare an effective defence, where an accused is not alleged to have directly carried out the incriminated conduct and is charged for crimes committed on the basis of a common plan, the accused must be provided with detailed information regarding: (i) his or her alleged conduct that gives rise to criminal responsibility, including the contours of the common plan and its implementation as well as the accused's contribution (ii) the related mental element; and (iii) the identities of any alleged co-perpetrators. With respect to the underlying criminal acts and the victims thereof, the Appeals Chamber considers that the Prosecutor must provide details as to the date and location of the underlying acts and identify the alleged victims to the greatest degree of specificity possible in the circumstances. In the view of the Appeals Chamber, the underlying criminal

therefore falls within the four corners of the findings of the Pre-Trial Chamber in the *Mbarushimana* case that there was an insufficient factual and legal basis to analyse particular attacks and allegations, due to the absence of specific details, such as the identity of the perpetrators, and a sufficiently reliable indication of a date that would enable the Chamber to ascertain that the incident fell within the charging period.[11]

21. As concerns the allegations concerning 'anonymous' victims in the Islamic Tribunal judgments,[12] the absence of identifying features prevents both the Defence and the Chamber from ascertaining whether the elements of the offences are met. Specifically, for several of the war crimes provisions set out in the charges, the Prosecution is required to plead and demonstrate that there are substantial grounds to believe that the victims were either "*hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities".[13] The absence of specific information concerning the identity of victims renders it impossible to assess whether this was the case. It also cannot be assumed that all of the victims were 'civilians', particularly since at least two can be identified as being members of Ansar Dine.[14]

22. As concerns the latter point, if the Pre-Trial Chamber accepts firstly, that Ansar Dine was an armed group engaged in active hostilities during the relevant time period, and secondly, that there was a nexus between its common plan to establish Sharia law in Timbuktu and the armed conflict, then the Prosecution's logic also dictates that members of Ansar Dine must be characterised as combatants during the relevant time period. It is, therefore, essential to have some basic identifying features concerning victims in order to establish that they were not members of Ansar Dine/AQIM.

23. As concerns dates, although it might not be possible to provide an exact date for each incident, "in accordance with regulation 52 of the Regulations, each

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acts form an integral part of the charges against the accused, and sufficiently detailed information must be provided in order for the accused person to effectively defend him or herself against them."
See also *Kenyatta*, ICC-01/09-02/11-450, para. 9.
[11] *Mbarushimana*, ICC-01/04-01/10-465-Red, paras. 130, 134, 136.
[12] DCC, para. 1061: "[REDACTED], *le* [REDACTED], *contre* [REDACTED]."
[13] Article 8(2)(c)(i), Article 8(2)(c)(ii), and Article 8(2)(c)(iv) of the Statute.
[14] [REDACTED]: DCC, paras. 371 and 1061.

specific incident should be dated as precisely as possible".[15] The extremely broad date range that has been provided for several incidents (i.e. April 2012 until January 2013) is completely unhelpful and unreliable. If the Prosecution is unable to provide greater detail as concerns the approximate month or season within this time period, then the Prosecution has also failed to discharge its burden of establishing that the incident falls within the scope of the charges. The absence of further particulars on this point is also prejudicial to the rights of Mr. Al Hassan, as it prevents the Defence from attempting to analyse the incident within the framework of the changing hierarchal structure within the Islamic Police.

24. Finally, as set out in Annex 6, the incidents set out in the Prosecution's annexes for the purpose of establishing contextual elements, lack key details concerning dates, locations and identities. The absence of such critical details renders it impossible to verify that the incidents are relevant to the charging period, and are capable of establishing the existence of either an armed conflict at the relevant time period, or an attack directed against the civilian population.

1.4 Cumulative conduct

25. Although the ICC has, thus far, permitted cumulative charging where there are different elements in the offences, it is incumbent on the Prosecution to clearly plead the manner in which the alleged facts satisfy these different elements, in the charging document.[16] In the absence of such a material distinction, included or overlapping offences have not been confirmed.

26. In the *Bemba* case, the Pre-Trial Chamber considered that

> […] as a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach and, ultimately, be confirmed as charges. This is only possible if each statutory provision allegedly breached in relation to one and the same

[15] *Bemba*, ICC-01/05-01/08-424, para. 68.
[16] *Bemba*, ICC-01/05-01/08-424, para. 311.

> conduct requires at least one additional material element not contained in the other.[17]

27. In that case, the Chamber concluded that the material elements of torture through rape are subsumed by the crime of rape – which also includes an additional element of penetration, and that the most appropriate legal characterisation was rape. The Chamber thus declined to confirm the charges for both rape and torture (through acts of rape). The Chamber adopted the same approach with respect to the charge of outrages upon personal dignity, which it held was subsumed by the charge of rape, and as such, the latter was the most appropriate legal characterization.[18]

28. This approach was also adopted by the Extraordinary Chambers in the Courts of Cambodia (ECCC)[19] and by the Appeals Chamber of the Special Tribunal for Lebanon (STL).[20] The STL Appeals Chamber recognised that principles concerning cumulative convictions should also be applied to determine the scope of cumulative charging. The Appeals Chamber therefore ordered that:

> […] the Pre-Trial Judge, in confirming the indictment, should be particularly careful to allow cumulative charging only when separate elements of the charged offences make these offences truly distinct. In particular, when one offence encompasses another, the Judge should always choose the former and reject pleading of the latter. Likewise, if the offences are provided for under a general provision and a special provision, the Judge should always favour the special provisions.[21]

29. In the present case, the Prosecution has charged Mr. Al Hassan for sexual slavery, rape, and inhumane acts, on the basis of the same alleged conduct, without identifying the materially different element that would justify each

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[17] *Bemba*, ICC-01/05-01/08-424, para. 202. See also STL, Appeals Chamber, STL-11-01/I/AC/R176bis, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging with corrected front page, 16 February 2011, para. 271.
[18] *Bemba*, ICC-01/05-01/08-424, para. 312.
[19] See ECCC, *Prosecutor v. Kaing Guek Eav alias Duch*, D99/3/42, Decision on Appeal Against Closing Order Indicting Kaing Guek Eav alias "Duch", 5 December 2008, para. 83, in which the Pre-Trial Chamber ruled that "[i]t is not necessary for the Pre-Trial Chamber to consider including the crime of homicide without intent to kill as codified in Article 503 of the Penal Code in the Indictment as it is subsumed by the international crimes that are already set out."
[20] STL, Appeals Chamber, STL-11-01/I/AC/R176bis, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging with corrected front page, 16 February 2011.
[21] STL, Appeals Chamber, STL-11-01/I/AC/R176bis, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging with corrected front page, 16 February 2011, para 298.

cumulative charge. The material facts for all three charges are set out at paragraphs 1075 to 1086. In paragraph 1087, the Prosecution charges Mr. Al Hassan of five different counts of crimes of a sexual nature, listing the same ten alleged victims for each count, without any clarification as to the materially different element.

30. The Prosecution alleges that the crime of forced marriage was used as a bridge for the commission of rape, sexual slavery and persecution for sexist motives;[22] the instances of sexual slavery allegedly resulted from the "marriage system" in place, and are therefore part of the crime of forced marriage.[23] The Prosecution further argued that the crime of forced marriage also comprises an additional element, which is the conjugal relationship forced upon the victim.[24] In other words, rape and sexual slavery are subsumed into the crime of forced marriage, while the latter contains the additional legal element of a forced conjugal relationship.[25] Consequently, the Prosecution fails to demonstrate that the crimes of rape and of sexual slavery each contain at least one additional material element not contained in the crime of forced marriage. The Chamber should therefore not allow the cumulative charging of all three crimes.

1.5 The allegations concerning 'Persecution' are pleaded in an overly broad manner, and consequently encompass acts which fall outside the definition in the Statute

31. Unlike the *ad hoc* Tribunals, the ICC Statute defines persecution in a restrictive manner, such that it is necessary to first establish the existence of either an underlying act falling within Article 7(1) itself, or a connection to another crime within the jurisdiction of the Court. The allegations set out at paragraph 1092 of the DCC fail to comply with this fundamental requirement. As such, although they might constitute a violation of human rights law, they fail to rise to the level of a crime against humanity, which would attract individual criminal responsibility under the Rome Statute.

[22] DCC, para. 792.
[23] DCC, para. 796. See also paras. 796, 802, 805, 806, 810-813, 815-819 in which the Prosecution uses the terminology of forced marriage to demonstrate sexual slavery, making it clear that the latter is a component of forced marriage.
[24] DCC, para. 781.
[25] See for example, DCC, para. 780.

32. This threshold requirement of a linkage to the acts in Article 7(1) or a crime under the Statute cannot be ignored or diluted: it was the lynchpin to the agreement underwriting the Statute itself, which was inserted in order to avoid the possibility that any kind of discriminatory practice was outlawed.[26] The Introduction to Article 7 in the Elements of the Crime also stipulates that the elements of the different crimes against humanity "must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world." The latter necessarily encompasses Islamic law.

33. The Prosecution has nonetheless failed to plead or explain how the discriminatory practices in question would be contrary to international law. Bearing in mind that the Prosecution has argued that there was an armed conflict or at the very least, a state of emergency, it would also be necessary to view this element through the lens of legal and human rights obligations that cannot be derogated from, during an armed conflict/state of emergency. There is no clear consensus that many of the practices set out in paragraph 1092 would reach the threshold of a form of prohibited discrimination, under international law, particularly in light of the multiple reservations from States to the Convention on the Elimination of Discrimination against Women (CEDAW) as concerns provisions concerning marriage, which conflict with Sharia law (or other religious laws).[27]

34. These reservations are also not unique to Islamic countries. For example, as concerns the regulation of women's clothing in public places, the European

[26] D. Robinson, 'The Elements of Crimes Against Humanity, Persecution' in R. Lee (ed), The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence (Transnational Publishers 2001) at p. 95.

[27] The following fifteen (15) state parties to CEDAW have made reservations with respect to article 16 on the grounds that it is not compatible with Islamic Sharia law or other religious laws: Bahrain, Bangladesh, Egypt, Israel, Kuwait, Libya, Malaysia, Maldives, Mauritania, Morocco, Oman, Saudi Arabia, Singapore, Syrian Arab Republic and The United Arab Emirates. *Convention on the elimination of all forms of discrimination against women* (adopted on 18 December 1979, entered into force on 3 September 1981) UNTS 1249 (CEDAW) at p. 13.

Court of Human Rights has affirmed that it would not be inconsistent with the Convention to impose certain security restrictions as concerns clothing requirements in public (in that case, whether Muslim women could wear a full veil in public areas in France); States have a wide margin of appreciation in this regard to determine local needs and conditions, including for the purpose of promoting the goal of 'living together'.[28]

35. Similarly, some of the indicia employed by the Prosecution to demonstrate forced marriages fail to draw a sufficient bright line between conduct, which would fall within the accepted definition of forced marriage under international criminal law due to the elements of force, harm, and inhumane treatment, and acts which would mirror practices, which are accepted in countries throughout the world. The role of guardians/parental choice and the payment of money are not, in themselves, sufficient to establish that the marriage in question would fall within the ambit of the Rome Statute.[29] Within the much more lenient framework of human rights law, the European Court of Human Rights has found that the payment of a dowry as part of the marriage process did not necessarily demonstrate that the marriage could be equated to a form of ownership or slavery;[30] the Court further reiterated that,

> […] marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. According to the Court, this payment can reasonably be accepted as representing a gift from one family to another, a tradition common to many different cultures in today's society.

36. The very generic allegations in paragraph 1092 concerning the prohibition of certain religious and cultural practices would also not satisfy the standard of specificity required by Regulation 52, or the gravity of acts of persecution demanded by Article 7(1)(h).

37. It follows that in order to fall within the ambit of the Statute, it is necessary for charges to be limited to allegations of persecution concerning the specific incidents set out in counts 1-12.

[28] *S. A. S. v. France*, App no. 43835/11 (ECtHR 1 July 2014), paras. 129, 151-159.
[29] Cf DCC, para. 845.
[30] *M. and Others v. Italy and Bulgaria*, App no. 40020/03 (ECtHR, 31 July 2012), para. 161.

Chapter 2: The Prosecution's evidence is unreliable, inaccurate and inconsistent. It fails to satisfy the requisite threshold that there are substantial grounds to believe that Mr. Al Hassan committed the charged crimes

38. The objective of the confirmation process is to "filter […] out those cases and charges for which the evidence is insufficient to justify a trial";[31] this objective would be frustrated by the confirmation of the charges against Mr. Al Hassan. Fundamental elements of the charges are either unsupported by evidence, or supported by weak, uncorroborated evidence, which fails to satisfy the necessary evidential threshold. It would be a miscarriage of justice to allow this case to proceed to trial on the basis of such a foundation.

2.1 Elements for which no evidence has been cited

39. In Annex 5, the Defence has set out 51 key allegations from the DCC, for which no evidence has been cited. The Defence has further verified that the allegations in question are not referenced elsewhere in the DCC – in many instances, the Prosecution has combined several material assertions, into one claim. Whereas part of the claim might be elaborated further or supported by particular evidential citations, the most incriminating elements of the claim are not – but are based on pure interpolation on the part of the Prosecution. As a result, rather than being presented with the fruits of an objective and impartial investigation, the Chamber has been handed a bastardised Hollywood version of what took place in Timbuktu, in 2012.

40. These elements, which are highlighted in bold in Annex 5, are not minor omission, They include:

a. The alleged relationship between AQIM and Al Qaeda, which is not addressed at any point in the DCC;
b. The claim that Ansar Dine is a jihadist movement that was principally Touareg;
c. Key claims concerning the nature and modalities of the alleged armed conflict in the North of Mali;
d. The claim that all the perpetrators were fully aware of the circumstances of the armed conflict in the North of Mali;
e. The systematic nature of the attack on the civilian population;

[31] *Mbarushimana*, ICC-01/04-01/10-514, para. 47.

f. Broad allegations concerning the treatment of the civilian population, including women and girls;
g. Broad speculation concerning the nature and purpose of religious training;
h. The existence of orders and directives concerning mistreatment, that are not referred to in the evidence;
i. The 'general rule' that people in any position of authority in the Islamic police could give punishments; and
j. Mr. Al Hassan's knowledge of the system of forced marriage or any mistreatment of women within this context.

41. For some key evidentiary items, the Prosecution has also put a particular gloss on the evidence, which is predicated on hidden assumptions concerning the facts in issue. For example, the Prosecution has claimed that Mr. Al Hassan used his telephone near a cemetery that was close to the destruction of buildings, but no witness or document cited in the DCC speaks to that alleged fact.[32] Similarly, the Prosecution has claimed that Islamic Tribunal convicted [REDACTED] on the basis of a report from Mr. Al Hassan, but no evidence supports the attribution of this conviction to such a report,[33] as opposed to an independent investigation conducted by the judge. The Prosecution also alleges, without any evidence, that no violation to the new rules was tolerated,[34] and could lead to immediate flogging or detention,[35] when in other parts of the DCC, they admit and cite to evidence that such violations would first only be met with a "warning".[36]

42. The Pre-Trial Chamber has emphasised, repeatedly, that the Prosecution is required to identify the specific evidence supporting each allegation in an accurate manner;[37] it is not the Pre-Trial Chamber's role to sift through countless documents in order to reconstruct a case that should have been put forward by the Prosecution. The absence of evidential references therefore operates as a bar to the confirmation of charges impacted by this evidential lacuna.

[32] Annex 5, Row 50, referring to DCC, para. 727.
[33] Annex 5, Row 44, referring to DCC, para. 449.
[34] Annex 5, Row 17, referring to DCC, para. 163.
[35] Annex 5, Row 45, referring to DCC, para. 530.
[36] DCC, paras. 342, 954.
[37] ICC-01/12-01/18-310, para. 24; ICC-01/12-01/18-35-Red2-tENG, para. 9.

2.2 Elements which the Prosecution has attempted to substantiate with weak, uncorroborated evidence

43. In Annexes 2, 3 and 4, the Defence has set out the specific type of evidence, which the Prosecution has relied upon in support of its allegations concerning contextual elements, and Mr. Al Hassan's individual responsibility. The breakdown demonstrates that the Prosecution relies repeatedly upon:

    a. Uncorroborated media articles, NGO or IGO reports;
    b. Uncorroborated anonymous witness statements;
    c. Uncorroborated interviews with [REDACTED]; and
    d. Inaccurate evidential interpretations.

44. In virtually every confirmation hearing, the Prosecution has attempted to eliminate or minimise the importance of reliability and credibility issues to this phase, and to thereby undermine the utility of the confirmation process. That battle has been lost. The Appeals Chamber has confirmed that Article 69 applies to the confirmation hearing;[38] the standard of proof differs, but there is still a standard of proof which applies, and which requires an assessment to be made as to whether the charges are supported by evidence of sufficiently probative standard to fulfil the standard of 'substantial grounds to believe'.[39]

45. The recent 'spate' of acquittals at the ICC also reinforces the importance of maintaining rigorous and effective evidential standards at the confirmation phase, in order to ensure that the time and resources of the Court are not unnecessarily and unfairly diverted to the prosecution of a person who should be free. Both the *Gbagbo* and *Bemba* cases were confirmed, after the confirmation process was adjourned in order to allow the Prosecution more time to collect additional evidence, or to reframe its charges to have a greater prospect of success.[40] Both cases resulted in eventual acquittals due to the weakness of the evidential foundation. In line with the direction from the Appeals Chamber,[41] the Prosecution has committed "to being as trial-ready as possible from the earliest phases of the judicial proceedings, such as when seeking a warrant of arrest and

[38] *Mbarushimana*, ICC-01/04-01/10-514, paras. 41-42.
[39] *Mbarushimana*, ICC-01/04-01/10-514, para. 1.
[40] *Gbagbo*, ICC-02/11-01/11-432; *Bemba*, ICC-01/05-01/08-388.
[41] *Mbarushimana*, ICC-01/04-01/10-514, para. 44: "As previously indicated by the Appeals Chamber, the investigation should largely be completed at the stage of the confirmation of charges hearing".

no later than the confirmation of charges hearing".[42] Pre-Trial Chambers have also consistently emphasised the importance of putting the best evidence before the Chamber,[43] the assumption must be that the case currently before the Chamber represents the high water mark as concerns credible and probative evidence against Mr. Al Hassan. There can be no expectation that the Prosecution's case will improve if it proceeds to trial, or if it is given more time to prepare its case.

2.2.1 Uncorroborated indirect evidence (media/NGO/IGO reports)

46. For a significant number of key allegations in the DCC, the Prosecution has relied exclusively on indirect evidence comprised of media articles, and NGO/IGO reports: this is illustrated in Annexes 2 and 3, where all such allegations are shaded in blue. These are not peripheral issues, but key claims that are relied upon in section 9 to establish material facts underlying the charges against Mr. Al Hassan. In most cases, the Prosecution has also not attempted to identify whether the information in one such source has been corroborated in an independent manner, by other sources.

2.2.2 Anonymous summaries

47. The golden rule for protective measures implemented at this phase is that they must not prejudice the fair trial rights of the Defence: since it is impossible for the Defence to make meaningful observations concerning the reliability and credibility of anonymous statements, such statements are afforded less weight.[44]

48. The use of anonymous evidence is particularly prejudicial when it is hearsay in nature: that is, it is based on a summary prepared by the Prosecution rather than a direct statement, or when the witness is referring to information relayed by unidentified persons or sources.[45] For this reason, "anonymous hearsay contained in witness statements will be used only for the purposes of corroborating other evidence, while second degree and more remote anonymous

[42] International Criminal Court, *OTP Strategic Plan, 2016 – 2018*, Office of the Prosecutor (16 November 2015), p. 15.
[43] *Katanga*, ICC-01/04-01/07-428-Corr, para. 81; *Gbagbo*, ICC-02/11-01/11-432, para. 25.
[44] *Mbarushimana*, ICC-01/04-01/10-465, para. 49. See also *Ruto and Sang*, ICC-01/09-01/11-373, para. 78.
[45] *Lubanga*, ICC-01/04-01/06-693-Anx1, p. 7, 10; *Lubanga*, ICC-01/04-01/06-803-tEN, para. 106.

hearsay contained in witness statements will be used with caution, even as a means of corroborating other evidence".[46]

49. As can be seen by the rows highlighted in red in Annexes 2 and 3, the Prosecution has relied on anonymous evidence, extensively throughout the DCC, to substantiate key allegations in a stand-alone manner – that is, without independent corroboration from a reliable source. This necessarily undermines the evidential foundation of the case.

2.2.3 [REDACTED]'s interviews and statements

50. The Prosecution has relied upon [REDACTED]'s statements to establish a significant number of material facts in this case.[47] This testimony should be treated with extreme caution, and afforded very little weight, due to:

a. [REDACTED]'s status as an insider witness, who [REDACTED];
b. [REDACTED] role as a quasi-Prosecution intermediary; and
c. The multiple inconsistencies in [REDACTED]'s statements concerning Mr. Al Hassan and the role of the Islamic police, and lack of intrinsic coherence as concerns material allegations.

51. [REDACTED] is an 'insider witness', who, according to the DCC, bears much greater responsibility for the charged crimes than Mr. Al Hassan himself.[48] [REDACTED] nonetheless benefitted from [REDACTED], according to which [REDACTED] was only [REDACTED],[49] and not [REDACTED], which the Prosecution has alleged to be part of the common plan involving [REDACTED]. The Prosecution also agreed to take measures to request the Registry to protect [REDACTED],[50] and to support [REDACTED]. Although [REDACTED].

52. Of further importance, [REDACTED]. His statement [REDACTED] the extent of his responsibility set out in the evidence and DCC. His failure to proffer a full account of his role and responsibility [REDACTED] speaks to his honesty and credibility. During his subsequent interviews, the Prosecution also advised him

[46] *Mbarushimana*, ICC-01/04-01/10-465, para. 49. See also para. 78.
[47] Annexes 2, 3 (see rows shaded in yellow).
[48] See for example, DCC, para. 248.
[49] [REDACTED].
[50] [REDACTED].

that notwithstanding [REDACTED], in light of ongoing status as a suspect, he was not obliged to answer all questions exhaustively.[51]

53. As a suspect accomplice, who was [REDACTED] for the information that he gave to the Prosecution, [REDACTED]'s testimony should be treated with extreme caution, even at the confirmation phase of the proceedings. [REDACTED]'s situation is therefore very similar to that of Michel Bagaragaza – an ICTR defendant who pleaded guilty to one count of genocide and provided testimony in other cases, in exchange for a reduced sentence, and the relocation of his family. In the *Zigiranyirazo* case, the ICTR Trial Chamber found that Bagaragaza's testimony should be treated with extreme caution both because of his accomplice status, and because of the perquisites that he had received in exchange for his cooperation.[52]

54. ICC Pre-Trial Chambers have also affirmed that accomplice evidence should be treated with caution. For example, in the *Banda & Jerbo* case, Pre-Trial Chamber I found that:[53]

> […] a number of statements presented by the Prosecutor were given by insider witnesses. Many of these witnesses participated in the events alleged in the present case, including the alleged attack on the MGS Haskanita. In the circumstances, when examining these statements, the Chamber will assess such witnesses' testimony in light of the evidence presented as a whole. When examining these statements, the Chamber will be mindful of the risks that attach to the evidence of insider witnesses and will therefore treat such evidence with caution.

55. An identical approach was adopted in the *Mbarushimana* confirmation decision:[54]

> The Chamber further notes that a number of the statements relied on by the Prosecution were given by former members of the FDLR, some of whom participated in the events alleged in the present case. The Chamber will assess the information contained in these statements in light of the evidence presented as a whole and, mindful of the risks

[51] [REDACTED].
[52] ICTR, *Prosecutor v. Zigiranyirazo*, ICTR-01-73-T, Trial Chamber, Judgment, 18 December 2008, paras. 137-140.
[53] *Banda and Jerbo*, ICC-02/05-03/09-121-Corr-Red, para. 42.
[54] *Mbarushimana*, ICC-01/04-01/10-465-Red, para. 50.

> that attach to the statements of insider witnesses, will exercise caution in using such evidence to support its findings.

56. Of further relevance, many of the statements relied upon by the Prosecution were given by [REDACTED] before the Prosecution had finalised [REDACTED]: he therefore had a clear incentive during such interviews to minimise [REDACTED] and to augment that of the Islamic police and Mr. Al Hassan. This incentive goes directly to his credibility and the weight of his statements. This would be in line with the following findings of the ICTY in the *Blagojevic* & *Jokic* case,[55]

> The Trial Chamber recalls that Dragan Jokic appeared at the questioning sessions with the Prosecution as a suspect; as is the case with any suspect, Mr. Jokic did not want to leave those sessions having been "elevated" to an accused. It is reasonable to expect that any person appearing at such a questioning session may minimise his role in any criminal activities while highlighting or even exaggerating the role of others in order to deflect attention from himself. A suspect appearing for questioning is not required to make a solemn declaration, as is a witness testifying before this Tribunal. Without making any finding about the specific interviews with Mr. Jokic or seeking to make any observation on the character or truthfulness of Mr. Jokic, the Trial Chamber finds that the veracity of any such interview is inherently suspect, and would not be sufficient to establish any facts at issue before it as proven beyond a reasonable doubt.

57. The problematic nature of [REDACTED]'s evidence is further aggravated by the inability of the Defence to cross-examine him in relation to his motives or incentives to implicate Mr. Al Hassan. In this regard, whilst the Statute and Rules allow the Prosecution to rely on witness statements at this phase of the proceedings, this is without prejudice to the duty of the Chamber to ensure that the use of such written testimony is not overly prejudicial to the rights of the Defence, including the right to examine and challenge the credibility of Prosecution evidence.[56] The rights of the Defence can best be protected by taking these issues into consideration when evaluating the weight of [REDACTED]'s testimony, and dismissing any allegations and charges that are not corroborated by independent evidence, which is reliable in nature.

[55] ICTY, *Blagojevic and Jokic*, IT-02-60-T, Trial Chamber, Decision on Prosecution's Motion for Clarification of Oral Decision regarding Admissibility of Accused's Statement, 18 September 2003, para. 24.
[56] *Lubanga*, ICC-01/04-01/06-773, paras. 2, 40, 50, 51.

58. [REDACTED]'s role as a quasi-Prosecution intermediary also militates in favour of applying extreme caution to [REDACTED]'s evidence. It would seem that throughout the interview process, [REDACTED] starts to identify with the objectives of the Prosecution, to such an extent that he repeatedly offers to contact witnesses and collect information and evidence for the Prosecution.[57] Rather than declining such offers, the Prosecution actively encouraged [REDACTED] in his endeavours, even though [REDACTED] clearly lacked the necessary skills and impartiality to satisfy the Prosecution's investigative duties and responsibilities under Article 54(1) of the Statute.

59. [REDACTED]'s active participation in Prosecution investigations demonstrates his partiality in this case: he was so keen to help the Prosecution obtain a conviction against Mr. Al Hassan (and to maintain a good relationship with the Prosecution) that he went above and beyond the role of a witness in providing a personal account of what he had experienced.

60. It is also pertinent that during interviews, which took place in the time period pre-dating [REDACTED]'s access to Prosecution evidence, [REDACTED] very rarely mentioned Mr. Al Hassan, and only in very vague terms. He also described him to the Prosecution as someone who was a potential witness (as opposed to a suspect).[58] [REDACTED] Timbuktu in September 2012,[59] and was therefore absent during which the Prosecution has alleged that Mr. Al Hassan assumed more duties in the Islamic Police.

61. In April 2016 (which was after [REDACTED] had [REDACTED]), the Prosecution met with [REDACTED] to elicit further information that could direct its investigations. After laughingly referring to [REDACTED]'s concession that he had withheld about 20% of the truth during his previous interviews, the Prosecution encouraged [REDACTED] to consider all the materials disclosed in the case file as "relevant, everything is your knowledge now and that's what we're talking about."[60]

[57] [REDACTED]
[58] [REDACTED].
[59] [REDACTED].
[60] [REDACTED].

62. Furthermore, after [REDACTED] had reviewed Prosecution evidence, including videos, statements and documents relating to Mr. Al Hassan, and started 'contemplating' the hierarchy in the police,[61] [REDACTED] then furnished many more concrete details concerning Mr. Al Hassan's alleged involvement in the events, during his July 2018 interviews.[62] [REDACTED] also moulded his testimony concerning Mr. Al Hassan and the hierarchy of the police, in order to conform to the contents of Prosecution exhibits disclosed in his own case.[63]

63. In 2016, when [REDACTED] listed all the individuals who were responsible for the destruction of the protected buildings, [REDACTED] failed to name Mr. Al Hassan.[64] And yet, when pressed to explain Mr. Al Hassan's involvement in 2018, [REDACTED] claimed that he knew, in his heart, that Mr. Al Hassan must have been involved.[65]

64. Similarly, in 2015, [REDACTED] complained that the Islamic Police was not acting as an 'Islamic' police, but rather one which mirrored the type of police that would be found in general civil system,[66] but in June 2018,[67] after the Prosecution underscored the importance of his testimony to their case against Mr. Al Hassan, [REDACTED] started to claim that the police conducted itself along more ideological lines.[68]

65. There are therefore serious grounds for questioning whether [REDACTED]'s testimony is based on his personal knowledge of the events, or whether he merely parroted the Prosecution's case, in order to maintain his good standing with the Prosecution. In the *Katanga* & *Ngdujolo* case, the Pre-Trial Chamber observed that the existence of discrepancies in a witness's testimony, which had appeared after the witness had accessed evidence or the case file, could be a matter that would impact on the credibility assessment of the witness in

[61] [REDACTED]
[62] [REDACTED].
[63] [REDACTED].
[64] [REDACTED].
[65] [REDACTED].
[66] [REDACTED]
[67] [REDACTED].
[68] [REDACTED].

question.[69] It would be appropriate to adopt the same approach as concerns [REDACTED]'s testimony.

66. Finally, the credibility and weight of [REDACTED]'s evidence concerning Mr. Al Hassan is fatally undermined by the extent of inconsistencies and incoherent information in his statements. [REDACTED] contradicts himself throughout his interviews,[70] and presents speculation and remote hearsay as if it was his own evidence.[71] This is amply demonstrated by his conflicting and mutating testimony concerning Mr. Al Hassan's role in the Islamic police:[72] he is described as a commander, being second or third in command, and also as having analogous functions to [REDACTED]'s personal driver in Hesbah.[73]

67. And yet, although he asserts at various junctures that Mr. Al Hassan was in command of the police during some unspecified time period,[74] [REDACTED] never provides any concrete examples of Mr. Al Hassan exercising authority over the police. To the contrary, as concerns all key allegations of criminal activity, [REDACTED] confirms that individuals other than Mr. Al Hassan exercised control and decision-making powers vis-à-vis the police, including as concerns the activities of police during patrols, internal discipline,[75] *tazir* punishments,[76] and during the attack on certain protected buildings.[77]

68. When viewed as a whole, his testimony is therefore insufficiently reliable to support the key allegations, which the Prosecution have attributed exclusively to him.[78]

[69] *Katanga*, ICC-01/04-01/07-632, para. 27: "The crucial factor in assessing the reliability of their oral statements or testimonies at trial (and consequently their probative value) is whether there are unjustified substantial differences between: (i) their statements at the investigation stage before they have access to the other evidence contained in the record of the case; and (ii) their oral statements or testimonies at trial after they have had access to the other evidence contained in the record of the case".
[70] [REDACTED].
[71] [REDACTED].
[72] [REDACTED].
[73] [REDACTED]
[74] [REDACTED].
[75] [REDACTED].
[76] [REDACTED].
[77] [REDACTED].
[78] See Annexes 2, 3.

69. Notwithstanding the lower standard of proof that applies to the confirmation phase, the Appeals Chamber has confirmed that:[79]

> In determining whether to confirm charges under article 61 of the Statute, the Pre-Trial Chamber may evaluate ambiguities, inconsistencies and contradictions in the evidence or doubts as to the credibility of witnesses.

70. In *Katanga and Ngudjolo*, the Pre-Trial Chamber found that before deciding whether to rely on particular items of evidence, "the Chamber must look at the intrinsic coherence of any item of evidence, and to declare inadmissible those items of evidence of which probative value is deemed prima facie absent after such an analysis."[80] In *Mbarushimana*, the Appeals Chamber also concluded that "in order to make this determination as to the sufficiency of the evidence, the Pre-Trial Chamber must necessarily draw conclusions from the evidence where there are ambiguities, contradictions, inconsistencies or doubts as to credibility arising from the evidence".[81]

71. The necessary elements of 'intrinsic coherence' and reliability are completely lacking as concerns the key allegations from [REDACTED], and as such, the Pre-Trial Chamber cannot safely rely on his testimony to establish substantial grounds to believe that Mr. Al Hassan committed the charged crimes.

2.2.4 Allegations that are supported by intrinsically incoherent or inconsistent evidence, or inaccurate citations

72. In Annexes 2 and 3, the Defence has identified key allegations, which the Prosecution has attempted to substantiate with different categories of unreliable evidence (for example, anonymous summaries and media statements). The fact that more than one, evidentially weak item of evidence, says the same thing, does not, however, make the assertion more reliable.[82] An item of evidence will

[79] *Mbarushimana*, ICC-01/04-01/10-514, para. 1.
[80] *Katanga*, ICC-01/04-01/07-717, para. 77.
[81] *Mbarushimana*, ICC-01/04-01/10-514, para. 39. See also *Ongwen*, ICC-02/04-01/15-422-Anx-tENG, para. 8.
[82] ICTY, *Prosecutor v. Limaj et al*, IT-03-66-A, Appeals Chamber, Judgment, 27 September 2007, para. 203: "Moreover, corroboration of testimonies, even by many witnesses, does not establish automatically the credibility, reliability or weight of those testimonies. Corroboration is neither a condition nor a guarantee of reliability of a single piece of evidence. It is an element that a reasonable trier of fact may consider in assessing the evidence. However, the question of whether to consider corroboration or not forms part of its discretion." (footnotes omitted). See also ICTY, *Mrkšić and Šljivančanin*, IT-95-13/1-A, Appeals Chamber, Judgement, 5 May 2009, para. 264; *Ngudjolo*, ICC-01/04-02/12-271-Corr, para. 148 and fn. 302; and *Bemba*, ICC-01/05-

also not constitute 'corroboration' if it speaks to a different fact or allegation, or if it was obtained from the same source,[83] the latter being very difficult to verify with NGO and UN reports, which do not identify their sources.[84]

73. In Annex 4, the Defence has further set out specific examples of evidence that has been cited in an inaccurate or misleading manner by the Prosecution. Given the short time frame available to the Pre-Trial Chamber for verifying and confirming charges, it is a matter of considerable concern that the Prosecution has presented its evidence in such a manner. The fact that the DCC is rife with such inaccuracies speaks to the flawed and partial nature of the Prosecution case itself. The core foundation of this case is weak, and insufficiently reliable to confirm for trial.

74. In line with its blinkered approach, the Prosecution has also simply ignored contradictory evidence amongst its own witnesses, and it has not provided any explanation or analysis as to why certain witnesses can be relied on as concerns incriminating aspects of their testimony, but not as concerns the elements that exculpate Mr. Al Hassan. For example, the Prosecution relies on [REDACTED] in order to establish that Mr. Al Hassan was *de facto* commissioner of the police,[85] but ignore his key qualification that Mr. Al Hassan carried out administrative functions, and had to go to the head of the police for any decisions.[86]

Chapter 3: The Prosecution's evidence fails to establish substantial grounds to believe that the charged crimes were committed

75. The Prosecution bears the burden of satisfying the requisite procedural, factual and legal threshold for each of the charged crimes. The threshold of 'substantial grounds to believe' applies to the facts and circumstances underpinning the

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01/08-3636-Anx2, Separate Opinion of Judge Van den Wyngaert and Judge Morrison, para. 64: "also reject the Trial Chamber's apparent conclusion that weak testimonial evidence can somehow be corroborated by weak documentary evidence, especially if one or both are based on (anonymous) hearsay".

[83] ICTY, *Prosecutor v. Haxhui*, IT-04-84-R77.5, Trial Chamber, Judgment, 24 July 2008, para. 41: "in order for a piece of evidence to be able to corroborate untested evidence, it must not only induce a strong belief of truthfulness of the latter, i.e. enhance its probative value, but must also be obtained in an independent manner".

[84] *Gbagbo*, ICC-02/11-01/11-432, paras. 28-30.

[85] DCC, fn. 316.

[86] [REDACTED].

charges, including the contextual elements required to establish the existence of an armed conflict, and crimes against humanity.[87] The DCC must also plead sufficient material facts to comply with the requirements of Regulation 52 of the RoC. For the reasons set out below, the DCC and related evidence fail to satisfy this burden as concerns each of the charged war crimes, and crimes against humanity – specifically:

i. For crimes against humanity, the Prosecution has failed to establish that there are substantial grounds to believe:
   a) That there was a widespread or systematic attack against a civilian population during the relevant time period of the charges;
   b) That there was an organisational policy to commit a widespread or systematic attack against a civilian population; and
   c) That Mr. Al Hassan was aware that his conduct was taking place within this context.

ii. For war crimes, the Prosecution has failed to establish that there are substantial grounds to believe:
   a) That there was an armed conflict in Timbuktu and its environs, during the relevant time period of the charges; and
   b) If there was such an armed conflict, that there was a nexus between this conflict and the charged crimes, and Mr. Al Hassan was, himself, aware of this nexus.

3.1 The Prosecution has failed to demonstrate substantial grounds to believe that the required contextual elements under Article 7 of the Statute are fulfilled

76. The *Katanga* Trial Judgement ruled "that application of article 7 pre-supposes three stages of reasoning": (1) analysis of the existence of an attack; (2) characterisation of the attack; and (3) the existence of the requisite nexus between the widespread or systematic attack and the act within the ambit of article 7 and, knowledge of that nexus by the perpetrator of the act.[88] The Prosecution charges against Mr. Al Hassan fail as concerns all three stages:

[87] *Gbagbo*, ICC-02/11-01/11-572, para. 38: "The Appeals Chamber further notes that the Prosecutor does not dispute that the facts and circumstances underpinning the contextual elements of crimes against humanity must be proven to the standard of substantial grounds to believe, which is essentially the issue for which leave to appeal was granted. Indeed, as set out above, the Prosecutor quotes with approval the Pre-Trial Chamber's statement that the 'evidentiary threshold under [a]rticle 61(7) applies to all 'facts and circumstances' of the case" and that it "is the same for all factual allegations, whether they pertain to the individual crimes charged, contextual elements of the crimes or the criminal responsibility of the suspect".
[88] *Katanga*, ICC-01/04-01/07-3436-tENG, paras. 1096-1099.

a. the DCC does not establish that there are substantial grounds to believe that an attack was carried out against the civilian population in Timbuktu in 2012-2013, pursuant to the plan or policy of an organisation;

b. the DCC further fails to demonstrate that if such an attack existed, it was widespread or systematic; and

c. the DCC fails to show substantial grounds to believe that Mr. Al Hassan knew that his acts were part of, or intended them to be part of such attack.

The Prosecution therefore fails to meet its burden in relation to the contextual elements of Article 7 of the Statute.

3.1.1 The Prosecution failed to establish that an attack against the civilian population took place in Timbuktu, pursuant to the policy of an organisation

77. The Prosecution describes the alleged attack as the commission of multiple acts prohibited under Article 7(1) of the Statute,[89] which it lists, but cannot precisely number.[90] It then alleges that this alleged attack was carried out by an "organisation"[91] (formed of Ansar Dine, AQIM, and the institutions they installed in Timbuktu)[92] which allegedly established its control over Timbuktu "on the basis of common ideological and religious views".[93]

78. The implementation of these "views" appears to constitute the alleged plan or policy of the "organisation". Although the Prosecution does not clearly spell it out in the section of the DCC dedicated to the nature of the alleged policy,[94] the DCC as a whole makes abundantly clear that the alleged policy underlying the so-called "attack" is the implementation of Sharia law in Timbuktu.[95]

79. Without putting too fine a nuance on the issue, this contextual requirement requires the Prosecution to demonstrate that "the assailants must not be sporadic or spontaneous. That is to say, even a widespread attack against a civilian population must exhibit the condition or quality of also being coordinated or organised (hence 'organisational'), in a manner that revealed forethought (or

[89] DCC, Titles 6.1 and 6.1.1.
[90] DCC, para. 161.
[91] DCC, paras. 177-183.
[92] DCC, para. 4.
[93] DCC, paras. 179, 180, 181, 185.
[94] DCC, paras. 184-193.
[95] See for example, DCC, paras. 52, 72, 82, 210, 216-218, 220-223, 227, 239, 254, 255, 365, 886-888, 893-895, 903-906, 908-909, 920, 985, 987, 989.

'policy')."[96] This is where the Prosecution's case falls down: there are no pleadings or evidence which reflects a coordinated plan to commit crimes against civilians. This is not a matter that can simply be assumed or that can rest on mere speculation. And yet, the DCC fails to cite any evidence which demonstrates that Ansar Dine, as an organisation, had a pre-determined policy to actively encourage or promote the commission of crimes (meaning the type of crimes set out in Article 7 of the Statute, and not war crimes, such as the attack on protected buildings) against civilians in Timbuktu (as in, individuals, who were not members of Ansar Dine).

80. The quality of evidence cited in the DCC on this point is extremely poor: it consists primarily of media reports, of an extremely generic nature.[97] To the extent that the Prosecution has adduced some witness testimony, the content concerns acts which fall outside the scope of Article 7 (such as the destruction of protected buildings) or conduct which fails to reach the threshold of a crime under Article 7 of the Statute.[98]

81. And, to the extent that the Prosecution may have collected evidence of particular crimes committed against individuals, in light of the clear policy of Ansar Dine to deprecate and prosecute rape and acts of violence, the Prosecution has failed to distinguish this case, from similar circumstances in the *Bemba* case, where Judge Eboe-Osuji remarked that:[99]

> To the extent that it is even reasonable to say that crimes against humanity were committed, such evidence rises no higher than to show that the perpetrators were on a 'frolic of their own'—as a well-known legal expression goes. But, what is more, the evidence reveals quite clearly, actions on the part of the Appellant showing,

[96] *Bemba*, ICC-01/05-01/08-3636-Anx3, para. 287.
[97] See Annex 2, Rows 196 (press article by Nouakchott News Agency describing an alleged statement by Iyad Ag Ghaly regarding the implementation of Sharia law in Timbuktu); 198, 200, 204-205 (France 2 video reportage); 202, 209 (Al Jazeera video reportage), 203 (press article in Libération describing in general terms the alleged prohibitions imposed by Ansar Dine and the "honeymoon" with French troops after their January 2013 intervention), 206 ([REDACTED]); 212 (Associated Press article which purports to detail the costs and financial statements of some of the institutions allegedly created in Timbuktu); 217 (YouTube video); 218 (articles by RTBF Monde, describing in general terms the departure of the "FNLA" and the alleged role of the Islamic police, and Alarabiya.net describing that an "Arab militia", the "FNLA", had entered and then left Timbuktu at AQIM's request).
[98] See Annex 2, Rows 154 and 174 (the statements of Witnesses [REDACTED] and [REDACTED] essentially refer to alleged destruction of buildings and manuscripts).
[99] *Bemba*, ICC-01/05-01/08-3636-Anx3, para. 289.

> as discussed below, clear efforts to discourage and reproach the commission of crimes and causing their perpetrators to be subjected to criminal judicial proceedings.

82. And, at this stage, the Prosecution has not adduced any evidence to demonstrate that the implementation of a system concerning religion constitutes an attack against a civilian population. The allegation that Sharia law constitutes a policy to commit an attack against a civilian population is problematic on many legal and evidential levels. Sharia law is the accepted legal system in several countries or regions across the world. At least fifteen States apply it more or less integrally: Egypt, Mauritania, Sudan, Afghanistan, Iran, Iraq, the Maldives, Pakistan, Qatar, Saudi Arabia, Yemen, certain regions in Indonesia, Malaysia, Nigeria, and the United Arab Emirates.[100] Other jurisdictions apply a mixed system, reserving Sharia law to family matters.

83. Moreover, if this policy fulfils the necessary threshold under Article 7, then it would also follow that an 'organisational policy' could equally encompass political systems, which promote particular forms of religious belief, and those, which promote secularism, or an absence of belief within the public sphere. If accepted by the Chamber, the alleged organisational policy in this case could therefore trigger significant consequences and parallels as concerns other situations under the potential jurisdiction of the Court.

84. As stressed by Bassiouni, there are extremely powerful policy reasons for ensuring that the contextual elements of Article 7 are not diluted or broadened to encompass a variety of unanticipated conduct:[101]

> The political consequence will be the opposition of states to such an approach, thus reducing the already limited political willingness to cooperate in the apprehension, prosecution and extradition of persons accused or charged with the commission of such crimes. It may also deter states from ratifying the ICC treaty. The policy implications would be to reduce the standing of "crimes against humanity" from its present standing of jus cogens to a lesser category of international crimes. This would be the case for two reasons. The first is that this new approach to "crimes against humanity" would have far less than

[100] Ashlea Hellmann, *The Convergence of International Human Rights and Sharia Law - Can International Ideals and Muslim Religious Law Coexist?*, New York State Bar Association, p. 6.
[101] M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law (2nd ed., Kluwer law, 1999) at pp. 245-246.

> universal recognition, and the second is that it would be much less "shocking to the conscious of humanity".

85. For these reasons, the Chamber should not find that there are substantial grounds to believe that the application of Sharia law may constitute a plan or a policy to commit an attack against a civilian population.

3.1.2 The Prosecution failed to establish that the alleged attack was widespread or systematic

86. The Prosecution alleges that a "few hundreds criminal acts", were committed in Timbuktu over a 10-month period.[102] It nonetheless concedes that some of these alleged criminal acts may have been counted multiple times.[103] By its own reckoning, the Prosecution has failed to establish substantial grounds to believe that the alleged incidents comprising the attack were widespread in nature.

87. A further obstacle arises from the fact that the incidents listed in the DCC are not precisely numbered,[104] and the alleged number of occurrences is not supported by the evidential references, which are comprised of a large proportion of hearsay evidence. For example, the Prosecution alleges that around 70 cases of flogging were recorded, but the cited evidence,[105] can, at its highest, support less than 10 occurrences.[106] Similarly, the Prosecution has attempted to support allegations that around 140 arrests and detention occurred, with the evidence of only four witnesses, three of whom are anonymous.[107] The 20 alleged cases of rape are only supported by the statements of three witnesses, of which two are anonymous,[108] which recount either their own rape (two cases) or rapes they had only heard about (anonymous hearsay). In sum, none of the already approximate numbers given by the Prosecution are matched by the

[102] DCC, para. 160.
[103] DCC, fn. 433.
[104] DCC, para. 161.
[105] See Annex 2, row 148-150, citing [REDACTED].
[106] Regarding the references cited in footnote 434, [REDACTED] recounts her own alleged flogging, while [REDACTED] recounts her own and someone else's alleged flogging, and the two Islamic tribunal judgements appear to each convict one person. In footnote 435, the report mentions mistreatment regarding one individual, and the statement of [REDACTED] recounts her own flogging. Finally, footnote 436 relies on the statements of [REDACTED], who describes mistreatment of his daughter and his mother. In total, the references contained in the three relevant footnotes could support claims of mistreatment for around nine persons.
[107] See Annex 2, row 151 citing [REDACTED].
[108] See Annex 2, row 152 citing [REDACTED].

evidence it refers to, and none are supported by sufficiently reliable evidence to meet the threshold of substantial grounds to believe.

88. Annexes A to E of the DCC reflect a similar lack of precision as concerns the numbers, dates, and identity of the alleged victims. Given the lack of precision and details, it cannot be excluded that some alleged acts or victims have been counted multiple times. As set out at Chapter 1 above, in light of the requirements of Regulation 52 of the RoC, such exceedingly vague allegations, which are undated or not dated with sufficient precision, and where the alleged crimes are committed against unknown victims, and by unidentified perpetrators, cannot support the existence of a wide-spread attack.

89. Regarding the systematic nature of the "attack", the Prosecution refers to a number of criteria, which it then fails to substantiate.[109] For example, the Prosecution implies that there were numerous new rules and prohibitions,[110] but does not specify how many, and does not support its allegation with any source. It alleges that the "formalisation" of rules is indicative of the systematic character of the attack, but refers to a single document showing such "formalisation".[111] The document in question was not issued until August 2012, and does not, on its face, concern the commission of Article 7 offences against civilians.

90. Other criteria are similarly vague, and unsupported by any evidence.[112] The Prosecution has also attempted, once again, to rely on conduct that falls outside the scope of Article 7. This includes conduct falling under Article 8, such as the attack on the protected buildings and the issuance of sentences by the Islamic Tribunals, and conduct which fails to rise to the gravity of the offences set out in Article 7 (the punishments exacted directly during patrols).

91. For these reasons, the Prosecution fails to show substantial grounds to believe that the alleged attack was widespread or systematic.

[109] DCC, para. 202.
[110] DCC, para. 202 ("Concernant le caractère systématique de l'attaque, cela ressort notamment : du nombre de nouvelles règles et d'interdits imposés, découlant de la vision idéologique et religieuse de l'Organisation…").
[111] See Annex 2, row 243, citing [REDACTED]. The two documents in reference are identical.
[112] DCC, para. 202.

3.1.3 The Prosecution failed to establish that Mr. Al Hassan knew that his acts were part of, or intended his conduct to be part of a widespread or systematic attack directed against the civilian population of Timbuktu

92. The Prosecution does not directly allege that Mr. Al Hassan knew that his acts were part of, or intended his conduct to be part of a widespread or systematic attack directed against the civilian population of Timbuktu.[113] Rather, it alleges that "perpetrators" knew of the alleged attack because of their membership in "the Organisation" and their receiving military and religious training.[114] This does not meet the burden of proof as concerns Mr. Al Hassan.

93. Proof of the alleged perpetrator's knowledge "constitutes the foundation of a crime against humanity as it elucidates the responsibility of the perpetrator of the act within the context of the attack considered as a whole."[115]

94. Article 30(1) of the Statute provides that "a person shall be criminally responsible and liable for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge". Paragraph 8 of the General Introduction to the Elements of the Crimes also specifies that, "As used in the Elements of Crimes, the term "perpetrator" is neutral as to guilt or innocence. The elements, including the appropriate mental elements, apply *mutatis mutandis*, to all those whose criminal responsibility may fall under articles 25 and 28 of the Statute". According to Robinson,[116]

> […] article 7 also differs from precedents in that it explicitly states the requirement that the accused must be aware of the attack. The general view was that this requirement would have been inferred in any event, given the jurisprudence, the requirements of article 30, and the general principles of international criminal law. Nevertheless, it was included out of an abundance of caution to accommodate those delegations that wanted no ambiguity on the point.

95. This means that the Prosecution was required to establish that Mr. Al Hassan possessed all relevant mental elements, including the awareness of this key

[113] DCC, paras. 205-207.
[114] DCC, para. 205.
[115] *Katanga*, ICC-01/04-01/07-3436-tENG, para. 1125.
[116] D. Robinson, "The Elements of Crimes Against Humanity" in R. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) at p. 64.

nexus between his conduct, and the existence of a widespread or systematic attack against the civilian population.

96. This interpretation is also consistent with the approach of the *ad hoc* Tribunals, and the overarching principle of individual responsibility. As formulated by the Appeals Chamber in the *Martinovic & Naletilic* case:[117]

> The principle of individual guilt requires that an accused can only be convicted for a crime if his *mens rea* comprises the *actus reus* of the crime. To convict him without proving that he knew of the facts that were necessary to make his conduct a crime is to deny him his entitlement to the presumption of innocence. The specific required mental state will vary, of course, depending on the crime and the mode of liability. But the core principle is the same: for a conduct to entail criminal liability, it must be possible for an individual to determine ex ante, based on the facts available to him, that the conduct is criminal. At a minimum, then, to convict an accused of a crime, he must have had knowledge of the facts that made his or her conduct criminal.

97. In the *Kayishema & Ruzindana* case, the ICTR Trial Chamber found that the principle of individual criminal responsibility required that the accused must be aware of the culpable context in which his or her acts took place.[118] In line with this, in the *Kunarac* case, the Appeals Chamber confirmed that it is the accused, and not just the physical perpetrator, that must be demonstrated to possess this knowledge.[119]

98. This element is absolutely essential and cannot be left to speculation, as has been done in the Prosecution DCC. The Prosecution has not adduced any evidence that Mr. Al Hassan pledged allegiance to Ansar Dine,[120] or that he was

[117] ICTY, *Prosecutor v. Martinovic & Naletilic*, IT-98-34-A, Appeals Chamber, Judgment, 3 May 2006, para. 114. See also para. 118.
[118] ICTR, *Prosecutor v. Kayishema & Ruzindana*, ICTR-95-1-T, Trial Chamber, Judgment, 21 May 1999, para. 134.
[119] ICTY, *Prosecutor v. Kunarac et al.*, IT-96-23&IT-96-23/1-A, Appeals Chamber, Judgment, 12 June 2002, paras. 102-104. See also ICTY, *Prosecutor v. Milutinovic et al*, IT-05-87-A, Appeals Chamber, Judgment, 23 January 2014, paras. 280-281, where the Appeals Chamber affirmed that it was necessary for the Trial Chamber to identify that the defendant possessed intent as concerns contextual elements, but nonetheless rejected the defendant's argument that the Trial Chamber had not in fact done so.
[120] DCC, paras. 54, 358, 368.

trained militarily,[121] or as a police officer.[122] The Prosecution's key witness also states that Mr. Al Hassan's "religious understanding was very limited".[123]

99. Without this specialised knowledge, Mr. Al Hassan could not know that imposing Sharia law could constitute an attack against the civilian population, and in turn, crimes against humanity. When viewed in connection with the sporadic and isolated nature of alleged incidents that actually reached the gravity threshold of Article 7, the Prosecution has failed to adduce evidence that a Muslim man, with Mr. Al Hassan's lack of training in religious and military matters, could have known that his conduct in the Islamic police had a sufficient nexus to a widespread or systematic attack against a civilian population.

100. In addition, it is worth noting that in its Article 53(1) Report issued in January 2013 and "based on information gathered by the Office [of the Prosecutor] from January until December 2012",[124] the Prosecution concluded that "the information available does not provide a reasonable basis to believe that crimes against humanity under Article 7 have been committed in the Situation in Mali."[125] While it will probably be argued that further investigations might have resulted in a different conclusion, it is still worth noting that if professional investigators and lawyers from the Prosecution were not satisfied that crimes against humanity had been committed in Mali in January 2013, then conversely, a lay person without a legal education could not have known that his acts were part of a widespread or systematic attack directed against the civilian population of Timbuktu in 2012-2013. The Prosecution has not, in any case, adduced any evidence that would demonstrate that Mr. Al Hassan possessed greater information or knowledge on this point, than the Prosecution.

101. For the reasons set out above, the Prosecution fails to demonstrate that there are substantial grounds to believe that Mr. Al Hassan was aware that a widespread or systematic attack against the civilian population was taking place, that he was

[121] DCC, para. 56.
[122] DCC, para. 297.
[123] [REDACTED].
[124] Situation in Mali, Article 53(1) report, 16 January 2013, para. 1.
[125] Situation in Mali, Article 53(1) report, 16 January 2013, para. 128.

aware that his acts were part of such attack, or that he intended his conduct to be part of such attack.

3.2 The Prosecution has failed to demonstrate substantial grounds to believe that the required contextual elements under Article 8 of the Statute are fulfilled

102. At the outset, the Defence underlines that the Prosecution's attempt to reference the *Al Mahdi* judgment,[126] in lieu of citing evidence concerning these elements, is flawed and unacceptable. The Rome Statute framework does not provide for 'adjudicated facts', as understood by the *ad hoc* Tribunals. The Appeals Chamber has also adopted a restrictive definition of 'judicial notice', which would exclude the admission of judicial findings from one case, to another.[127] Instead, Rule 68(2) envisages that the Court may rely upon the prior recorded testimony from another case, without being bound by the other Chamber's ultimate findings in that case. The Prosecution had free reign in this case to use the evidence tendered in the *Al Mahdi case*, and has in fact done do. The Prosecution cannot, however, use the *Al Mahdi* judgment itself to cover the evidential lacuna in both cases.

103. A further bar to the use of the *Al Mahdi* judgment concerns the fact it was issued on the basis of a plea deal/guilty plea. International tribunals, which allow adjudicated facts, nonetheless consider that "facts based on an agreement between parties in previous proceedings cannot be deemed "adjudicated facts" within the meaning of Rule 94 of the Rules because they have not been established by the Trial Chamber on the basis of evidence".[128]

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[126] DCC, paras. 38, 44, 53, 75-76. See also Annex 7.
[127] ICC-01/05-01/13-2159, para. 8.
[128] ICTR, *Bagosora et al. v. Prosecutor*, ICTR-98-41-A, Appeals Chambers, Decision on Anatole Nsengiyumva's Motion for Judicial Notice, 29 October 2010, paras. 10-11. See also ICTY, *Prosecutor v. Seselj*, IT-03-67-T, Trial Chamber, Decision on Prosecution Motion for Judicial Notice of Facts Adjudicated by *Krajišnik* Case, 23 July 2010, para. 7(5); ICTY, *Prosecutor v. Popovic et al.*, IT-05-88-T, Trial Chamber, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 26 September 2006, para. 11: "In this Trial Chamber's view, if a Chamber cannot readily determine, from an examination of the citations in the original judgement, that the fact was not based on an agreement between the parties, it must deny judicial notice of the fact."; ICTY, *Prosecutor v. Krajisnik*, IT-00-39-PT, Trial Chamber, Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92*bis*, 28 February 2003, para. 14: "In *Kupreškić*, the Appeals Chamber established, in respect of cases on appeal, that only facts from judgements concluded on appeal can be judicially noticed in subsequent cases under Rule 94(B) and that the facts would have to be specified individually, thereby excluding the taking of judicial notice of an entire judgement."

104. This position applies with particular force to the particular elements of the *Al Mahdi* judgment, which are relied upon to support these charges.

105. The existence of findings in the *Al Mahdi* case cannot, therefore, exempt this Pre-Trial Chamber from its duty, under Article 61(7), to "on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged". And as will be established below, this threshold is not met.

3.2.1 The Prosecution failed to establish the existence of protracted hostilities between organised armed groups and the Malian government

106. The DCC has pleaded the existence of a non-international armed conflict between Malian armed forces ('FAMa') and other organised armed groups, including Ansar Dine and AQIM. The material facts supporting this claim are not established by sufficiently reliable evidence to fulfil the necessary evidential threshold, and even if the Chamber accepts that these facts have been established, the intensity and duration of the hostilities fails to rise to the threshold of a non-international armed conflict.

107. In terms of the scope and nature of the conflict, in the DCC, the Prosecution has placed the genesis of the alleged conflict in 2011, relying largely on NGO reports, UN reports and media articles.[129] It then divides the alleged armed conflict into "two phases", namely between January and April 2012, and between April 2012 and January 2013.[130] This artificial division is an attempt to divert from the fact that the intensity of the clashes never reached the threshold necessary to classify the events as an armed conflict. Article 8(2)(f) of the Statute specifies that isolated or sporadic violence does not trigger the application of Article 8(2)(e) of the Statute: the allegations in this case therefore cannot be characterised as war crimes occurring in a non-international armed conflict.

108. The ICRC has explained that "[a] situation of violence that crosses the threshold of an 'armed conflict not of an international character' is a situation in which

[129] DCC, para. 77.
[130] DCC, para. 39.

organized Parties confront one another with violence of a certain degree of intensity. It is a determination made based on the facts."[131] This was confirmed in multiple cases before the ICTY and the ICC: the intensity of the conflict is a factual matter "which ought to be determined in light of the particular evidence available and on a case-by-case basis."[132] This intensity can be demonstrated by resorting to factors such as:[133]

- the seriousness of attacks;
- whether there has been an increase in armed clashes;
- the spread of clashes over territory and over a period of time;
- any increase in the number of government forces and mobilisation and
- the distribution of weapons among both parties to the conflict, etc.

109. In the present case, the facts set out in the DCC do not indicate that the episodes of violence reached the required level of intensity in either of the two "phases" of the alleged armed conflict.

110. Regarding the alleged "first phase" of the conflict, the Prosecution has asserted, based on governmental reports, that it started on 17 January 2012, with an attack in Ménaka, which is located over 900 km away from Timbuktu.[134] The Prosecution also referred to an attack on Aguelhok (over 1,000 km away from Timbuktu), taking place the next day,[135] and the fall of military bases, such as Amachach, in Tessalit (over 1,150 km from Timbuktu) in March 2012.[136] These assertions are based on uncorroborated indirect evidence (pro-government sources and media articles).[137] The Prosecution adduced no evidence to establish

[131] Commentaries to the Geneva Conventions, Article 3 common, para. 387. https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC.
[132] ICTY, *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-T, Trial Chamber, Judgment, 10 July 2008, para. 175. See also ICTY, *Prosecutor v. Tadic*, IT-94-1, Appeal Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70; ICTY, *Prosecutor v. Tadic*, IT-94-1-T, Trial Chamber, Opinion and Judgment, 7 May 1997, para. 562; SCSL, *Prosecutor v. Sesay*, SCSL-04-15-T, Trial Chamber, Judgment, 2 March 2009, para. 95; *Bemba*, ICC-01/05-01/08-424, para. 231, and *Bemba*, ICC-01/05-01/08-3343, para. 128; ICTR, *Prosecutor v. Rutaganda*, ICTR-96-3-T, Trial Chamber, Judgment and Sentence, 6 December 1999, para. 92.
[133] ICTY, *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-T, Trial Chamber, Judgment, 10 July 2008, para. 177; ICTY, *Prosecutor v. Haradinaj*, IT-04-84-T, Trial Chamber, Judgment, 3 April 2008, paras. 49 and 90-99; ICTY, *Prosecutor v. Limaj*, IT-03-66-T, Trial Chamber, Judgment, 30 November 2005, paras. 90 and 135–170. *Lubanga*, ICC-01/04-01/06-2842, para. 538; *Katanga*, ICC-01/04-01/07-3436-tENG, para. 1187; *Bemba*, ICC-01/05-01/08-3343, paras. 137–141.
[134] DCC, paras. 39, 75, 78.
[135] DCC, para. 79.
[136] DCC, para. 79.
[137] Annex 2, rows 94-106.

that these sporadic attacks were connected. The Prosecution also did not argue that any attack had occurred in or around Timbuktu during the "first phase".

111. The "second phase" of the alleged armed conflict is said to have started with the arrival of "armed groups" in Timbuktu, on 1 April 2012.[138] There is however no evidence that there were any hostilities or combat in or around Timbuktu at that time. Importantly, the Prosecution has conceded that the FAMa made the choice to quit the town,[139] and that the groups entered only afterwards.[140]

112. The Prosecution has not adduced any evidence that there were hostilities in or around Timbuktu between April 2012 and January 2013. Although the Prosecution has alleged that there was combat in Timbuktu on 13 June 2012,[141] this allegation is not supported by the weight of the evidence. The evidence cited by the Prosecution primarily relates to the departure of the MNLA from the airport, on 28 June 2012, but the evidence does not establish that their departure was accompanied by any hostilities.[142] The only document that seems to suggest that hostilities took place in Timbuktu on 13 June 2012 is an uncorroborated [REDACTED] emanating from the Malian authorities.[143] In line with the approach of Trial Chamber II, the Chamber should treat information concerning military developments, issued by interested parties, with caution.[144]

113. The other instances of alleged combat in the "second phase" took place hundreds of kilometres away from Timbuktu,[145] and are not sufficiently supported by the evidence, which is mostly composed of anonymous or redacted evidence, press articles, UN reports or Malian military documents.[146] The evidence is of the exact same ilk that was roundly deprecated by Pre-Trial

[138] DCC, para. 39.
[139] DCC, para. 107: "Les autorités civiles et militaires maliennes ont alors fait le choix de quitter la ville".
[140] DCC, para. 108.
[141] DCC, para. 85.
[142] See for example, [REDACTED]. See also the other documents listed in footnote 229 of the DCC.
[143] [REDACTED].
[144] *Katanga*, ICC-01/04-01/07-2635, para. 32: "Many of these documents contain opinion evidence without qualifying their authors as experts. Where they make specific factual assertions about relevant political or military events, they can only be admitted if it can be shown that the authors have made reliable and objective reports. This is not the case for even though some of the documents may contain information that is directly relevant to contentious issues in the case, the fact that they are assertions made by interested persons severely diminishes their probative value".
[145] DCC, paras. 85-87.
[146] Annex 2, Rows 109-121.

Chamber in the *Gbagbo* case, as being insufficiently reliable to satisfy contextual elements under the Rome Statute.[147] As underlined by that Chamber,[148]

> The Chamber notes with serious concern that in this case the Prosecutor relied heavily on NGO reports and press articles with regard to key elements of the case, including the contextual elements of crimes against humanity. Such pieces of evidence cannot in any way be presented as the fruits of a full and proper investigation by the Prosecutor in accordance with article 54(l)(a) of the Statute. Even though NGO reports and press articles may be a useful introduction to the historical context of a conflict situation, they do not usually constitute a valid substitute for the type of evidence that is required to meet the evidentiary threshold for the confirmation of charges.

114. The Prosecution has, in addition, failed to demonstrate that these clashes are closely related to the events in Timbuktu.[149] The alleged six clashes are also spread over a period of six months.

115. It is therefore apparent that the alleged clashes were few and far between, and the links between the clashes have not been established. The entry of different armed groups in Kidal, Gao and Timbuktu merely corresponds to an abdication of responsibility and control by the Malian State in these towns, and did not result from armed clashes. Consequently, for the purposes of this case, the Prosecution has failed to establish sufficient grounds to believe that a non-international armed conflict took place in Mali from January 2012 onwards.

116. Alternatively, even if the Chamber is satisfied that an armed conflict existed in the "first phase", this conflict had waned by the time that Ansar Dine entered into Timbuktu on 1 April 2012. The armed confrontations had fallen below the intensity required for a non-international armed conflict, and the remaining alleged clashes were mainly between other groups, and did not involve the FAMa, which was one of the original parties to the alleged conflict. As explained by the ICRC, "the lasting absence of armed confrontations between the original Parties to the conflict may indicate – depending on the prevailing

[147] *Gbagbo*, ICC-02/11-01/11-432, paras. 29-31 (anonymous hearsay/NGO reports), paras. 32-34 (anonymous statements and summaries).
[148] *Gbagbo*, ICC-02/11-01/11-432, para. 35.
[149] ICTY, *Prosecutor v. Tadic*, IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

facts – the end of that non-international armed conflict, even though there might still be minor isolated or sporadic acts of violence."[150] This indeed seems to have been the situation on the ground from April 2012 onwards.

117. For these reasons, the Prosecution has not met its burden in relation to the existence of a non-international armed conflict during the period covered by the charges.

3.2.2 The Prosecution failed to establish the existence of an "occupation", or its legal relevance within the context of a non-international armed conflict ('NIAC')

118. The Prosecution argues that the presence of the alleged armed groups in Timbuktu constituted an "occupation".[151] This is plainly wrong. A legal occupation can only occur in an international armed conflict, as "humanitarian law governing non-international armed conflicts […] contains no equivalent to the occupation law regime."[152]

119. The distinction is not purely semantic. A situation of occupation would trigger the applicability of an additional body of law and impose strict obligations on the "occupying forces". This is inconsistent with the reality of a non-international armed conflict, in which non-State armed groups do not have the means and resources of a State. Moreover, as explained by Schabas, in his critique of the *Al Mahdi* judgment:[153]

> To their supporters, they were the "liberators," not the "occupiers," of Timbuktu. From the standpoint of international humanitarian law, they had as much right to be there as the government of the country. For this reason, the obvious nexus where a territory is occupied in the

[150] Geneva Conventions, ICRC Commentary of 2016, Article 3: conflicts not of an International character, para. 494.
[151] DCC, paras. 11, 27, 39, 46, 84, 92, 94, 98, 102, 148, 152, 153, 223, 245, 269, 276, 286, 327, 356, 405, 406, 425, 464, 465, 469, 592, 625, 647, 726, 731, 755, 763, 786, 828, 832, 854, 930, 963, 1003, 1004, 1026, 1029, 1069, 1075, 1078, 1085, 1087, 1088.
[152] Geneva Conventions, ICRC Commentary of 2016, Article 3: conflicts not of an International character, para. 391. See also Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague (18 October 1907), Article 42; Convention (IV) relative to the Protection of Civilian Persons in Time of War; Julia Grignon, "Un effet secondaire de la décision Al-Mahdi de la Cour pénale internationale : une mauvaise utilisation de la notion d'occupation en droit international humanitaire" (Université Laval, Clinique de droit pénal international, 2016).
[153] William Schabas, 'Al Mahdi Has Been Convicted of a Crime He Did Not Commit', Case Western Reserve Journal of International Law 49 (2017) p. 78, at 96.

course of an international armed conflict cannot be mechanistically transposed to a civil war.

120. In the present case, the use of the term occupation and the alleged classification as a non-international armed conflict are simply incompatible and the Pre-Trial Chamber should reject the use of the term occupation as legally inaccurate.

121. This error also leads the Prosecution to rely on inapplicable law, for example, the Prosecution erroneously relies on international conventions that do not apply to a non-international armed conflict, in its analysis of the alleged destruction of cultural property.[154] It serves no purpose for the Prosecution to emphasise that these conventions afford protection to cultural property in the context of an occupation, since the Prosecution has failed to demonstrate that the situation in Mali in 2012-2013 was an occupation, as defined by international law. The instruments the Prosecution relies on are simply not relevant within the factual context put forward by the OTP.

122. As concerns the Prosecution's argument that control of a part of a territory by an armed group may be indicative of an armed conflict of sufficient intensity,[155] this is only one of several criteria in such a determination, and it is not sufficient to demonstrate the existence of an armed conflict on its own. When viewed in conjunction with the sporadic nature of the alleged attacks, their low intensity and the absence of any hostilities in or around Timbuktu, the circumstances as a whole do not reach the threshold of establishing that a non-international armed conflict took place in the north of Mali in 2012-2013.

3.2.3 The Prosecution failed to establish a nexus between the alleged non-international armed conflict and the charged acts

123. Even if the Chamber is satisfied that there are sufficient grounds to believe that a NIAC existed in Mali in 2012-2013, the Prosecution has failed to demonstrate the required nexus between the charged conduct and incidents, and the NIAC in question. The purpose of this nexus requirement is to ensure "the protection of people as victims of internal armed conflicts, not the protection of people against

[154] DCC, paras. 694, 697-699.
[155] DCC, para. 84.

crimes unrelated to the conflict, however reprehensible such crimes may be."[156] Accordingly, even if criminal conduct occurred in Timbuktu, the alleged criminal acts "remain regulated exclusively by domestic criminal and law enforcement regimes, within the boundaries set by applicable international and regional human rights law".[157]

124. For this nexus element to be satisfied, the charged incidents particular act must be "closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict" for that act to be committed in the context of the armed conflict and for humanitarian law to apply.[158] As explained by the ICTY Appeals Chamber in *Kunarac*,[159]

> What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.

125. In the *Ntaganda* case, the ICC Appeals Chamber underscored that this nexus requirement should be applied rigorously.[160] The Appeals Chamber further endorsed the findings of the ICTY in the *Kunarac* case as concerns the type of indicia that would be relevant to such a determination:[161]

> […] the Trial Chamber may have regard, inter alia, to "the fact that the perpetrator is a combatant; the fact that the victim is a noncombatant; the

[156] ICTR, *Prosecutor v. Semanza*, ICTR-97-20-T, Trial Chamber, Judgement and Sentence, 15 May 2003, para. 368.
[157] Geneva Conventions, Commentary of 2016, Article 3: conflicts not of an International character, (ICRC), para. 460. See also ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Chamber, Judgment, 2 September 1998, para. 636; and ICTY, *Prosecutor v. Kunarac*, IT-96-23&IT-96-23/1-A, Appeals Chamber, Judgment, 12 June 2002, paras. 58–59.
[158] ICTY, *Prosecutor v. Tadic*, IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70; ICTY, *Prosecutor v. Kunarac et al*, IT-96-23&IT-96-23/1-A, Appeals Chamber, Judgement, 12 June 2002, paras. 55, 57; *Ntaganda*, ICC-01/04-02/06-1962, para. 68; *Katanga*, ICC-01/04-01/07-717, paras. 380, 382-83; *Katanga*, ICC-01/04-01/07-3436-tENG, para. 1176; *Bemba*, ICC-01/05-01/08-3343, paras 142-144. See also, Geneva Conventions, ICRC Commentary of 2016, Article 3: conflicts not of an International character, para. 460.
[159] ICTY, *Prosecutor v. Kunarac*, IT-96-23&IT-96-23/1-A, Appeals Chamber, Judgment, 12 June 2002, para. 58.
[160] *Ntaganda*, ICC-01/04-02/06-1962, para. 68.
[161] *Ntaganda*, ICC-01/04-02/06-1962, para. 68.

> fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties.

126. The Prosecution's sparse pleadings fail to demonstrate that these criteria can be applied to the specific crimes and conduct charged in this case.[162]

127. The flawed nature of the Prosecution's case on this point is reflected by its reliance on the following indicia:

    a. "Personne ne pouvait avoir une position importante à Tombouctou, tel que chef d'un organe, sans avoir porté allégeance aux groupes armés";[163]
    b. "que les « policiers » étaient aussi membres d'Ansar Dine ou d'AQMI[164] et suivaient le même entraînement militaire et religieux que les combattants de ces groupes";[165] and
    c. "que des membres de la Police islamique ont combattu dans des attaques lancées par les Groupes".[166]

128. These 'key' attributes and indicia did not apply to Mr. Al Hassan, or his charged conduct. As emphasised by the ICTR Appeals Chamber, "the determination of a close relationship between particular offences and an armed conflict will usually require consideration of several factors, not just one. Particular care is needed when the accused is a non-combatant."[167] The Prosecution evidence does not, however, establish that Mr. Al Hassan pleaded 'allegiance' to any armed groups, that he underwent any religious or military training, or that he participated in hostilities, or otherwise fought in attacks led by "armed groups".[168] On the latter aspect, the Prosecution is erroneously implying that the use of the expression "dispatching vehicles and missionary expeditions" in a video attributed to Mr. Al Hassan[169] implies that the Islamic police was involved in hostilities. This interpretation is not supported by the language used in that video. The speaker seen in the video clearly states that "the work done by the Islamic Police is just ordinary work."[170] In addition, the question which is asked of the speaker relates to vehicles and patrols in remote desert

[162] DCC, paras. 95-100.
[163] DCC, para. 96.
[164] [REDACTED]; [REDACTED]
[165] DCC, para. 99.
[166] DCC, para. 99.
[167] ICTR, *Prosecutor v. Rutaganda*, ICTR-96-3-A, Appeals Chamber, Judgment, 26 May 2003, para. 570.
[168] DCC, para. 99.
[169] DCC, para. 99, referring to [REDACTED].
[170] [REDACTED].

zones, and not to participation in combat, or conduct of hostilities in general.[171] The Prosecution therefore fails to link any alleged criminal acts committed in Timbuktu with armed clashes in other parts of Mali.

129. Mr. Al Hassan's sphere of influence and daily activities in the Islamic police also had no nexus to the armed conflict. [REDACTED] even informed the Prosecution that Mr. Al Hassan had no capacity to discipline or give orders to the military, or to otherwise influence their conduct.[172] The tasks ascribed to him by the Prosecution falls within the scope of civilian policing (i.e. going on patrols, handling complaints).[173] Footnote 38 of the Elements to the Crimes also reflects the understanding that police activities linked to the enforcement of law and order in a particular area, cannot be equated to active participation in the hostilities.[174]

130. Mr. Al Hassan did not, therefore, meet the Prosecution's own definition of someone who had a sufficient nexus to the hostilities.

131. The Prosecution has also failed to clearly plead or establish that the alleged victims can be considered to be aligned to an 'opposing side'. Rather, the rules alleged to have been imposed by the new administration appear to have been so imposed on the entire population of Timbuktu, regardless of their allegiance. Members of armed groups themselves were subject to these rules.[175] Apart from the fact that the Prosecution has not disclosed the names and identifying features of several victims,[176] it would also appear that some of the defendants arrested and brought before the Islamic Tribunal, were members of Ansar Dine,[177] and some of the arrests and prosecutions were triggered by complaints filed by other citizens in Timbuktu.[178] In such circumstances, the processes and consequences were initiated by the citizens themselves, and not imposed by Ansar Dine.

[171] [REDACTED]
[172] [REDACTED]. [REDACTED] , [REDACTED].
[173] DCC, paras. 277 and 281.
[174] "The presence in the locality of persons specially protected under the Geneva Conventions of 1949 or of police forces retained for the sole purpose of maintaining law and order does not by itself render the locality a military objective."
[175] DCC, para. 370.
[176] See paras. 10, 21, 88 *supra*, and Annex 6.
[177] DCC, para. 371.
[178] DCC, para. 287.

132. The Prosecution's argument that the nexus between the alleged crimes and the conflict can be established because these acts were committed as part of the "occupation" of Timbuktu is also misconceived, and based on a flawed legal premise.[179] Timbuktu was not the subject of a legal or factual 'occupation'. The Prosecution has also conceded that the Malian authorities quit Timbuktu, voluntarily, before Ansar Dine established any form of administration. The establishment of such structures – when faced with a vacuum of law and authority – was not illegal or inconsistent with IHL,[180] and the Prosecution had not established substantial grounds to believe that there was any clear and coherent opposition to such administrative structures, from the civilian population as a whole. As such, the Prosecution has failed to demonstrate that the civilian administration of Timbuktu shows sufficient linkage with hostilities alleged to have taken place in other parts of Mali.

133. Finally, the Prosecution has failed to establish that the charged acts can be assimilated to a 'military campaign', or that they otherwise served the ultimate military campaign.[181] The burden fell on the Prosecution to explain, with sufficient clarity, how the particular charged conduct of Mr. Al Hassan advanced or served a military objective. The military nature of Ansar Dine's objective has not been clearly pleaded, nor has the Prosecution explained, or demonstrated the link between the charged conduct and this military objective. The DCC fails to elucidate or otherwise establish that "the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit [the crime], his decision to commit it, the manner in which it was committed or the purpose for which it was committed."[182] The mere repetition of the common plan to install Sharia law in Timbuktu does not, in any way, satisfy these requirements, particularly since the impetus to establish Sharia law has not been established to arise from an armed conflict, nor has it been established to have been dependent on an armed conflict. Indeed, as explained by Schabas,[183]

> In her principal submission to the Pre-Trial Chamber, [the Prosecution] cited the following as evidence of the motives of Ansar

[179] DCC, paras. 97-98, 100.
[180] See paras. 170, 255, *infra*.
[181] Cf ICTY, *Prosecutor v. Kunarac*, IT-96-23&IT-96-23/1-A, Appeals Chamber, Judgment, 12 June 2002, para. 59.
[182] ICTY, *Prosecutor v. Stakic*, IT-97-24-A, Appeals Chamber, Judgment, 22 March 2006, para. 342.
[183] William Schabas, 'Al Mahdi Has Been Convicted of a Crime He Did Not Commit', Case Western Reserve Journal of International Law 49 (2017), pp. 96-97.

> Dine: "Le groupe entend instaurer la charia sur ses membres et les autres musulmans pour la paix et le salut au Mali. De fait, le Mali a envoyé des militaires sur nos terres et on s'est défendu." These are not "military" objectives.

134. The nexus element must also be viewed in connection with the extremely sparse evidence concerning the existence of the NIAC itself. As set out in paragraphs 107-117 above, the Prosecution has failed to adduce evidence of hostilities in or around Timbuktu for significant periods of the charges. Even if the Pre-Trial Chamber were to find that a NIAC existed, and continued to formally exist throughout the charges, the significant reduction in the intensity and duration of fighting is relevant to the nexus element. As observed by Mettraux,[184]

> Once a sufficient nexus has been established between the acts of the accused and the armed conflict, it will last for as long as his actions continue to be sufficiently related to the armed conflict. The nexus might, however, be eroded over time and the court must assess whether the passing of time (or other circumstances) might in fact have resulted in breaking that link altogether. (…)
>
> There may be a point in time (…) when a close connection between the crime and the armed conflict may dissolve and where applying the laws of war to those acts would not be consistent with the role and function of that body of law, nor with the requirement that the conduct in question must be closely related to the armed conflict to qualify as a war crime.

135. Even if the Chamber agrees with the Prosecution that the presence of "armed groups" in Timbuktu and the alleged crimes committed against the civilian population "*entraient dans le cadre de la politique d'imposition de la vision de l'Organisation dans les territoires placés sous leur contrôle, ou étaient une conséquence de la mise en place de cette politique*",[185] there is absolutely no basis for establishing a nexus between the 'conflict', and the specific crimes charged in this case. As underscored by the ICTR Appeals Chamber,[186]

> […] the expression 'under the guise of the armed conflict' does not mean simply 'at the same time as an armed conflict' and/or 'in any circumstances created in part by the armed conflict'. For example, if a non-combatant takes advantage of the lessened effectiveness of the police in conditions of disorder created by an armed conflict to murder

[184] Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford University Press, 2006), p. 47.
[185] DCC, para. 100.
[186] ICTR, *Prosecutor v. Rutaganda*, ICTR-96-3-A, Appeals Chamber, Judgement, 26 May 2003, para. 570.

> a neighbour he has hated for years, that would not, without more, constitute a war crime under Article 4 of the Statute.

136. This observation is particularly apposite as concerns the allegations of sexual violence, and the destruction of protected monuments. The importance of a sufficient nexus is further bolstered in the case of the latter, by the express requirement that the destruction takes place pursuant to an 'attack'.[187] As argued by Schabas[188]

> In ordinary usage, the term "attack" is not the word that would be used to describe the demolition or destruction of structures, using implements that are not weapons or military in nature, and where armed adversaries are not to be found within hundreds of kilometres.

137. Schabas further refers to commentary concerning the notion of an 'attack' for the purposes of Article 8, which affirms that it "refers to the use of armed force to carry out a military operation during the course of an armed conflict".[189] The disjunct between the clear stance of the Statute and authoritative commentators on the one hand, and the over-stretched notions applied by the Prosecution, on the other, speaks to the extent to which this case falls outside the scope of the Rome Statute, and the boundaries of legality.

3.2.4 The Prosecution failed to establish Mr. Al Hassan's knowledge of the existence of an armed conflict and of the nexus

138. The Prosecution has failed to demonstrate that Mr. Al Hassan knew that his charged conduct took place within the context of a non-international armed conflict. In the absence of sufficient evidential proof on this point, the war crime charges must be dismissed.

139. The specific war crimes charged in this case include the material element that the "perpetrator was aware of factual circumstances that established the existence of an armed conflict". As set out in paragraphs 93 to 97, the Prosecution is also required to demonstrate that the defendant possessed this mental element.

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[187] See Element 1, of the Elements of Crimes, Article 8(2)(e)(iv).
[188] William Schabas, 'Al Mahdi Has Been Convicted of a Crime He Did Not Commit', Case Western Reserve Journal of International Law 49 (2017) p. 78.
[189] William Schabas citing Knut Dörmann, *Elements of War Crimes Under the Rome Statute of the International Criminal Court, Sources and Commentary*, (Cambridge, Cambridge University Press, 2002), pp. 134, 150-151, 156, 169, 178-179, 216, 350-351.

140. In this case, the Prosecution's allegation that because Mr. Al Hassan was a member of Ansar Dine, he must have known that an armed conflict existed,[190] is not supported by any evidence to this effect. The Prosecution refers to an interview attributed to Mr. Al Hassan, in which there is no mention of an armed conflict, of combat or of any armed opposition.[191] This sole interview does not support the allegation that Mr. Al Hassan possessed the requisite knowledge.

141. As discussed above, there were also no hostilities in or around Timbuktu during the period of the charges. Mr. Al Hassan is also alleged to have started working for the Islamic Police in May 2012, and was not involved in the establishment of Ansar Dine. He also did not receive military training. He cannot therefore, be presumed to have been aware of the existence or relevance of any hostilities. In the absence of any evidence supporting the allegation that Mr. Al Hassan knew that an armed conflict existed, the Prosecution fails to demonstrate substantial grounds to believe that he was indeed aware of the existence of the alleged armed conflict and/or of the nexus between his acts and said conflict.

Chapter 4: The Prosecution has failed to demonstrate that there are substantial grounds to believe that Mr. Al Hassan is individually responsible for crimes set out in the charges

4.1 The common plan fails to include the virtually certain commission of crimes under the Statute

142. The Prosecution's case falls at the first hurdle due to the fact that the common plan, which underpins the entirety of the allegations against Mr. Al Hassan, fails to include a sufficient element of criminality, to satisfy the various forms of common plan liability set out under Article 25(3)(a), (c), and (d).

143. The Prosecution has alleged that between April 2012 and January 2013, Mr. Al Hassan and other co-perpetrators engaged in a common plan to impose their own ideological and religious vision over the civilian population in Timbuktu, by any means, including through conduct and measures which, in the ordinary course of

[190] DCC, para. 104.
[191] DCC, para. 105, referring to [REDACTED];; [REDACTED].

events, resulted in violations of fundamental human rights and the commission of atrocities and the types of crimes prosecuted in this case.[192]

144. The Prosecution has attempted to hedge its bets through vague wording. The Prosecution has pleaded that there was a common plan, and that sometimes crimes occurred, but it does not set out its theory of liability in a manner that establishes any clear nexus between the two. Rather than pleading and establishing the existence of a foreseeable nexus between the common plan and the commission of crimes, the Prosecution pleadings stop short at the common plan itself, and then assume that the implementation of Sharia law in Timbuktu would necessarily entail the commission of war crimes and crimes against humanity. This is an extremely unpalatable position, as a matter of law, as a matter of evidence, and as a matter of principle.

145. The Prosecution's attempt to infer the existence of the common plan, from the commission of acts that were supposedly committed pursuant to the common plan, is also impermissibly question begging. It adds nothing to the clarity of the allegations or the weight of probative evidence to list the crimes were allegedly committed, and argue on this basis alone that they must have been committed pursuant to a common plan.[193] There are, moreover, no shared characteristics between the listed crimes: the dates, locations, and physical perpetrators are not the same, nor do the alleged victims share the same characteristics.

146. The commentary attributed to Sanda Ould Boumama and Mr. Al Hassan to anterior events also has no legal or evidential relevance:[194] to say that something has occurred, does not amount to evidence of a pre-existing plan to bring such events about.

147. The Prosecution's own case and evidence also contradicts the existence of a common plan to commit certain crimes. In an attempt to artificially enlarge the scope and gravity of its case, the Prosecution has created a Frankenstein of a case, in which completely dissonant crimes have been stitched as artificial limbs to its skeletal common plan. The allegations of rape are the most glaring example of this dissonance.

[192] DCC, para. 212.
[193] Cf DCC, para. 235.
[194] Cf DCC, paras. 237, 238.

148. One plank of the Prosecution case concerns the measures allegedly taken by Ansar Dine to arrest, prosecute, and punish individuals, who committed rape.[195] At the same time, the Prosecution has also alleged that common plan to install Sharia law in Timbuktu involved the commission of rape (as an independent allegation from sexual slavery and forced marriage). The Prosecution has not pleaded any nexus between the common plan and the specific incidents of rape, nor can the nexus between the commission of these incidents of rape and the installation of Sharia law in Timbuktu be guessed or otherwise ascertained from the evidence. The Prosecution's reliance on the prosecution and punishment of individuals who perpetrated rape, as an example of the implementation of the common plan,[196] also severs any hypothetical link between the common plan, and the charged incidents of rape.

149. The dissonance between the plan to implement Sharia law and the outcome of rape is exemplified by the Prosecution's reliance at paragraph 218 of the DCC on a speech from Iyad Ag Ghaly, which allegedly called on the population to "*help us establishing the religion, spreading justice, security and ruling between people with justice, and promoting of virtue and preventing of vice*".[197] It is impossible to extrapolate a common plan to commit rape from a common plan to promote justice and virtue, and prevent vice. The only way to bridge this divide would be to accept the premise that traditional forms of Islamic marriage inevitably, and in a virtually certain manner, entail rape. Such a religious stereotype would run roughshod over Article 21(3) of the Statute, and the Preamble's emphasis on the ICC as a vehicle for protecting and preserving the common bonds and shared heritage that unites diverse peoples and religious groups.

150. The same dissonance is also apparent from the Prosecution's irreconcilable claims that:

- the system of forced marriage presaged that multiple men could have forced sexual relations with a wife;[198]
- Ansar Dine strictly punished any form of adultery or relations outside of marriage;[199] and

[195] [REDACTED].
[196] See for example, DCC, para. 347.
[197] [REDACTED]
[198] DCC, paras. 783, 1082.
[199] DCC, paras. 825, 790.

- [REDACTED]'s testimony that it would be incompatible with the religious beliefs of members to allow for a women to be married to several men.[200]

151. The victims' assertion that some of the perpetrators were members of Ansar Dine is not sufficient to establish such a nexus. The ICC does not proscribe group liability: individuals who joined Ansar Dine cannot be held to account for any crimes committed by any other members of this group. Rather, in order to invoke mutual imputation, the Prosecution was required to establish that there was mutual awareness that the implementation of the common plan to install Sharia law in Timbuktu would result in the commission of these crimes of rape. It failed to do so.

152. The circumstances in this case are thus similar to the *Katanga and Ngudjolo* case, where Pre-Trial Chamber I dismissed specific allegations of inhuman treatment on the grounds that although the Prosecution had adduced evidence that the crimes had been committed by certain soldiers,[201]

> the Prosecution has not brought sufficient evidence to establish substantial grounds to believe that, as a result or part of the implementation of the common plan, these facts would occur in the ordinary course of events. Instead, they appear to be crimes intended and committed incidentally by the soldiers, during and in the aftermath of the attack on Bogoro village, without a link to the suspects' mental element.

153. There is pressure for the Court to address allegations of sexual violence, but it does a complete disservice to the victims to append such allegations onto a case where they do not belong. This unfairly raises expectations of a conviction against a defendant, who does not possess the necessary mental intent or culpability.

4.2 The Prosecution has failed to establish that Mr. Al Hassan was a member of the 'common plan'

154. The Prosecution has failed to plead, or tender evidence concerning:

a. Mr. Al Hassan's membership of, and adoption of the goals of the 'common plan'; or

[200] See [REDACTED]
[201] *Katanga*, ICC-01/04-01/07-717, para. 571.

b. Mr. Al Hassan's "mutual awareness" that by joining and contributing to the common plan, he would contribute to the commission of the crimes set out in the charges.

155. An agreement, express or implied, is an essential component of common plan liability: as quoted at paragraph 260 of the DCC, it is the "*agreement between [the] perpetrators, which [leads] to the commission of one or more crimes […] ties the co-perpetrators together and […] justifies the reciprocal imputation of their respective acts*".[202] The Prosecution charges are nonetheless completely silent as concerns the existence, nature and timing of Mr. Al Hassan's alleged agreement to join, or otherwise contribute to the realisation of the common plan or charged crimes.

156. The Prosecution asserts that the 'common plan' was adopted on, or before April 2012,[203] but also concedes that its evidence only establishes that Mr. Al Hassan was in Timbuktu from May 2012 onwards.[204] He is not alleged to have been involved in creating the common plan. Although Mr. Al Hassan is alleged to have 'joined' Ansar Dine, the Prosecution charges are vague and deficient as concerns when this occurred, and what this entailed. For example, whereas the Prosecution has averred that religious and military training were important aspects of the formulation and promulgation of the common plan,[205] Mr. Al Hassan is not alleged to have undergone any such training, or to have been involved in training others.

157. The Prosecution also has not alleged or tendered evidence concerning any specific ideology espoused by Ansar Dine, beyond the implementation and application of Sharia law, as it is practised in several countries around the world. Although the Prosecution makes much ado about Iyad Al Ghaly's reference to the principle of jihad,[206] this word simply means to strive to achieve something with a praiseworthy aim. In the absence of any evidence that either Mr. Al Hassan or the population

[202] *Lubanga*, ICC-01/04-01/06-3121-Red, par. 445.
[203] DCC, paras. 1021, 1029.
[204] DCC, para. 23.
[205] DCC, para. 227: "L'existence d'un plan commun est démontrée par l'organisation de formations religieuses pour les membres de l'Organisation présents à Tombouctou qui s'ajoutait à leur formation militaire. La formation religieuse était importante pour veiller à ce que les membres de l'Organisation imposent leur vision de la religion à la population civile."
[206] See for example, DCC para. 221.

understood this to refer to a specific objective, related to the charged crimes,[207] it is a red herring, with no relevance to the case.

158. The Prosecution has also not alleged or tendered evidence that Mr. Al Hassan subscribed to the ideological objectives of the common plan, and was aware that these objectives would result in the commission of the charged crimes. Instead, there is vague reference to a statement, from [REDACTED](that is, [REDACTED] after the commencement of the common plan), where he describes the role of the Islamic police as,[208]

> *correcting objectionable acts: any type of reprehensible act which has been forbidden […]– we correct, such as drinking alcohol, smoking, and a woman adorning herself, and other such acts […]*

159. This phraseology – 'correcting objectionable acts' – is a phrase that is repeated many times in the Quran; it is a fundamental tenet of Islamic faith which is shared by millions of people around the world, who are clearly not members of the charged common plan.

160. Indeed, the Prosecution's inability to cite a single item of evidence in support of its claim that Mr. Al Hassan made an 'intentional' contribution to the execution of the common plan[209] is itself, a stark testament to the evidential poverty of their case.

4.3 The Prosecution has failed to establish that Mr. Al Hassan made an intentional contribution (essential or otherwise) to the common plan or the crimes committed pursuant to the common plan

161. The Prosecution's allegations concerning the manner in which Mr. Al Hassan and other co-perpetrators contributed to the realisation of the common plan and charged crimes are contradictory, and incoherent. The Prosecution has described a particular structure and hierarchy that overrides and otherwise cancels out the

[207] Cf DCC, para. 240: "AL HASSAN lui-même a admis au cours de son entretien avec les enquêteurs de la CPI que les Groupes avaient imposé leur vision de la religion aux habitants de Tombouctou. Il a expliqué que pendant la période où Tombouctou se trouvait sous le contrôle de l'Organisation: « *[i]ls ont établi la Sharia islamique à Tombouctou.…demander aux gens de faire le jihad de se lever pour faire le jihad*…». Il a précisé que cela signifiait : « … *[é]tablir la sharia islamique, le Hudud. L'ordonnance du convenable et l'interdiction du blâmable. Prêcher demandant les gens de rentrer dans l'islam… et se repentir* ».''
[208] DCC, para. 230: [REDACTED]
[209] Cf DCC, para. 527.

impact and relevance of Mr. Al Hassan's actions during the time period of the charges.

162. The Prosecution has described a structure in which:

a. Iyad Ag Ghaly is alleged to have been responsible for setting up the common plan and directing the overall implementation of the 'common plan';[210]
b. Abou Zeid, Yahia Abou Al Hammam, and Abdallah al Chinguetti are alleged to have been responsible for the daily direction of activities in Timbuktu;[211] and
c. As a member of the Presidency, and as governor of Timbuktu, Abou Zeid is alleged to have given written instructions and orders to the Islamic police, and to have possessed the power to intervene in judicial proceedings;[212]
d. Abdallah Al Chinguetti is alleged to have been a member of the Presidency, a spiritual leader, and a member of the Islamic Tribunal;[213]
e. Al Mahdi and Mohamed Moussa are alleged to have been responsible for devising rules of proper moral conduct and enforcing these rules amongst the civilian population;[214]
f. Houka Houka, as President of the Islamic Tribunal, is alleged to have controlled the application of the religious vision of the organisation, and the nature of the particular punishments meted out to the people of Timbuktu. His authorisation or order was required to use violence during questioning, or to order physical sanctions;[215] and
g. Adama and Khaled Abou Souleymane are alleged to have been the first and second *Emir* of the Islamic police, in which capacity "ils ont tous deux apporté une contribution essentielle au plan commun en exerçant par exemple leurs pouvoirs d'ordonner les châtiments devant être infligés à des personnes".[216]

163. By outlining this structure, the Prosecution has conceded that Mr. Al Hassan was not responsible for:

a. determining Ansar Dine's overall objectives or its daily direction;
b. interpreting the manner in which Sharia law should be implemented or applied;
c. devising and regulating the rules concerning 'objectionable conduct';
d. deciding what punishments should be issued and when force should be used during questioning; or
e. giving orders concerning the implementation of punishments.

[210] DCC, para. 243.
[211] DCC, para. 244.
[212] DCC, para. 245.
[213] DCC, para. 247.
[214] DCC, paras. 248-249.
[215] DCC, para. 254.
[216] DCC, para. 250.

164. Within this hierarchical framework, it is impossible to conclude that Mr. Al Hassan possessed the power to frustrate the implementation of the common plan, or the crimes allegedly committed pursuant to the execution of the common plan.[217] The Prosecution has not pleaded any facts or tendered any evidence that establishes that Mr. Al Hassan had either the power or *de facto* authority to stop the charged crimes from occurring.[218] The common plan was created, and existed independently of Mr. Al Hassan. The Sharia Court were established independently of Mr. Al Hassan, and made their judgments independently of Mr. Al Hassan.[219] The moral police (Hesbah) decided on the rules of conduct in Timbuktu independently of Mr. Al Hassan.[220] Any decisions and orders concerning the Islamic Police were made by persons other than Mr. Al Hassan.[221] Mr. Al Hassan was not a 'cog in the wheel of criminal design'; he was simply a peripheral part of the landscape of Timbuktu during the period in question. Mr. Al Hassan's alleged contributions to the common plan would have had no impact, or at most, an extremely negligible and legally irrelevant impact as concerns the commission of the charged crimes: they would have occurred in substantially the same manner, even if Mr. Al Hassan had not made the alleged contributions.[222]

165. As will be set out below, the specific elements relied upon by the Prosecution to establish Mr. Al Hassan's culpable contribution, are irrelevant or unfounded.

4.3.1 First alleged contribution: Mr. Al Hassan's alleged role, as the 'interface' between the Islamic Police and the population in Timbuktu, is based on an inaccurate interpretation of the evidence, and even if established, did not contribute to the commission of the charged crimes

166. After setting out banal tasks that align more directly to the role of an interpreter or administrative assistant, the Prosecution makes an unsubstantiated leap of evidential reasoning, in asserting that Mr. Al Hassan was the *de facto* commissioner of police, and was considered as such, until January 2013.[223] The evidence relied upon to establish this material fact fails to satisfy the threshold of

[217] *Ongwen*, ICC-02/04-01/15-422-Red, para. 38.
[218] Cf *Mbarushimana*, ICC-01/04-01/10-465-Red, para. 297.
[219] DCC, para. 506.
[220] DCC, para. 1029.
[221] See for example, [REDACTED]
[222] Cf DCC, para. 263.
[223] DCC, para. 269.

substantial grounds to believe. Firstly, the evidence lacks probative value: it is comprised of a statement of an insider witness [REDACTED], and two anonymous witness summaries ([REDACTED]).[224]

167. Secondly, the individual statements/summaries are unreliable and internally incoherent, and do not corroborate each other. For example, the Prosecution uses highly leading questions in order to attempt elicit evidence from [REDACTED] that Mr. Al Hassan was allegedly the chief or second-in-command,[225] and then [REDACTED] proceeds to contradict himself, and undermine the weight of his evidence, by giving vague, and highly qualified responses, stating that there was no discipline,[226] that there was no difference in the levels of the police,[227] that the fact that persons may have been under Mr. Al Hassan's *de facto* 'command' did not mean that they would do what he asked them to,[228] and he had no influence or authority over any soldiers in Timbuktu.[229] At a later junction of the cited statement, [REDACTED] also acknowledges that it is only 'possible' that Mr. Al Hassan was the leader of the police,[230] and then states that Mr. Al Hassan was the assistant and not the chief, and Khaled was the leader.[231]

168. As concerns the anonymous witness summary [REDACTED], this witness provided no explanation as to the basis of his knowledge of the structure of the Islamic police, and appears to have identified certain persons only after being shown videos by the Prosecution,[232] which is a highly leading and inappropriate means of eliciting identification evidence.[233] [REDACTED] also acknowledged

[224] DCC, fn. 665.
[225] *I.e.*, that he had told them that Mr. Al Hassan was the chief or second in charge.
[226] [REDACTED]
[227] [REDACTED]
[228] [REDACTED]
[229] [REDACTED]
[230] [REDACTED]
[231] [REDACTED]
[232] [REDACTED]
[233] ICTY, *Prosecutor v. Tadic*, IT-94-1-T, Trial Chamber, Judgement, 7 May 1997, paras. 548-52. See also, Richard May and Marieke Wierda, '*International Criminal Evidence*', Ardsley, New York, 2002, at pages 178-79; ICTY, *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, IT-03-66-A, Appeals Chamber, Judgement, 27 September 2007, para. 27; ICTY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, IT-96-23-T&IT-96-23/1-T, Trial Chamber, Judgment, 22 February 2001, para. 562; ICTY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, IT-96-23&IT-96-23/1-A, Appeals Chamber, Judgement, 12 June 2002, para. 320; ICTR, *Prosecutor v. Jean de Dieu Kamuhanda*, ICTR-99-54A-A, Appeals Chamber, Judgement, 19 September 2005, para. 243.

that he only met Mr. Al Hassan in December-January 2013,[234] and further claimed that Adama was the commissioner of police until the end of the "occupation".[235] [REDACTED], in an anonymous witness summary, conceded that he did not know of the role of the Islamic police:[236] he is therefore not in a position to provide reliable testimony as to its command structure. All three witnesses provided contradictory information concerning the command structure of the Islamic police, and thus undermine rather than corroborate each other.

169. The specific examples concerning Mr. Al Hassan's interaction with the local population are either portrayed in an inaccurate manner, or do not establish the existent of any real or *de facto* authority on the part of Mr. Al Hassan. For example, in the evidential extracts relied upon to establish that Mr. Al Hassan was the 'first line' with the population, and in this capacity, received complaints from civilians:

- [REDACTED] refers to Mr. Al Hassan as an assistant, and not the chief, who was either Adam or Khaled;[237] and
- [REDACTED] also states that Mr. Al Hassan only received complaints when Khaled was not there, and only for the purpose of organising them for Khaled.[238] He also explains that complaints might have been addressed to him because he spoke local languages, and Khaled did not.[239]

170. Similarly, the allegations concerning Mr. Al Hassan's presence during a protest are overstated and exaggerated, when compared to the evidence relied upon. Whereas the Prosecution implies that Mr. Al Hassan was involved in policing the event and firing shots to disperse the protestors, [REDACTED] states that the event was a protest against Ahmed Moussa from Hisbah, Mr. Al Hassan is only alleged to have arrived, along with other members of the police, after the shots were fired.[240] The claim that Mr. Al Hassan was "l'un des **plus hauts** responsables de la Police islamique presents" is not supported by [REDACTED]'s evidence, which refers to all police officers as the 'responsables', states that were 'beaucoup de

[234] [REDACTED]
[235] [REDACTED]
[236] [REDACTED]
[237] [REDACTED]
[238] [REDACTED]
[239] [REDACTED]
[240] [REDACTED][240] [REDACTED]

responsables' there (many of whom he could not recall the names),[241] and further claims that Khaled was in charge.[242]

171. The Prosecution's inaccurate approach to the actual text of evidence, and flawed approach to corroboration, is also demonstrated by its attempt to rely on Mr. Al Hassan's statement, and the notes of [REDACTED], to claim that Mr. Al Hassan 'participated' in at least one [REDACTED], as a representative of the local population, and as one of the most responsible of the Organisation.[243] In his statement to the Prosecution, Mr. Al Hassan says that he attended one meeting as an interpreter.[244] Even if the Chamber does not believe Mr. Al Hassan's evidence that he attended as an interpreter, it is not possible to equate disbelief of one thing, to evidence of another positive fact.[245] Indeed, the very minimal nature of Mr. Al Hassan's attendance at this meeting is reflected by the fact that he does not appear to be mentioned in the minutes.[246]

172. Similarly, the Prosecution's claim, that Mr. Al Hassan was in contact with the media, is supported by a statement from a journalist, acknowledged that she does not speak fluent French, and did not know for certain with whom she spoke: she called a number she no longer possesses, and someone answered.[247]

173. The Prosecution has also acknowledged that Mr. Al Hassan's role in the Islamic police was tied closely to his linguistic skill and ability to translate and interpret

[241] [REDACTED]
[242] [REDACTED]
[243] DCC, para. 273.
[244] [REDACTED].
[245] ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1-AR77, Appeals Chamber, Judgement on appeal by Anto Nobilo against finding of contempt, 30 May 2001, para. 47: "A mere disbelief of a witness's denial of a particular fact does not by itself logically permit a tribunal of fact to accept beyond reasonable doubt the truth of fact which he denied." See also *R. V. Jacques Mungwarere*, 2013 ONCS 4594 (5 July 2013), paras. 65-66: "The presumption of innocence applies to issues of credibility. It is not only about choosing the version of the story which appears more likely to have happened. (…) even if Mr. Mungwarere is not believed, if his testimony raises a reasonable doubt on his participation, he must be acquitted. Likewise, if the testimony of Mr. Mungwarere is rejected, he cannot be declared guilty unless if, in light of the totality of the other evidence, the court is convinced beyond reasonable doubt of his guilt". *People v. Matthews*, 17 Mich. App. 48 (1969), footnote 5: 'The mere disbelief of a witness' testimony cannot serve to fill an evidentiary gap in the case; it will not justify a conclusion that the opposite of the witness' testimony is true in the absence of any independent evidence affirmatively supporting that conclusion'; *Evans-Reid v. District of Columbia*, 930 A.2d 930, 940 (D.C. 2007), in *Dominique Bassil v. United States*, No. 13-CF-1133 (D.C 2016): "when the testimony of a witness is not believed, the trier of fact may simply disregard it. Normally the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion".
[246] Cf DCC, fn. 670.
[247] [REDACTED].

information into Songhaï (one of the local languages).[248] The Prosecution has nonetheless failed to explain the nexus between Mr. Al Hassan's alleged role in interpreting, translating and communicating the daily work of the Islamic Police to the local population, and the intentional commission of the charged crimes. As found in the *Mbarushimana* case, a defendant's role in speaking publicly for a particular organisation does not constitute evidence of authority over the commission of crimes by the organisation in question.[249]

174. Nor can such a nexus be discerned from the charges or the evidence. Mr. Al Hassan's linguistic skills did not influence the content of the orders issued by Adama or Khaled, nor did these skills have any impact on the execution of the specific crimes charged in this case. Individual criminal responsibility for serious crimes also cannot be predicated on conduct of a completely banal and administrative nature, such as Mr. Al Hassan's alleged role in acting as the 'postbox' as concerns complaints filed by the local population.[250] Adama and Khaled would have issued the same orders, irrespective as to whether Mr. Al Hassan was a member of the Islamic police, and the local population would have filed complaints with the police, even if he had not been there to receive them. Indeed, in the same statement relied upon by the Prosecution to establish such 'essential' contributions,[251] [REDACTED] stated that Mr. Al Hassan only received complaints when Khaled was not there, and only for the purpose of organising them for Khaled. [252]

4.3.2 Second alleged contribution: Mr. Al Hassan's alleged role in organising the activities and functioning of the Islamic Police is not established and did not, in any case, contribute to the commission of the charged crimes.

175. The evidential foundation for this assertion is completely inaccurate and unreliable.

176. The first plank of the Prosecution's argument on this point is based primarily on the statements of Mr. Al Hassan, and [REDACTED] (an insider who [REDACTED]), and an inaccurate reading of this evidence. For example, whereas

[248] DCC, paras. 267-268.
[249] *Mbarushimana*, ICC-01/04-01/10-465-Red, para. 297.
[250] Cf DCC, para. 271.
[251] DCC, para. 271, [REDACTED]
[252] [REDACTED]

the Prosecution has alleged that Mr. Al Hassan organised the daily activities of the Islamic police and assured the good coordination of its activities, the cited sections of Mr. Al Hassan's statement either makes clear that his tasks were of a clerical rather than authoritative nature,[253] or do not touch on the issue of the organisation of the police.[254] Mr. Al Hassan also gave evidence that the Emir would choose who would do what, and only the Emir and his deputy could give orders; Mr. Al Hasan would merely relay the message.[255] Mr. Al Hassan also describes his organisational functions in a manner that is consistent with an administrative role ('*un travail administratif*'), with no authority not to execute certain orders coming from above.[256]

177. [REDACTED] evidence on this point was elicited through leading questions.[257] The Prosecution investigator also clearly considered his answers to be unreliable, positing to him that "there was a little bit of contradiction here I think". [258]

178. In support of its claim that Mr. Al Hassan was the sole person to decide upon tasks within the office, the Prosecution have cited an uncorroborated anonymous witness summary, from someone who appears to be an 'insider' witness ([REDACTED]). This evidence has insufficient probative value to establish such a key fact. [REDACTED] also states the exact opposite of what has been attributed to him, averring that:[259]

> *C'est lui [Khalid] qui dirige tout ... [redacted] [redacted] Al HASSAN parce que à chaque fois même si ... on lui demande un petit truc, il faut qu'il demande à KHALID ...[redacted] ... [redacted] ... normalement c'est [redacted] qui [redacted] décider certaines choses. Mais à chaque fois que on vient te demander quelque chose, il faut que toi tu demandes ensuite à KHALID [...]*
> *même la décision de patrouille c'est KHALID qui décide tout ...*

[253] DCC, para. 273, [REDACTED]
[254] [REDACTED]
[255] [REDACTED]
[256] [REDACTED]
[257] [REDACTED]
[258] [REDACTED]
[259] [REDACTED]

179. Indeed, the uncertainty of the Prosecution case is reflected by its equivocation as to whether Mr. Al Hassan actually performed these tasks ('**Al HASSAN** décidait seul de ces tâches **et/ou** transmettait aux membres des ordres' (emphasis added)).[260]

180. The anonymous witness summary of [REDACTED] also sheds no clarity and gives no weight as concerns the Prosecution's claim that Mr. Al Hassan exercised authority within the police. [REDACTED] claims that there was a meeting where Mr. Al Hassan was appointed commissioner, but also claims that Khaled was appointed as Director,[261] and was responsible for everyone and everything.[262] The Prosecution's attempt to rely upon an isolated extract to claim that the commissioner was responsible for everything done by the police only serves to demonstrate the confusion and incoherence of [REDACTED] testimony concerning this position. Indeed, on the very same page, [REDACTED] stresses that Khaled was responsible for making all decisions, even on small things, and Mr. Al Hassan could only transmit requests to Khaled for determination; he could not decide things himself.[263] [REDACTED] also acknowledges that he does not have any personal knowledge of the appointment process,[264] and these sections (from an anonymous summary) are so heavily redacted and decontextualised that it is impossible to place any evidential weight on his evidence.

181. The Prosecution's arguments concerning Mr. Al Hassan's role in the payment of dowries and the arrangement of marriages is equally exaggerated and inaccurate. The cited reference to Mr. Al Hassan's statement makes no reference to his assistance in procuring dowries:[265] he explains that the he was not aware of the process of payment, but was aware that supplicants would request financial assistance directly from the Emir, because he had assisted some individuals to draft their demands. It is clear from this that Mr. Al Hassan played no role in the determination and dissemination of such dowries. As concerns the marriage of Abou Dhar, apart from the fact that the family demanded a dowry, the Prosecution has provided no evidence or context concerning the circumstances of this marriage.

[260] DCC, para. 278.
[261] [REDACTED]
[262] [REDACTED]
[263] [REDACTED]
[264] [REDACTED]
[265] [REDACTED]

The Prosecution charges fail to include sufficient detail to establish the elements of forced marriage, and there is no evidence to suggest that the marriage in question was 'forced' – the Prosecution never even put this possibility to Mr. Al Hassan.

182. The allegations concerning Mr. Al Hassan's alleged role in organising information and recruitment within the police office is also based on evidence that is described in an inaccurate manner, intrinsically incoherent, or incompatible with the Prosecution's case. For example, [REDACTED] claim that there was no discipline amongst members of the police,[266] and that individual members would just go around and do whatever they wanted to do, without any consequence,[267] undermines any claim that Mr. Al Hassan possessed any actual authority within the office. His alleged ability to organise documents did not translate to any effective power as concerns the conduct of individual police officers.

183. The relevance of the above allegations has also not been established. Whereas the Prosecution has claimed that the tasks and activities of the police were essential to the eventual repression in general of the civilian population, it fails to draw a specific link between them and the charged crimes. The specific examples of repression that are listed (i.e. prohibition of adultery, theft and alcohol) are not, in themselves, crimes under the ICC Statute, and the Statute does not permit *dolus eventualis* / more extended forms of liability.[268]

184. The Prosecution has also not demonstrated any causation between Mr. Al Hassan's alleged activities, and these prohibitions. The order to prohibit this conduct existed independently of Mr. Al Hassan, and the decisions concerning the means of enforcing these prohibitions were also taken independently of Mr. Al Hassan.

4.3.2.1 The Prosecution has not established that Mr. Al Hassan had the power to give instructions or orders

185. The key claim, that Mr. Al Hassan had the power to give orders to police members – irrespective as to whether the Emir was present or not, is either not reflected in the cited evidence, or based on completely unreliable evidence. The cited sections

[266] [REDACTED]
[267] [REDACTED]
[268] *Bemba*, ICC-01/05-01/08-424, para. 358; *Lubanga*, ICC-01/04-01/06-3121-Red, para. 451.

of Mr. Al Hassan's statement either refer to Adama's role (and not Mr. Al Hassan), or do not refer to giving orders.[269] [REDACTED]evidence is comprised of an anonymous summary, which is framed in extremely vague terms. The summary also states that Adama was the commissioner towards January, and that in any case, Abou Zeid was the one who took all the decisions in Timbuktu.[270] In an anonymous statement, [REDACTED] claims that Mr. Al Hassan was the 'Emir' of the police, and in this capacity, gave orders to all,[271] but this description is contradicted by the weight of other Prosecution evidence concerning the role and identity of Emirs in Timbuktu.[272] [REDACTED] also does not describe any specific orders or the context in which they were allegedly given.

186. Similarly, whereas the Prosecution claims that Mr. Al Hassan and the Emir both took measures to regulate the conduct of the police, the cited documentary evidence makes no reference to Mr. Al Hassan,[273] and only serves to confirm that such matters were regulated by Abou Zeid and not Mr. Al Hassan. [REDACTED]lack of evidentiary value on this point is highlighted by the Prosecution's inability to pinpoint any particular statement or extract on this point. They cite, instead, pages [REDACTED],[274] none of which address this point.

187. Finally, the claim that Mr. Al Hassan could take measures against individual members or investigate them is unsupported by the cited sections of [REDACTED] statement,[275] and contradicted by other sections of [REDACTED] evidence.[276] The only concrete example concerns steps taken by Mr. Al Hassan to arrest a member of Ansar Dine who committed rape.[277] As concerns the anonymous summary of [REDACTED], the section relied upon has been so heavily redacted that it is impossible to ascertain who was responsible for the many of the acts in question.[278] [REDACTED] also clearly states that Khaled was responsible for taking decisions

[269] [REDACTED]
[270] [REDACTED]
[271] [REDACTED]
[272] [REDACTED]
[273] [REDACTED]
[274] [REDACTED]
[275] [REDACTED]
[276] [REDACTED]
[277] [REDACTED]
[278] [REDACTED]

to punish members of the police; Mr. Al Hassan merely translated his orders.[279] The complaint submitted to Adama also undermines the Prosecution's thesis concerning Mr. Al Hassan's alleged role in such matters, and further affirms Adama's control of the police in that period.[280]

4.3.3 Third alleged contribution: the Prosecution has failed to establish that Mr. Al Hassan played a key role in repression of infractions of new rules, as an investigator, or in referring matters to the Islamic Tribunal

4.3.3.1 The reception of complaints

188. This claim is duplicative of Prosecution allegations in paragraphs 271 and 284 of the DCC. It is also unfounded. [REDACTED] does not refer to Mr. Al Hassan – he mentions a 'Touareg',[281] of which there were several in the Islamic police. In the evidence relied upon by the Prosecution, Mr. Al Hassan explains that complaints were received by the Emir or his deputy; if they were not there, Mr. Al Hassan would draft a summary, and make an appointment, so that the complainant could be received by the Emir upon his return.[282]

189. There is, in any case, no nexus between such alleged conduct, and the charged crimes. Indeed, the existence of a complaints procedure, which allowed civilians in Timbuktu to seek redress as concerns any crimes committed against them (including murder and rape) undermines any claim that the Islamic police were part of an organisational policy to commit crimes against the civilian population (see section 3.1.1 above).

4.3.3.2 Convocation of persons

190. The Prosecution has provided no context or argument as to purpose of such convocations, and the relevance to the charged crimes. The Prosecution has not demonstrated how the mere stamping of such documents contributed to the common plan, or the realisation of the charged crimes.

[279] [REDACTED]
[280] [REDACTED]
[281] [REDACTED]
[282] [REDACTED]

4.3.3.3 Investigations of different affairs, inside and outside Timbuktu, and questioning, which also entailed recourse to force/violence

191. The Prosecution's evidence concerning the existence and conduct of interrogations fails to establish that Mr. Al Hassan made an essential or significant contribution to the charged crimes; its allegations are based on an inaccurate portrayal of its own evidence, or anonymous hearsay evidence with no probative value. For example, in his anonymous summary, [REDACTED]acknowledges that he has no personal knowledge of the manner in which the questioning was done.[283] [REDACTED]does not refer to Mr. Al Hassan nor does he discuss the conduct of interrogations,[284] and [REDACTED]acknowledges that he does not have any personal knowledge as to how the questioning took place; he merely speculates as to how they would take place based on his knowledge of the Quran.[285] He also claims that the questioning was done by all of the police.[286] The Prosecution's attempt to rely on [REDACTED]and [REDACTED]to establish Mr. Al Hassan's involvement in the use of force is also undermined by the fact that [REDACTED]averred that the Islamic police did not use force,[287] and [REDACTED]also stated that he had not heard any actual allegations of the Islamic police using questionable interrogation methods.[288] [REDACTED]only mentioned and claimed to know Mr. Al Hassan, after Mr. Al Hassan was arrested by the ICC, and [REDACTED]saw him on the internet.[289] [REDACTED]claim to have recognised Mr. Al Hassan is also inconsistent with his simultaneous claim that Mr. Al Hassan's face was covered at the time.[290]

192. It is also impossible to ascertain the nexus between the alleged conduct, and either the internal armed conflict / systematic and widespread attack against the civilian population or the common plan. The Prosecution has based its allegations on evidence concerning the investigation of members of the Islamic police, or other

[283] [REDACTED]
[284] [REDACTED]
[285] [REDACTED]
[286] [REDACTED]
[287] [REDACTED]
[288] [REDACTED]
[289] [REDACTED]
[290] [REDACTED]

members of Ansar Dine.[291] In so doing, they undercut any claim of discrimination vis-à-vis any other groups or ethnicities in Timbuktu, or any nexus with an organisation policy to commit crimes against the civilian population.

4.3.3.4 Drafting of police reports

193. The Prosecution relies heavily on the statements of Mr. Al Hassan in order to establish his alleged authorship of the reports, but at the same time, ignores his evidence concerning his role in drafting the reports, and explanation as to why he signed them: that is, that he was one of the few people in the police who could do so.[292] It also has no evidential value to claim that all bar one of the reports gathered by the Prosecution bear Mr. Al Hassan's signature.[293] In his statement, [REDACTED]states that journalists had taken documents from the buildings before [REDACTED]arrived:[294] it is therefore impossible to conclude whether the remaining documents constituted an accurate sample of the totality of reports issued by the Police.

194. [REDACTED]also informed the Prosecution that these reports did not define the scope of inquiry; the judges could, and did, conduct their own, independent investigations.[295]

4.3.3.5 Classification, and organisation of cases, and referral to the Islamic Tribunal

195. The Prosecution evidence on this point relies, once again, almost exclusively on the statements of Mr. Al Hassan, and yet once again, the Prosecution bases its assertions on an inaccurate or incomplete representation of the text. For example, the extract relied upon to establish that Mr. Al Hassan organised and classified cases, is comprised of Mr. Al Hassan simply responding to the investigator concerning the type of cases that came to the police.[296] Similarly, contrary to the DCC, Mr. Al Hassan did not state that he was responsible for referring cases to the Islamic Tribunal: he states that he interpreted, and then wrote the reports of

[291] DCC, para. 293.
[292] [REDACTED] See also [REDACTED]
[293] Cf DCC, para. 300.
[294] [REDACTED]
[295] [REDACTED]
[296] [REDACTED]

investigations done by someone else ([REDACTED]*)*.[297] Mr. Al Hassan's lack of substantive involvement is also reflected by his statement [REDACTED]".[298] He also informed the Prosecution investigators that complaints were received by the Emir, Mr. Al Hassan would merely make a note and another appointment if the Emir was not there.[299]

196. [REDACTED] also does not provide any evidence concerning the referral of cases to the Islamic Tribunal, and as noted above, conceded that he did not have personal knowledge of such specific details. [300] Although [REDACTED] bases many of his answers on how he understood that the police would function on a theoretical level,[301] he also conceded to the Prosecution that the Islamic Police in Timbuktu did not function in the way prescribed by Islamic texts – it functioned more as a general police force as is found in other civil systems, and that he was not, in any case, involved in their work.[302]

197. The claim that Mr. Al Hassan took suspects to the Islamic Tribunal is based only on the uncorroborated statement of [REDACTED], which does not have sufficient weight to fulfil the necessary evidential threshold.[303] The Prosecution also continues to conflate and confuse the administrative nature of Mr. Al Hassan's transcription of certain reports, with the substantive role that belonged to others, such as Adama.

4.3.3.6 Power to arbitrate, and deal with affairs lying within the religious vision of the organisation

198. The Prosecution has provided no explanation or argument as to the link between this alleged conduct, the common plan, and the commission of the charged crimes. The Prosecution's attempt to place a religious or discriminatory inflection on such

[297] [REDACTED]
[298] [REDACTED]
[299] See para. 188 above.
[300] [REDACTED]
[301] [REDACTED]
[302] [REDACTED]
[303] Cf DCC, fns. 736 and 737.

conduct is also unsupported by any concrete evidence concerning Mr. Al Hassan's conduct.[304]

4.3.4 Fourth alleged contribution: the Prosecution has not substantiated the role of Mr. Al Hassan in punishments inflicted on civilians.

199. A significant component of these allegations is based on either unsupported extrapolation on the part of the Prosecution,[305] or the uncorroborated statement of Mr. Al Hassan. The allegations also do not implicate Mr. Al Hassan; to the contrary, the cited evidence establishes that Mr. Al Hassan had no personal responsibility or influence over decisions to inflict sanctions – even the 'petits ta'zirs' fell within the exclusive prerogative of the Emir to decide (in consultation with the Sharia committee).[306] There is also no evidence that Mr. Al Hassan participated or in any way influenced this decision making process.

200. Mr. Al Hassan also states that these small punishments would not be imposed without first following a process (i.e. they would only be imposed upon decision by the Emir, and in the second instance of a violation).[307] In contrast, [REDACTED]evidence on this point is based on pure speculation: he acknowledges he has no personal knowledge of Mr. Al Hassan ever hitting someone,[308] and further informed the Prosecution that only the chief of Hesbah and the Chief of the Islamic Police could decide such matters, and not the persons under their command.[309] [REDACTED] described the Chief of the Islamic Police as Adam.[310] [REDACTED] was also unable to give any example of Mr. Al Hassan being involved in such matters.[311]

201. These 'petits ta'zirs' would also not meet the severity threshold to constitute either war crimes or crimes against humanity.

[304] Cf DCC, paras. 310-313.
[305] DCC, para. 315.
[306] [REDACTED].
[307] [REDACTED]
[308] [REDACTED]
[309] [REDACTED]
[310] [REDACTED]
[311] [REDACTED]

4.3.4.1 Sanctions executed upon decisions issued by the Islamic Tribunal

202. Apart from the limited nature of concrete incidents which are linked to Mr. Al Hassan, this type of conduct fails to engage Mr. Al Hassan's individual responsibility. Mr. Al Hassan did not take, or otherwise participate in the decision to issue certain punishments, and the punishments would have been executed irrespective of his role. The Prosecution has therefore not established any nexus between Mr. Al Hassan and the core elements of the charged crimes.

203. The ambit of Article 8(2)(b)(iv) is also confined to two types of proscribed conduct: the passing of sentences (that is, the judicial act of imposing a particular sentence), and the carrying out of executions. The former type of conduct falls exclusively within the realm of judicial prerogative, and whilst the latter conduct is broader ('carrying out'), it is confined to a specific category of sentences – that is, those that involved the death penalty ('executions'). The Prosecution has not established that Mr. Al Hassan was engaged in either of these two forms of proscribed conduct. He was not involved in the adjudication of defendants appearing before the Islamic Tribunals, nor has he been charged for contributing to the execution of the death penalty against specific individuals.

4.3.5 Fifth alleged contribution: the Prosecution has failed to substantiate that Mr. Al Hassan contributed to a permissive environment nor has it explained the clear link between this allegation and the commission of the charged crimes

204. In the absence of any evidence or argument on this point, it should be dismissed out of hand.

4.3.6 Sixth alleged contribution: the Prosecution has not established the relevance of these other administrative acts to the charged crimes, nor has it adduced sufficient probative evidence to establish Mr. Al Hassan's effective authority over such matters

205. The Prosecution has once again, ignored evidence that Mr. Al Hassan's role in stamping documents was administrative, nor has it adduced any further evidence concerning this particular instruction that would allow the Chamber to conclude to the contrary. The connection between such conduct and the specific common plan in this case (and the commission of charged crimes) is also impermissibly vague,

and does not therefore satisfy the requirements of confirming a case for trial. These acts – even if established – do not reflect that Mr. Al Hassan possessed the power to frustrate the commission of the charged acts, or to otherwise influence, in a concrete manner, the means by which they were carried out.

4.4 The Prosecution has not established that the subjective elements of Article 25 and 30 are met

206. The Prosecution's case concerning Mr. Al Hassan's personal knowledge fails to satisfy the necessary elements of Articles 25(3) and 30. The essence of common plan liability is that the co-perpetrators are mutually aware, and mutually accept that the implementation of the common plan will result in the commission of specific crimes under the Statute.[312] The nature of the common plan must be such that the members can foresee that taking steps to implement it will result in the commission of the crimes in question. Nonetheless, the Prosecution has neither pleaded, nor established as a matter of evidence, that Mr. Al Hassan was aware that the common plan would result in the commission of the specific crimes charged in this case, and that he participated in the common plan, with the awareness, that his participation would contribute to the commission of these crimes. The evidence tendered by the Prosecution is either irrelevant to the charged crimes, or it does not establish that Mr. Al Hassan knew and intended that his conduct would contribute to the commission of the charged crimes. Each of the limbs advanced by the Prosecution will be addressed below, in order to demonstrate that the Prosecution's charges fail to satisfy the fundamental element of *mens rea*, and as such, the charges should be dismissed in their entirety.

4.4.1 Mr. Al Hassan's statements do not reflect either his knowledge of specific crimes under the Rome Statute, or his intention to contribute to the commission of such crimes

207. The Prosecution has relied heavily on the uncorroborated statements of Mr. Al Hassan to establish knowledge and intent. Even if the highly problematic nature of these statements is put aside, at its highest, this evidence only establishes that Mr.

[312] *Banda*, ICC-02/05-03/09-121-Corr-Red, para. 150.

Al Hassan was aware that Ansar Dine had the intention to apply Sharia law in Timbuktu.

208. Mere knowledge that Ansar Dine applied Sharia law cannot be equated to knowledge that a group or individuals would commit crimes under the Rome Statute. To hold otherwise would effectively equate the application of Sharia law to a crime in and of itself. Such a position would have catastrophic effects as concerns the potential universalisation of the Rome Statute: clearly, States will not ratify the Statute if the mere fact that Sharia law is practiced in their territory renders them liable to be prosecuted for war crimes and crimes against humanity.

209. The Prosecution's broad approach to criminal intent is also inconsistent with the agreement of States underpinning the Rome Statute itself; that is, in order to reconcile the competing concerns between those States which wanted the death penalty included in Article 77, and those who were opposed, it was agreed the exclusion of the death penalty from the Statute would be without prejudice to the right of member States to maintain such penalties at a domestic level.[313] It was also further agreed that the President of the Assembly of States Parties would issue the following declaration: [314]

> The debate at this Conference on the issue of which penalties should be applied by the Court has shown that there is no international consensus on the inclusion or non-inclusion of the death penalty. However, in accordance with the principles of complementarity between the Court and national jurisdictions, national justice systems have the primary responsibility for investigating, prosecuting and punishing individuals, in accordance with their national laws, for crimes falling under the jurisdiction of the International Criminal Court. In this regard, the Court would clearly nor be able to affect national policies in this field. It should be noted that not including the death penalty in the Statute would not in any way have a legal bearing on national legislations and practices with regard to the death penalty. Nor shall it be considered as influencing, in the development of customary international law or in any other way, the legality of penalties imposed by national systems for serious crimes.

[313] W. Schabas, 'Penalties', in Cassese, Gaeta and Jones (eds), *The Rome Statute of the International Criminal Court* Vol. II (Oxford University Press, 2015) p. 1505, fn. 54, citing Article 80 of the Rome Statute.
[314] W. Schabas, 'Penalties', in Cassese, Gaeta and Jones (eds), *The Rome Statute of the International Criminal Court* Vol. II (Oxford University Press, 2015), fn. 55.

210. In line with the notion that it is not the role of the ICC to sit in judgment as concerns the fairness and impartiality of domestic trials,[315] the ICC has also consistently afforded a significant amount of deference to States as concerns the manner in which domestic trials are conducted. In contrast, if the bar for defining individual criminal responsibility for the punishments issued by domestic courts is set too low, it would mean that ICC Judges and Prosecutors could themselves, face potential liability for their role in approving certain admissibility challenges, which culminated in unfair verdicts and human rights abuses.

211. Given this legal framework, it was incumbent on the Prosecution to ensure that its pleading set out, with sufficient clarity, Mr. Al Hassan's specific knowledge and intent that the application of Sharia law would, in the ordinary course of events, result in the commission of the charged crimes. These additional elements are, however, completely lacking from the charges and evidence.

212. As set out at paragraphs 154-164 above, the Prosecution has also failed to demonstrate that Mr. Al Hassan shared the goals of the common plan: that is, that he joined Ansar Dine for the purpose of contributing to the establishment of Sharia law in Timbuktu. The particular assertion that "il avait été convaincu de rejoindre Ansar Dine en raison de la nécessité de faire le djihad"[316] is based on an inaccurate portrayal of the text of his statement. Mr. Al Hassan stated that he had been convinced to work with Ansar Dine,[317] but not for the purpose of further specific religious goals. He had been informed he would be given a position,[318] and hoped that he could work at a hospital to acquire more experience.[319] The extract relied upon by the Prosecution does not establish that Mr. Al Hassan knew and understood that his role would contribute to the commission of the charged crimes, or crimes under the jurisdiction of the Court.

[315] *Gaddafi*, ICC-01/11-01/11-565, para. 219: "The Court was not established to be an international court of human rights, sitting in judgment over domestic legal systems to ensure that they are compliant with international standards of human rights". See also para. 225: "The Appeals Chamber notes that certain States, during the course of the negotiations of the Court's Statute, emphasised that the international criminal court should not pass judgment on the operation of national courts in general or the penal system of a State."
[316] Cf DCC, para. 329.
[317] [REDACTED]
[318] [REDACTED]
[319] [REDACTED]

213. Similarly, the allegation that Mr. Al Hassan transcribed the phrase – "*[REDACTED]*"[320] – does not reflect any knowledge or intent concerning the commission of crimes under the ICC Statute; if anything, it reflects his understanding that the application of Sharia law in Timbuktu had facilitated the ability of victims to seek a remedy from the authorities, and that far from contributing to crimes, it had contributed to the establishment of the rule of law. Indeed, given the withdrawal of the Malian State (including civilian authorities),[321] and the level of insecurity in Timbuktu prior to Ansar Dine, the absence of Sharia law courts would have meant the absence of law.

214. [REDACTED]'s uncorroborated testimony concerning Mr. Al Hassan's so-called shared vision concerning the destruction of the mausoleums is also based purely on [REDACTED] assumption as to the beliefs that would have fallen within Mr. Al Hassan's ideology.[322] [REDACTED] was also unable to provide the Prosecution with any specific and credible details on this point: at most, his testimony amounts to a claim that Mr. Al Hassan held a belief that was the same as many other persons.[323] Of key importance, [REDACTED] also noted that Mr. Al Hassan's "religious understanding was very limited",[324] and that "AL HASSAN does not have, did not have deep knowledge of the Islamic rules, so he just followed what the other Islamists were telling him to do."[325]

215. Even if Mr. Al Hassan shared the same religious belief as other members of Ansar Dine (and many of the civilians in Timbuktu and its environs), Defendants before the ICC cannot be punished for their religious belief, or for mere membership of a certain religious organisation. Article 21(3) states in the strictest terms that the application of the Statute must be without any adverse distinction founded on grounds of religion or belief. The right to religious belief and/or opinion is also consecrated as a non-derogable human right.[326] It is, therefore, impermissible to substitute the duty to make a careful and considered assessment of the defendant's

[320] See [REDACTED]
[321] DCC, para. 107.
[322] [REDACTED]
[323] [REDACTED]
[324] [REDACTED]
[325] [REDACTED]
[326] Human Rights Committee, General Comment 22, Article 18 (Forty-eighth session, 1993) U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994), para. 1.

intentional contribution to specific crimes with broad brushstroke assumptions based on the defendant's creed, membership of a religious group, or mere opinions.

216. The examples given by the Prosecution as concerns Mr. Al Hassan's alleged role in regulating particular aspects of Sharia law also do not reflect human rights violations, let alone a violation of the Rome Statute. For example, as concerns his signature on a document preventing a journalist from taking photographs of women not wearing the veil, the Prosecution has failed to establish that Mr. Al Hassan formulated the edict in question (which is common throughout Islamic countries), or that it was in itself, a measure linked to the commission of crimes under the Statute. In the same manner that the ECHR authorised France to impose bans (with sanctions) on persons wearing the full veil in public places, in order to promote its goal of 'living together' (see paragraph 34 above), Mr. Al Hassan would have had no cause to question or controvert the standard Sharia practice of banning persons from taking photographs of unveiled women.

217. Finally, Mr. Al Hassan's observations concerning the impact of punishments on the population does not establish personal knowledge and intent concerning the commission of specific crimes, for the purposes of Articles 25(3) and 30 of the Statute. Firstly, this evidence is not corroborated: [REDACTED] testimony concerning the meeting between Iyad Ag Ghaly and Abou Zeid[327] pre-dates Mr. Al Hassan's alleged involvement in these charges, and there is no evidence which establishes that Mr. Al Hassan was aware of the contents of this meeting. Secondly, Mr. Al Hassan's statement is framed as a generic observation and not a statement of intent. To the contrary, in noting that it was the first time that the population saw such punishments, the Prosecution omits Mr. Al Hassan's addition that it was also the first time for him:[328] as such, the punishments were not a known and foreseeable consequence for him. In referring to the reaction of '*les gens*' to such punishments, it is also not clear that Mr. Al Hassan viewed their response as separate from his own ignorance and fears.

[327] DCC, para. 338.
[328] [REDACTED].

218. Mere knowledge of general crimes is also not sufficient to establish liability under Article 25 and 30 of the Statute. The forms of liability set out in Article 25(3) refer to the commission of specific crimes ('such a crime'/ '*tel crime*'). Article 30(2)(b) is also framed in a manner that refers to specific consequences: the defendant must be aware that his or her conduct will result in particular consequence ('that person means to cause *that* consequence'), that it will occur in the ordinary course of events. Trial Chamber II interpreted this provision in the *Katanga* case, observing in the context of Article 25(3)(d), that:[329]

> The Chamber underlines its holding that the group of persons acting with a common purpose must have harboured the intention to commit the crime; such interpretation references article 30(2)(b) of the Statute. In its view, and as put by article 30, "in relation to the consequence" which constitutes the crime, the group must "mean to cause that consequence" or know that the crime "will occur in the ordinary course of events". The Chamber takes the view that the accused's knowledge of the intention of the group must be defined with reference to article 30(3) of the Statute: the accused must be aware that the intention existed when engaging in the conduct which constituted his or her contribution.
>
> Knowledge of such circumstance must be established for each specific crime and knowledge of a general criminal intention will not suffice to prove, as article 25(3)(d)(ii) mandates, that the accused knew of the group's intention to commit each of the crimes forming part of the common purpose.

219. Within the context of Joint Criminal Enterprise category 1, which is analogous to the intent requirement of Article 25(3)(a), an ICTR Trial Chamber averred, in the *Mpambara* case,[330]

> A co-perpetrator (a term used to refer to a participant in a joint criminal enterprise) must intend by his acts to effect the common criminal purpose. Mere knowledge of the criminal purpose of others is not enough: the accused must intend that his or her acts will lead to the criminal result. The mens rea is, in this sense, no different than if the accused committed the crime alone. As the Appeals Chamber has aptly remarked, a 'joint criminal enterprise is simply a means of committing a crime; it is not a crime in itself'.

220. Similarly, in the *Stakic* case, the ICTY Trial Chamber confirmed that, "[t]he basic category of joint criminal enterprise requires proof that the accused shared the

[329] *Katanga*, ICC-01/04-01/07-3436-tENG, paras. 1641-1642.
[330] ICTR, *Prosecutor v. Mpambara*, ICTR-01-65-T, Trial Chamber, Judgment, 11 September 2006, para. 14.

intent specifically necessary for the concrete offence, and voluntarily participated in that enterprise."[331] In line with the approach adopted by the ICC in the *Katanga* case, the ICTY and ICTR have also extended the requirement that the accused must know that his or her conduct will contribute to the commission of specific crimes, to the elements of aiding and abetting.[332] Knowledge of crimes and 'mere suspicion' that certain individuals might have been involved, is not sufficient to demonstrate that the accused had actual knowledge that his conduct could aid and abet the commission of the crimes in question.[333]

221. It follows, therefore, that even if the Prosecution were to establish that Mr. Al Hassan was aware that crimes had been committed in Timbuktu, this would not be sufficient to demonstrate that he possessed the necessary intent and knowledge as concerns the relationship between his individual conduct, and the charged crimes in this case.

4.4.2 Mr. Al Hassan's presence and participation in the Islamic police does not reflect his knowledge and intent to commit the charged crimes

222. The *actus reus* and *mens rea* of a crime are two separate elements. Although it might be possible in some cases to infer the latter from the very specific manner in which a crime is committed, the Prosecution has failed, in this case, to adequately explain and elaborate how such knowledge and intent can reasonably be inferred from the facts and circumstances in question. Rather, the Prosecution's allegations are repetitive[334] and vague, and the Prosecution had not clearly articulated the basis

[331] ICTY, *Prosecutor v. Stakic*, IT-97-24-T, Trial Chamber, Jugement, 31 July 2003, para. 436. See also ICTY, *Prosecutor v. Vasiljević*, IT-98-32-T, Trial Chamber, Judgment, 29 November 2002, para. 68; ICTY, *Prosecutor v. Kvočka* et al., IT-98-30/1-T, Trial Chamber, Judgment, 2 November 2001, paras. 284, 271; ICTY, *Prosecutor v. Krstic*, IT-98-33-T, Trial Chamber, Judgment, 2 August 2001, para. 613.
[332] ICTR, *Prosecutor v. Muhimana*, ICTR-95-1B-A, Appeals Chamber, Judgement, 21 May 2007, para. 189: "The Appeals Chamber has explained that an aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a specific crime, and that this support has a substantial effect on the perpetration of the crime. The requisite mental element of aiding and abetting is knowledge that the acts assist the commission of the **specific crime** of the principal perpetrator." (emphasis added).
[333] ICTY, *Prosecutor v. Krnojelac*, IT-97-25-T, Trial Chamber, Judgment, 15 March 2002, para. 319: "Nor is the Trial Chamber satisfied that the Accused is individually responsible under Article 7(1) for having aided and abetted their crimes, as it has not been established beyond reasonable doubt that in fact he knew that those individuals, as opposed to the guards of the KP Dom, were taking part in the beatings. There were sufficient indications to put him on notice that beatings were taking place and that outsiders may have been involved, and thus put him under an obligation to investigate the matter, but that would not suffice, in the absence of evidence that he had actual knowledge, as opposed to mere suspicions concerning their part therein, to hold him responsible for aiding and abetting those who were not guards."
[334] DCC, para. 340, 341.

for determining that there are substantial grounds to conclude that the inferences presented by the Prosecution are the most reasonable inference on the facts.[335]

223. A particular hurdle arises from the Prosecution's reliance on irrelevant, inconsistent and unreliable evidence. As a result, the evidence – when assessed individually or as a whole – does not support the existence of knowledge or intent on the part of Mr. Al Hassan. For example, the documents of the Islamic Tribunal, which were collected by a journalist, were not authored or otherwise generated by Mr. Al Hassan;[336] when presented them during an interview, Mr. Al Hassan informed the Prosecution that he had not seen these documents before and was unaware of the cases referred to inside.[337] The cases are also undated,[338] which makes it impossible to link them, to specific conduct on the part of Mr. Al Hassan.

224. Similarly, many factual assertions misconstrue, misstate or exaggerate the actual contents of Prosecution evidence. For example, the Prosecution has claimed that Mr. Al Hassan was aware of a surge of violence committed against women, at the end of Ramadan, and yet the cited extracts of Mr. Al Hassan's statement only refers to one incident involving a women being flogged, which resulted in disciplinary measures being taken against the individuals involved.[339] And when the Prosecution asked Mr. Al Hassan if other incidents had taken place, he responded, '*Je ne me souviens pas*'.[340] The Prosecution's claim that 'the police' punished 'persons' for listening to music is also not supported by the evidence in question: the notes of [REDACTED] refer to one person being punished by one police officer, who was then disciplined and ordered to apologise to the victim.[341] [REDACTED] also informed the Prosecution that the police were ordered not to insult or take measures against any persons listening to music, even if they were themselves attacked by a member of the public.[342] In any case, given the discrete

[335] ICTY, *Prosecutor v. Vasiljević*, IT-98-32-A, Appeals Chamber, Judgement, 25 February 2004, para. 131: "The Appeals Chamber considers that when a Chamber is confronted with the task of determining whether it can infer from the acts of an accused that he or she shared the intent to commit a crime, special attention must be paid to whether these acts are ambiguous, allowing for several reasonable inferences."
[336] DCC, fn. 789 citing [REDACTED].
[337] [REDACTED]
[338] [REDACTED].
[339] DCC, fn. 801, citing [REDACTED].
[340] [REDACTED]
[341] DCC, fn. 803, [REDACTED]
[342] DCC, fn. 803, citing [REDACTED]

and independent nature of these incidents, and the measures taken subsequently to discipline the individuals involved, these incidents are not probative of the element that Mr. Al Hassan knew that his participation in the police would contribute to the commission of the charged crimes.

225. The Prosecution's allegations in this part also contradict those that immediately precede it, and ignore key inconsistencies in its own evidence. At paragraph 339 of the DCC, the Prosecution relies on an evidential extract that asserted that it was *Hesbah*, and not the Islamic Police, that was in general responsible for regulating conduct through patrols. The Prosecution then obliterates this distinction and claims that the Islamic Police enforced such punishments.[343] Similarly, whereas the Prosecution relies on Mr. Al Hassan's statement in order to attempt to establish that he had a direct role in exacting punishments during patrols, Mr. Al Hassan informed the Prosecution that on such patrols, if it was the first infraction, the police could only note the name of the person, and caution them.[344] Mr. Al Hassan had no personal knowledge of this rule being disobeyed.[345] And, according to the Prosecution's own evidence, the Emir was then responsible for determining whether a person who committed more than one infraction should be punished;[346] Mr. Al Hassan had no discretion or authority in this area. The Prosecution's claims concerning Mr. Al Hassan's role in organising patrols are also affected by the same inaccuracies identified in Annex 4.[347]

226. These allegations do not, in any case, concern specific conduct on the part of Mr. Al Hassan or knowledge of the specific charged crimes in this case. As explained in paragraphs 218 to 221 above, the general nature of such allegations falls foul of the knowledge and intent requirements of Articles 25 and 30 of the Statute. And this lack of coherence and inconsistency undermines any attempt, on the part of the Chamber, to draw reasonable inferences of intent to commit the crimes charged in this case.

[343] DCC, para. 342.
[344] [REDACTED]
[345] [REDACTED]
[346] [REDACTED]
[347] Annex 4, Rows 7-12, 64.

4.4.3 The intention and knowledge of Mr. Al Hassan does not emerge from his application of religious rules when conducting investigations, mediations, or referring matters to the Islamic Tribunal

227. This section is entirely duplicative of the Prosecution's allegations in section 7.3.2 of the DCC, which is addressed at paragraphs 161 to 205 *supra.*

4.4.4 The intention and knowledge of Mr. Al Hassan is not demonstrated by his alleged role in the system of marriages and treatment of women

228. The Prosecution has failed to establish a clear and coherent basis for concluding that Mr. Al Hassan was aware that his conduct contributed to the commission of the specific incidents of forced marriage, sexual slavery, and inhuman acts, charged in this case.

229. The paucity of evidence is reflected by the Prosecution's reliance on the following incidents, which have no nexus to the charged crimes, or Mr. Al Hassan's personal responsibility:

230. *Firstly*, Mr. Al Hassan is alleged to have known that a member of Ansar Dine raped a woman,[348] although this incident has not been charged, and Mr. Al Hassan's knowledge stemmed from the fact that measures were taken against the perpetrator in question.[349] This example does not, therefore, demonstrate that Mr. Al Hassan knew that his conduct contributed to the charged crimes.

231. *Secondly*, Mr. Al Hassan's knowledge, that his conduct would contribute to the commission of forced crimes, is based solely on extracts from his statement, concerning the marriage between members of groups and women in Timbuktu,[350] and his involvement in the payment of a dowry in relation to a marriage, which has not been established to have been forced. Mr. Al Hassan's knowledge that marriages took place does not equate to knowledge of forced marriage, sexual slavery or rape, and more importantly, knowledge that his conduct contributed to such crimes. The victim complaints also make no reference to Mr. Al Hassan's

[348] DCC, para. 347.
[349] [REDACTED]
[350] [REDACTED]

knowledge or involvement in forced marriages and are, as such, irrelevant to this point.

232. *Thirdly*, the Prosecution's attempt to establish Mr. Al Hassan's knowledge of the system of persecution in Timbuktu against women is based on the uncorroborated statements of [REDACTED], who acknowledged that the Islamic Police did not, as an organ, play a role in forced marriages.[351] [REDACTED] was also unable to refer to any examples of Mr. Al Hassan's personal involvement in such matters.[352]

233. *Fourthly*, there is no nexus between clothing requirements, and the commission of forced marriage, rape and sexual slavery.[353] [REDACTED]

234. *Fifthly*, [REDACTED] statement concerning the treatment of [REDACTED] lacks clarity and evidential weight. [REDACTED] also recounts that Mr. Al Hassan referred the matter to Hesbah:[354] the only reasonable inference from this is that Mr. Al Hassan lacked authority over such matters.

235. *Finally*, it is striking that in order to underscore the consensual nature of marriages during the pre-Ansar Dine epoch, the Prosecution avers that such marriages required the consent of the family.[355] If family consent is the hallmark of a consensual marriage, then it follows that the allegations concerning Mr. Al Hassan's role in negotiating the dowry of a potential bride with the family of the bride, serve to prove the consensual nature of that marriage, and thus Mr. Al Hassan's innocence vis-à-vis this charge.

4.4.5 The intention and knowledge of Mr. Al Hassan is not demonstrated through his interactions with persons in Timbuktu

236. The Prosecution's allegations in this section are based on a melange of misstatements, inaccuracies and irrelevant evidence.

237. As concerns the first plank of this allegation, which concerns Mr. Al Hassan's alleged participation in meetings with [REDACTED], the Prosecution has failed

[351] [REDACTED]
[352] [REDACTED]
[353] Cf DCC, para. 349.
[354] [REDACTED]
[355] DCC, para. 896.

to establish either Mr. Al Hassan's active participation in meetings (see paragraphs 171, 241 *infra*), or the relevance of such meetings to the commission of the charged crimes in this case. In the absence of specific evidence that the common plan to commit the charged crimes was discussed at these meetings,[356] and that Mr. Al Hassan participated in a manner that reflected his endorsement of these goals, this point should be dismissed, or disregarded. Apart from one [REDACTED] meeting, the Prosecution has also failed to provide the dates and participants of such meetings,[357] even though such details are material facts.[358] Conversely, if the Prosecution considers that such details are insufficiently important to include in the charges, then it also follows that the allegation itself is insufficiently probative to establish *mens rea* on the part of Mr. Al Hassan.

238. The second component, concerning Mr. Al Hassan's presence during a protest by women in Timbuktu, does not reflect any criminal intent on the part of Mr. Al Hassan.[359] As set out at paragraph 170 above, the evidence states that Mr. Al Hassan arrived at the scene of the protest after shots were fired into the air, in order to ascertain what was happening. The evidence does not reflect that Mr. Al Hassan was present when grievances were ventilated, nor does it suggest that Mr. Al Hassan prevented the women from doing so. His presence and conduct was entirely consistent with the standard reaction of law enforcement in such situations, and is not probative of *mens rea* to commit war crimes and crimes against humanity.

239. Thirdly, the weakness of the Prosecution's case is underlined by its attempt to shore up this point by claiming that "**AL HASSAN** devait savoir que des femmes et jeunes filles seraient maltraitées dans le cours normale [*sic*] des évènements":[360] since Mr. Al Hassan has not been charged with command responsibility, the Prosecution is required to establish – on the basis of evidence – that Mr. Al Hassan possessed actual knowledge and intention to commit the

[356] DCC, para. 352.
[357] [REDACTED]
[358] ICTR, *Prosecutor v. Ntawukulilyayo*, ICTR-05-88-PT, Trial Chamber, Decision on Defence Preliminary Motion Alleging Defects in the Indictment, 28 April 2009, paras 19-22; *Abu Garda*, ICC-02/05-02/09-243-Red, paras. 168-179.
[359] Cf DCC, para. 353.
[360] DCC, para. 354.

charged crimes. This cannot be established through speculation or the mere assertion that he must have known that women and young girls were being mistreated in Timbuktu. And in any case, there is a distinction between general knowledge of crimes, and knowledge that the individual's conduct would contribute to the commission of the charged crimes. The Prosecution's case does not even address the latter element, let alone establish it.

4.4.6 The intention and knowledge of Mr. Al Hassan is not demonstrated through contacts and collaboration with alleged co-perpetrators

240. The Prosecution's allegations concerning contacts between members of the common plan lacks sufficient material detail concerning the date and content of such contacts. These pleadings therefore fail to comply with the standard of detail required to bring these charges to trial.

241. As found by the ICTY Appeals Chamber, solid inferences cannot be drawn from the existence of contacts between common plan members, in the absence of evidence concerning the content of such contacts.[361] As set out above, the details of meetings and contacts are materials facts which should be set out in the charges. Notwithstanding these requirements, the DCC provides no detail concerning the date and content of such interactions, and the relevance to the commission of the charged crimes.

242. As concerns telephone contacts, the Prosecution has not addressed issues of attribution or ownership: [REDACTED], at its highest, only establishes contacts between different numbers. The Prosecution has also not established further that specific details of the common plan or the execution of crimes were discussed during such contacts. Nor has the Prosecution established a foundation for making reasonable inferences from the existence of such contacts. Even if attribution is assumed, given the positions of the persons involved, the existence of such contacts is entirely consistent with regular communications concerning day to day non-criminal activities in Timbuktu.

[361] ICTY, *Prosecutor v. Krstić*, IT-98-33-A, Appeals Chamber, Judgement, 19 April 2004, paras. 84-98.

4.4.7 The personal knowledge of Mr. Al Hassan is not demonstrated by the alleged fact that the crimes were apparently 'well known'

243. This section is duplicative and beset with the same flaws set out in paragraphs 207 to 221 above. The existence of media reports concerning crimes committed in Timbuktu is also a patently inadequate basis to establish the existence of actual knowledge and intent on the part of Mr. Al Hassan to commit the charged crimes, particularly in the absence of evidence that the defendant was aware of the reports, and believed them to be true.[362] Media reports are unreliable indirect evidence,[363] and are therefore an insufficient basis to establish the existence of the crimes in the first place, let alone the knowledge and intent of Mr. Al Hassan to commit such crimes.

4.4.8 The intention and knowledge of Mr. Al Hassan is not established through the allegations that he maintained an association with Ansar Dine

244. This allegation is evidentially unfounded, and irrelevant. Given its prejudicial content and lack of nexus to the charged crimes, it should also be struck from the DCC (if the charges are confirmed).

4.5 The Prosecution has failed to establish the minimum degree of contribution and knowledge, required to fulfil any of the modes of liability under Article 25(3)

245. The common denominator for all forms of liability under Articles 25(3)(a)-(d) is that at the very least, the Prosecution must establish that the defendant:

a. Engaged in conduct that had an appreciable impact on the commission of the charged crimes, such that the crimes would not have occurred, or would not have occurred in the same manner, in the absence of the defendant's participation; and
b. Knew and intended that his conduct would have an appreciable impact on the charged crimes.

246. However, notwithstanding the voluminous nature of the DCC, the Prosecution's case fails to fulfil this basic threshold for individual criminal liability. Specifically, the multitude of accusations levelled against Mr. Al Hassan do not

[362] *Bemba*, ICC-01/05-01/08-3636-Anx2, para. 50.
[363] *Bemba*, ICC-01/05-01/08-424, para. 47; ICTY, *Prosecutor v. Karadzic*, IT-95-5/18-T, Trial Judgment, 24 March 2016, para. 22: "The Chamber considered that written media reports, whether they be reports, articles or interviews, were not admissible from the bar table as they would not meet the reliability and probative value requirements; they were admitted only when a witness testified to the accuracy of the information contained therein and attested that they had not been manipulated in any way".

demonstrate that he had the capacity to exercise control and influence over the commission of the charged crimes, and that he knowingly did so. To the contrary, the Prosecution's own pleadings and evidence reveal that the alleged crimes occurred independently of Mr. Al Hassan, and he, in turn, had no authority or capacity to frustrate the execution of either the common plan, or the commission of the specific charged crimes. Even if Mr. Al Hassan had never been born, or had been thousands of miles away from Timbuktu at the time of the events, the alleged incidents would have occurred, in the same manner.

247. Apart from the non-existence or *de minimis* nature of Mr. Al Hassan's involvement in the commission of the charged crimes, the Prosecution has also failed to establish that Mr. Al Hassan knew, and intended that his conduct should contribute to the commission of the charged crimes. At its highest, the Prosecution's evidence only establishes that Mr. Al Hassan might have known that some crimes had been committed – but the same could be said for every single police officer around the world. Knowledge of crimes does not equate to criminal *mens rea*: the latter requires proof that the defendant intended to engage in certain conduct, knowing that this conduct will result in certain consequences that will contribute to the commission of the charged crimes. The evidence never addresses the latter element. Since Article 30(1) specifies that a person shall be criminally responsible and liable "only if the material elements are committed with intent and knowledge", Mr. Al Hassan cannot be charged for any of the crimes set out in the DCC.

4.6 The Prosecution has failed to demonstrate that Mr. Al Hassan possessed the mental element required for specific war crimes charges, such as Article 8(2)(c)(iv)

248. The Prosecution has failed to demonstrate that Mr. Al Hassan was aware of the absence of a previous judgment or of the denial of relevant guarantees and the fact that they are essential or indispensable to a fair trial. This is a required element under Article 8(2)(c)(iv).

249. The Prosecution's pleadings and evidence on this point are manifestly insufficient, and do not fulfil the threshold of 'substantial grounds to believe'. This charge should therefore be dismissed.

250. Although the Prosecution has attempted to dilute this requirement by relying on [REDACTED],[364] [REDACTED].

251. The Prosecution's case fails to surmount this hurdle. The Prosecution has not established that Mr. Al Hassan was involved in the court process, and had any awareness as concerns the specific procedures that were applied in each case. The evidence cited in this regard fails to support the accompanying allegation. For example, the Prosecution has cited Mr. Al Hassan's statement in support of its claim that Mr. Al Hassan knew that sentences had been imposed without a prior trial, but the extracts in question only refers to some of the functions of the Islamic police (i.e. going on patrols, and being involved in security),[365] and the response to small infractions.[366] The latter fall outside the scope of Article 8(2)(c)(iv), which prescribes either the act of sentencing (which fell outside the authority of the Islamic police), or the act of executing one of more persons – any punishment falling below the threshold of an execution would not satisfy this second limb.

252. The Prosecution has also acknowledged that Mr. Al Hassan had no police diploma or training,[367] and their key witness stated that Mr. Al Hassan had a limited understanding of religion, and could not, therefore, be expected to have known of the particular procedural requirements of Sharia law. The allegations in the DCC also directly contradict the possibility that Mr. Al Hassan knew and understood that the judgments failed to comply with the necessary fair trial guarantees. For example, at paragraph 519 of the DCC, the Prosecution aver, in connection with Mr. Al Hassan, that "*il véhiculait le message selon lequel les crimes commis n'étaient pas criminels par nature mais des actes conformes à leur vision de la religion*".

253. It is, moreover, illuminating to compare the allegations concerning Mr. Al Hassan, with the specific conduct that triggered the application of this war crime in World War II cases. Notably, convictions were reserved for defendants who were lawyers,

[364] DCC, para. 499, fn. 1215.
[365] [REDACTED]
[366] [REDACTED]
[367] DCC, para. 442.

who were aware of the requirements of criminal procedure and due process, and who played a substantive role in the prosecution or judgment of the victims.[368] In contrast, defendants who played more of an administrative or logistical role (such as interpreters or guards), were acquitted.[369] The reviewing authority also overturned convictions pertaining to non-lawyers, who would have had no basis to question the legality of orders that they were requested to executed.[370] Given that this WWII case law shaped the formulation of Article 8(2)(b)(iv), the principle of legality dictates that the scope of the ICC provision should be interpreted in such a manner so as to exclude the conduct of a non-lawyer, such as Mr. Al Hassan, who neither controlled the formulation of sentences, nor had the means to appreciate the extent to which the process complied with international law.

254. Finally, the Prosecution's attempt to portray the court system in Timbuktu as inherently illegal, due to the fact that it was not set up in accordance with domestic procedures, is unsupported by evidence or law. On a domestic level, the Prosecution has failed to illuminate and establish the basis for asserting that the application of Sharia law would have been illegal in Mali. Moreover, in line with the Prosecution's claim that such courts were established in connection with an

[368] See for example, *Shigeru Sawada et al*, Case no. 25. (United States Military Commission, 1946) in which Lieutenant Wako Yusei was a judge and a legal advisor in the same case (p. 5); Second-Lieutenant Okada Ryuhei was a judge, who was found to be familiar with criminal procedure (p. 6); See The United Nations War Crimes commission, *Law Reports of Trials of War Criminals* (Vol 5, London, 1948), see the commentary at pp. 77-78 which also confirms that all of the individuals convicted for the equivalent offence had been judges or prosecutors.

[369] In *Ohashi et al*., Case No. 26. (Australian Military Court, 1946), in which the Court found not guilty those accused who had taken part in the execution of the victims but had not acted as their judges, including the accused who had acted as interpreter." (p. 31). Cf "Those found guilty were the two accused who had acted as judges at a trial which, according to the evidence of the Defence themselves, lacked any representation of the accused by Counsel and occupied only about 50 minutes and was followed rapidly by execution of sentence, in which those found guilty by the Australian Military Court participated."

[370] For example, in *Shigeru Sawada et al.*, Case no. 25 (United States Military Commission, 1946), the following findings were made, at pp. 6, 8: "In his official capacity as warden or chief of the guards Tatsuta was also in charge of the execution-of the three fliers and signed the report of execution. The evidence indicated, however, that the order which Tatsuta received to carry out the unlawful sentences was of apparent legality, that is to say, on its face it appeared to be legal to one who neither knew or was bound to inquire whether the order was in fact illegal. Tatsuta visited the courtroom for a short time while the so-called trial was in progress and he observed the sick condition of one of the prisoners. There was no conclusive proof, however, of either actual or constructive knowledge on Tatsuta's part of the. illegality of the he Enemy Airmen's Act, the trial under it, or the sentences passed at the trial." The Reviewing Authority therefore overturned his conviction for acting unlawfully in being in charge of the execution of three prisoners.
See also *Tanaka Hisakusu et al*., Case No. 33 (United States Military Commission, 1946), p. 70. The findings and sentence on General Tanaka were disapproved for the reason that, although Tanaka had final authority in the matter, he was absent from command at the time of the trial, the passing of sentence and the execution of Major Houck, and there was not sufficient evidence of wrongful knowledge on his part of the acts of his subordinates upon which to predicate his criminal responsibility for their acts.

armed conflict, the governing law is IHL and not domestic law. IHL does not prohibit non-State actors from establishing courts and tribunals; rather, as argued by Cameron, "if ['a regularly constituted court'] would refer exclusively to State courts constituted according to domestic law, non-State armed groups would not be able to comply with this requirement. The application of this rule in common Article 3 to 'each Party to the conflict' would then be without effect. Therefore, to give effect to this provision, it may be argued that courts are regularly constituted as long as they are constituted in accordance with the 'laws' of the armed group."[371] This view appears to be shared by Bothe et al, who argue that "[t]here is no basis for the concept that the rebels are prevented from changing the legal order existing in the territory where they exercise factual power."[372] Indeed, the establishment of such courts might be required to satisfy a commander's obligations to prevent or punish violations of the laws of war. Some commentators also argue that the fact that such courts have been established by non-State actors might attract a lower standard of due process; that is, that due process expectations are, to some extent, tailored to due process capacities.[373]

255. Given the existence of authoritative views that 'rebel' courts are not *ipso facto* illegal under IHL, it follows that Mr. Al Hassan could not have known that Ansar Dine's establishment of its own court structure would constitute a violation of Article 8(2)(b)(iv) of the ICC Statute.

Chapter 5: The Charges are insufficiently grave to satisfy the gravity threshold

5.1 The case fails to meet the admissibility threshold of Article 17(1)(d) of the Rome Statute

256. The Defence has demonstrated the reasons why the charges against Mr. Al Hassan should not be confirmed. The charges brought by the Prosecution are weak, not adequately supported by evidence or rely on an inadequate reading of the evidence.

[371] Lindsey Cameron et al., "Article 3 – Conflicts not of an international character", in Knut Dörmann et al., *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, (Cambridge University Press 2016), p. 236.
[372] Michael Bothe, Karl Josef Partsch, and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts* (Martinus Nijhoff 1982), p. 651.
[373] Louise Doswald-Beck, "Ch. 23 Judicial Guarantees under Common Article 3", in Andrew Clapham, Paola Gaeta and Marco Sassòli, *The 1949 Geneva Conventions: A Commentary*, (Oxford University Press 2015), p. 489; Marco Sassòli and Yuval Shany, "Should the obligations of states and armed groups under international humanitarian law really be equal?", 93(882) International Review of the Red Cross 425 (2011).p. 430.

But even if the Chamber were to confirm some or all of the charges, the case against Mr. Al Hassan is inadmissible pursuant to Article 17(1)(d) of the Statute, since it is of insufficient gravity to justify further action by the Court.

257. In *Abu Garda*, the Pre-Trial Chamber found that "the gravity of 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 when assessing the gravity of a given case".[374]

258. Even with a 457-page DCC, the Prosecution fails to demonstrate that the case against Mr. Al Hassan meets the quantitative and qualitative aspects which would make it of sufficient gravity to justify the Court's action. *First*, the evidence alleged to establish the threshold of Articles 7 and 8 of the Statute cannot be considered when assessing the gravity of the case. *Second*, and as a result, 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. *Third*, Mr. Al Hassan's alleged role in the events is that of a minor police administrator who should not be brought before a jurisdiction looking to try the persons most responsible for the most serious crimes. *Fourth*, Mr. Al Hassan's alleged conduct as described by the Prosecution does not demonstrate the necessary aggravating or qualitative factors to meet the gravity threshold. *Finally*, the *Al Hassan* case cannot be compared to the *Al Mahdi* case for the purposes of the gravity assessment, since such assessment was never carried out in the latter case.

5.2 The scope of the case must exclude the nexus evidence

259. To assess the gravity of a case, the Chamber must limit its analysis to the scope of the specific charges included in the DCC, excluding the allegations related to the contextual elements of the alleged crimes. Indeed, the fact that the crimes under the jurisdiction of the Court may be considered as some "of the most serious crimes for the international community as a whole is not sufficient for [a case] to be

[374] *Abu Garda*, ICC-02/05-02/09-243-Red, para. 31 (emphasis added). See also *Blé Goudé*, ICC-02/11-02/11-185, para. 11.

admissible before the Court."[375] This necessarily means that the events described for the purpose of establishing the respective thresholds of Articles 7 and 8 of the Statute, but not charged against the suspect, should not be considered when assessing the gravity of a particular case.

260. In the section related to the gravity of the case of its Request for a warrant of arrest against Mr. Al Hassan, the Prosecution alleged that the war crimes and crimes against humanity charged against Mr. Al Hassan "were among the gravest crimes under the Court's jurisdiction as provided in Article 5 of the Statute."[376] The Statute, however, does not provide for a hierarchy of crimes. The Prosecution's contention in this regard is unsubstantiated and has no merit.

261. The Prosecution relies on countless alleged incidents for which it provides neither dates nor identity of the alleged victims. The Chamber should give no weight to the content of these Annexes, and not take them into account when assessing the admissibility of the case pursuant to Article 17(1)(d) of the Statute.

5.3 The scope of the present case does not meet the quantitative requirement

262. The acts attributed to Mr. Al Hassan, as described in the DCC, are not of a magnitude that would justify the Court's action. The Court has ruled "that all crimes that fall within the subject-matter jurisdiction of the Court are serious, and thus, the reference the insufficiency of gravity is actually an additional safeguard, which prevents the Court from investigating, prosecuting and trying peripheral cases".[377] The *Al Hassan* case is precisely the type of "peripheral case" that the drafters of the Rome Statute did not want the Court to pursue.

263. The case against Mr. Al Hassan does not meet the quantitative aspect of the gravity analysis, which relates to the number of victims.[378] The case is in fact minor: the 13 charges brought against him appear to have resulted in the partial destruction of ten buildings (Count 7),[379] the alleged physical mistreatment of about 32 persons

[375] *Ntaganda*, ICC-01/04-02/06-20-Anx2, para. 42.
[376] ICC-01/12-01/18-1-Red, para. 302.
[377] Situation in the Republic of Kenya, ICC-01/09-19-Corr, para. 56.
[378] *Abu Garda*, ICC-02/05-02/09-243-Red, para. 31.
[379] DCC, para. 1074.

(Counts 1-6 and 8-12)[380], as well as persecution of the imprecisely defined "Timbuktu civilian population",[381] of which only 17 persons are identified (Count 13).[382] Notably, the Prosecution does not allege that any civilian died as a result of Mr. Al Hassan's alleged actions and participation in the so-called common plan. The identified alleged criminal acts seem to have been committed sporadically during a period of 10-months. In other words, the DCC fails to demonstrate sustained criminal acts affecting identified victims over the time-period of the charges.

264. These figures are well below other cases found to be of sufficient gravity to be tried before the ICC. For example, the case against Mr. Blé Goudé was related to five alleged incidents resulting in "at least 184 deaths, 38 rapes, 126 cases of serious bodily harm, and 348 cases of religious or political persecution."[383] In the Situation in the Republic of Kenya, the Prosecution alleged that over 1,000 people were killed, that 900 acts rape and sexual violence were documented, that around 350,000 people were displaced, and over 3,500 were seriously injured. Clearly, the *Al Hassan* case does not reach the gravity of previous cases before the Court in quantitative terms.

265. The case is also limited geographically, since it only encompasses events alleged to have taken place in Timbuktu. While the Prosecution relies on a wider area of northern Mali to establish the contextual elements of Articles 7 and 8 of the Statute, and tries to extend the scope of the charges by implying that crimes were also committed in the wider Timbuktu region,[384] no crime committed in another locality is included in the actual charges brought against Mr. Al Hassan.

5.4 Mr. Al Hassan's low rank militates against him being tried before the ICC

266. The DCC alleges that Mr. Al Hassan was the "*commissaire de facto*" of the Islamic police.[385] The use of the term "*de facto*" shows that there was no such position in

[380] DCC, paras. 1058, 1066, 1087.
[381] DCC, para. 1088.
[382] DCC, para. 1092.
[383] *Blé Goudé*, ICC-02/11-02/11-171, para. 31. See also *Blé Goudé*, ICC-02/11-02/11-185, para. 21(i).
[384] See paras. 12-16 *supra.*
[385] DCC, paras. 11, 24, 121, 152, 261, 269, 367, 399, 402, 406, 409, 410, 510, 512, 824, 837, 846, 998, 1000, 1004, 1006, 1009, 1016, 1029 and 1041.

the actual hierarchy of the Islamic police. Rather, "*commissaire de facto*" is a made-up title in order assign a role to Mr. Al Hassan, and to artificially bolster the case against him.

267. However, the Prosecution admits that Mr. Al Hassan was not an important figure in the groups alleged to have ruled Timbuktu in 2012. In its Request for a warrant of arrest, the Prosecution lists the alleged leaders of the groups, but omits Mr. Al Hassan.[386] It further alleges that the Islamic Police was only one of several organs constituting the administration of the town.[387] Mr. Al Hassan was not a leader within the Islamic police either, and did not occupy any official function.

268. The Prosecution alleges that no one in Timbuktu could occupy an important function without first pleading allegiance to the "armed groups".[388] Yet, there is no evidence that Mr. Al Hassan ever pledged allegiance to Ansar Dine.[389] Similarly, there is no evidence that he was ever trained militarily,[390] as a police officer,[391] or that he even bore weapons.[392] As a result, he cannot be considered to have been a leader of the Islamic police.

269. The Prosecution alleges that Mr. Al Hassan was drafting and signing police reports and organising patrols. By any definition, this is a very minor, administrative role which does not warrant action by the ICC.

270. The ICTY has declined to try multiple cases that appeared, on their faces, graver than the *Al Hassan* case and decided to refer them to domestic jurisdictions based on insufficient gravity and low grade of the accused. For example, in the *Stankovic* case, the accused was "one of the main paramilitary leaders in Foca, and a sub-commander of the military police there"[393] and was accused for "incidents of torture and rape involving sixteen females and within a time frame of four months

[386] ICC-01/12-01/18-1-Red, para. 59.
[387] ICC-01/12-01/18-1-Red, para. 62.
[388] DCC, para. 96.
[389] DCC, paras. 54, 358, 368.
[390] DCC, para. 56.
[391] DCC, para. 297.
[392] DCC, para. 123.
[393] ICTY, *Prosecutor v. Stankovic*, IT-96-23/2-PT, Decision on Referral of Case under Rule 11 *bis*, 22 July 2005, para. 19.

in 1992".[394] Yet, his case was found to be of insufficient gravity to justify the Tribunal's intervention.

271. In *Mejakic et al.*, the defendants were alleged to have been heavily involved in crimes committed in Omarska Camp, in their respective capacities, which included Commander and Shift Commander.[395] The ICTY Trial Chamber nonetheless found that,[396]

> [t]he crimes alleged against the Accused are grave as they include the crimes of persecution, murder, and inhumane treatment of a large number of victims in two camps which were in operation for approximately three months. When considered in the context of the other cases currently before the Tribunal, it becomes apparent that the crimes alleged in this case, while very serious, are not among the most serious as they are limited in geographical and temporal scope.

272. For these reasons, Mr. Al Hassan's low position in the Islamic police, on its own face, and when compared to other cases, does not justify the Court's action.

5.5 Mr. Al Hassan's alleged "conduct in question" is not sufficiently grave

273. The allegations related to Mr. Al Hassan's conduct under Article 25(3)(a), (b), (c) and (d) of the Statute are not sufficiently grave to justify the action of the ICC. While the section of the DCC dedicated to Mr. Al Hassan's individual criminal responsibility appears lengthy, it is repetitive and inflates a handful of acts and conducts which do not warrant the Court's intervention.

274. Mr. Al Hassan is alleged, under Article 25(3)(a), to have personally flogged three persons. Two of them are unidentified,[397] while the allegations related to the third alleged victim, [REDACTED], are extremely cursory, as reflected by the fact that the Prosecution dedicates only two paragraphs of the 457-page DCC to the incident.[398] The first instance of flogging allegedly occurred in [REDACTED],[399]

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[394] ICTY, *Prosecutor v. Stankovic*, IT-96-23/2-PT, Decision on Referral of Case under Rule 11 *bis*, 22 July 2005, para. 19.
[395] ICTY, *Prosecutor v. Mejakic et al.*, IT-02-65-PT, Decision on Prosecutor's Motion for Referral of Case pursuant to Rule 11 *bis*, 20 July 2005, para. 12.
[396] ICTY, *Prosecutor v. Mejakic et al.*, IT-02-65-PT, Decision on Prosecutor's Motion for Referral of Case pursuant to Rule 11 *bis*, 20 July 2005, para. 21.
[397] See DCC, para. 209, where they are described as two men who were flogged for drinking alcohol.
[398] DCC, paras. 465, 554.

while the second one occurred in [REDACTED].[400] Mr. Al Hassan is also not alleged to have played a significant or decisive role in the decision to flog these individuals. He is also one of several persons, who were alleged to have implemented the punishment.

275. Mr. Al Hassan is also alleged to have personally mistreated [REDACTED].[401] The Prosecution contends that Mr. Al Hassan participated in his arrest, detention and interrogation.[402] Finally, Mr. Al Hassan is alleged to have arrested one unidentified individual and drafted a police report about him in [REDACTED].[403]

276. These four alleged events are strictly confined to the months of [REDACTED].

277. Apart from these incidents, the Prosecution charges Mr. Al Hassan for his alleged involvement with the Islamic police in general. The acts described by the Prosecution to demonstrate Mr. Al Hassan's criminal behaviour are in large part those of a police administrator (typing police reports and participating in patrols,[404] acting as an interpreter with the local population,[405] organisation of police work,[406] administrative assistance to the police,[407] et cetera). Although Mr. Al Hassan has been charged, through common plan liability, with responsibility for a range of other incidents, the extent and impact of his alleged contribution is factually minimal. The duplication introduced through cumulative charging of modes of liability also does not augment the actual size of his alleged culpability.

278. Similarly, the mere fact that a person is charged for having been a member of an alleged common plan does not automatically indicate that the case is of such gravity as to trigger admissibility of the Court. Indeed, the gravity of the offences charged should not be assessed by virtue of the gravity of the whole of the joint criminal enterprise; rather, "[t]he level of responsibility of [the Suspect] is also to

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[399] DCC, para. 1056(a).
[400] DCC, para. 554.
[401] DCC, paras. 210, 563.
[402] DCC, para. 210.
[403] DCC, para. 210.
[404] DCC, para. 210.
[405] DCC, paras. 265-274.
[406] DCC, paras. 275-284.
[407] DCC, paras. 287-289, 299-308.

be evaluated by reference to [his] particular positions and functions, not by reference to the responsibility of the political leadership."[408]

279. In comparison to other similar cases, it is clear that Mr. Al Hassan's actual conduct does not justify the Court's action. For example, in *Ljubicic*, the accused was charged under both Article 7(1) and Article 7(3) of the ICTY Statute (equivalent to Articles 25 and 28 of the ICC Statute), with six counts of crimes against humanity (persecutions on political, racial or religious grounds, two counts of murder, and three counts of inhumane acts), and nine counts of violations of the laws or customs of war (unlawful attack on civilians, two counts of murder, two counts of violence to life and person, devastation not justified by military necessity, destruction or wilful damage to institutions dedicated to religion or education, plunder of public or private property and cruel treatment).[409] The accused was the assistant chief of the military police administration and was, in that capacity, in charge of combining military police activities and tasks of the light assault battalions and the military police battalions.[410] It was alleged that Ljubicic and paramilitary troops under his command and control, planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of crimes committed during attacks on several towns and villages between January and April 1993, resulting in the death of over one hundred Bosnian Muslim civilians, while many more were detained and abused, livestock were killed and Muslim property destroyed, including two Mosques.[411] Ljubicic was also alleged to have been present and to have taken part directly in some of these attacks.[412]

280. Yet, even though the case against Ljubicic appears on its face graver than that against Mr. Al Hassan, the ICTY Prosecutor alleged that the gravity of the crimes

[408] ICTY, *Prosecutor v. Mejakic et al.*, IT-02-65-PT, Decision on Prosecutor's Motion for Referral of Case pursuant to Rule 11 *bis*, 20 July 2005, para. 24.
[409] ICTY, *Prosecutor v. Ljubicic*, IT-00-41-PT, Decision to Refer the Case to Bosnia and Herzegovina pursuant to Rule 11 bis, 12 April 2006, para. 14.
[410] ICTY, *Prosecutor v. Ljubicic*, IT-00-41-PT, Decision to Refer the Case to Bosnia and Herzegovina pursuant to Rule 11 bis, 12 April 2006, para. 11.
[411] ICTY, *Prosecutor v. Ljubicic*, IT-00-41-PT, Decision to Refer the Case to Bosnia and Herzegovina pursuant to Rule 11 bis, 12 April 2006, paras. 12-13.
[412] ICTY, *Prosecutor v. Ljubicic*, IT-00-41-PT, Decision to Refer the Case to Bosnia and Herzegovina pursuant to Rule 11 bis, 12 April 2006, para. 12.

charged against Ljubicic as well as his level of responsibility were compatible with a referral to national authorities as opposed to a prosecution by the ICTY.[413]

281. Another striking case is that of Milorad Trbic, whose case was referred by the ICTY, although he was alleged to have participated in two joint criminal enterprises with the objectives of summarily executing and burying thousands of Bosnian Muslim men and boys captured from the Srebrenica enclave and to the forcibly remove the Bosnian Muslim population from the Srebrenica and Zepa enclaves to areas outside the control of Republika Srpska.[414] Trbic was charged with genocide, conspiracy to commit genocide, extermination as a crime against humanity, murder as a crime against humanity, murder as a violation of the laws or customs of war, persecution as a crime against humanity and forcible transfer as an inhumane act as a crime against humanity.[415] After conceding that the crimes charged against Mr. Trbic were grave, the Referral Bench still decided to refer the case to national jurisdiction, after assessing that the "alleged role and degree of authority of the Accused" made it clear that "his level of responsibility was relatively low."[416]

282. For the above reasons, the Defence submits that although serious, the alleged conduct of Mr. Al Hassan is not such that it requires the Court's action. In fact, his is a case that would be more appropriately brought before the relevant domestic jurisdictions in Mali.

5.6 The Al Mahdi judgement has no application for the gravity assessment in the present case

283. In the Situation in the Republic of Burundi, Pre-Trial Chamber II found that cases "dealing exclusively with the destruction of buildings dedicated to religion have

[413] ICTY, *Prosecutor v. Ljubicic*, IT-00-41-PT, Decision to Refer the Case to Bosnia and Herzegovina pursuant to Rule 11 bis, 12 April 2006, para. 15. See also, ICTY, *Prosecutor v. Rasevic & Todovic*, IT-97-25/1-PT, Decision on Referral of Case under Rule 11 bis with Confidential Annexes I and II, 8 July 2005, paras. 16-17, 22-24; ICTY, *Prosecutor v. Kovacevic*, IT-01-42/2-I, Decision on Referral of Case pursuant to Rule 11*bis*, 17 November 2006, paras. 12-14, 20.
[414] ICTY, *Prosecutor v. Trbic*, IT-05-88/l-PT, Decision on Referral of Case under Rule 11 *bis* with Confidential Annex, 27 April 2007, para. 11.
[415] ICTY, *Prosecutor v. Trbic*, IT-05-88/l-PT, Decision on Referral of Case under Rule 11 *bis* with Confidential Annex, 27 April 2007, para. 12.
[416] ICTY, *Prosecutor v. Trbic*, IT-05-88/l-PT, Decision on Referral of Case under Rule 11 *bis* with Confidential Annex, 27 April 2007, para. 23.

been considered to be sufficiently grave not only to justify an investigation but even actual prosecutions" before the ICC.[417] In finding so, Pre-Trial Chamber II referred to the *Al Madhi* Trial Judgement.

284. However, at no point during the *Al Mahdi* case was the gravity of the case evaluated in the context of Article 17 of the Statute. The *Al Mahdi* defence did not bring a challenge related to gravity, and neither the Pre-Trial Chamber nor the Trial Chamber raised it *proprio motu*. For the reasons set out in paragraphs 102 to 105 above, the fact that Mr. Al Mahdi entered a guilty plea also militates against the application of these findings to the present case. Mr. Al Mahdi also exercised a radically different position as compared to the role attributed to Mr. Al Hassan; Mr. Al Mahdi was head of the Hesbah police, and acknowledged his primary role in the destruction of the buildings in question.

285. The Pre-Trial Chamber in the present case is therefore not bound by any prior decision of the *Al Mahdi* case in relation to the gravity of the case. The Chamber must make its own assessment, regardless of the fact that the *Al Mahdi* case was prosecuted by the ICC.

286. As a result of the limited scope of the case, of his low rank and of his relatively minor role in the events that took place in Timbuktu in 2012, it seems apparent that the case against Mr. Al Hassan is simply not of sufficient gravity to be prosecuted before the ICC. The Court's mandate should not be trivialised by taking on cases of minor importance. The *Al Hassan* case should be found inadmissible under Article 17(1)(d) of the Statute.

Conclusion

287. The existence of a prior judgment at this Court for events in Timbuktu should not detract from the importance of careful judicial scrutiny concerning the facts in this case as concerns this particular defendant. Mr. Al Hassan is neither a leader of men nor a zealot. He is an ordinary man, who happened to live and work in Timbuktu in 2012.

[417] *Situation in the Republic of Burundi*, ICC-01/17-9-Red, para. 184 (footnote omitted).

288. The Prosecution interviewed Mr. Al Hassan on 19 different occasions, starting from July 2018. The Prosecution then had a further two years since to establish a nexus between his actions, and the crimes alleged by the Prosecution, while Mr. Al Hassan continued to be detained. They failed to do so. It is therefore time to bring these proceedings to a close.

Melinda Taylor
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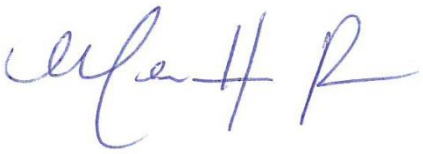

Marie-Hélène Proulx
Associate Counsel for Mr Al Hassan

Dated this 4th Day of July 2019
At The Hague, The Netherlands