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**International
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PRE-TRIAL CHAMBER I

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

SITUATION IN THE REPUBLIC OF MALI

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

PUBLIC REDACTED VERSION

**Decision on the Prosecutor's Application for the Issuance of a Warrant of Arrest
for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud**

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

Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Counsel for the Defence

Mr Yasser Hassan

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

States' Representatives

**Office of Public Counsel for the
Defence**

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Detention Section

**Victims Participation and Reparations
Section**

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Pre-Trial Chamber I (“Chamber”) of the International Criminal Court (“Court”), acting pursuant to article 58 of the Rome Statute (“Statute”), decides the following.

I. Procedural history

1. On 20 March 2018, the Prosecutor filed an application for the issuance of a warrant for the arrest of Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (“Mr Al Hassan”) (“Application” or “Prosecutor’s Application”).¹

2. In her Application, the Prosecutor submits that there are reasonable grounds to believe that Mr Al Hassan has incurred criminal responsibility under the Statute for the commission of: (a) crimes against humanity, *viz.* torture, rape, sexual slavery, persecution on religious and gender grounds and other inhumane acts perpetrated in Timbuktu, on the territory of the Republic of Mali (“Mali”), between April 2012 and January 2013; and (b) war crimes, *viz.* violence to person, outrages upon personal dignity, the passing of sentences without previous judgment pronounced by a regularly constituted court affording all judicial guarantees which are generally recognized as indispensable, rape and sexual slavery perpetrated in Timbuktu, Mali, between April 2012 and January 2013, and the war crime of intentionally directing attacks against buildings dedicated to religion and historic monuments, perpetrated in Timbuktu, Mali, between late June and mid-July 2012.²

3. On 27 March 2018, the Chamber issued a warrant pursuant to article 58 of the Statute for the arrest of Mr Al Hassan (“Warrant of Arrest”).³

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

² Application, ICC-01/12-01/18-1-Red, para. 50.

³ “Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud”, 27 March 2018, ICC-01/12-01/18-2-tENG.

4. On 28 March 2018, the Chamber designated Judge Péter Kovács as Single Judge responsible for carrying out the functions of the Chamber, subject to article 57(2)(a) of the Statute, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (“*Al Hassan case*”), except for the period from 3 to 6 April 2018, during which Judge Marc Perrin de Brichambaut was to act as the Single Judge in the case.⁴

5. On 31 March 2018, Mr Al Hassan was surrendered to the Court, and he is currently in custody at the Court’s detention centre in The Hague.⁵

6. On 3 April 2018, the Single Judge scheduled his first appearance for 4 April 2018.⁶

7. On 4 April 2018, the first appearance hearing was held, during which Mr Al Hassan appeared before the Single Judge in the presence of his counsel and the Prosecutor.⁷

II. Introduction

8. In its Warrant of Arrest, the Chamber stated that its analysis of the evidence and other information submitted by the Prosecutor would be set out in a decision to be issued at a later date.⁸ The Chamber provides that analysis in the present decision. The Chamber incorporates into the present decision the conclusions stated in the Warrant of Arrest issued on 27 March 2018.

9. To dispose of the Application the Chamber has relied on certain evidence (“evidence” or “material”) submitted by the Prosecutor. In that regard, the Chamber has noticed that some of the material cited in the footnotes does not precisely

⁴ “Decision Designating a Single Judge”, dated 28 March 2018 and reclassified as public on 31 March 2018, ICC-01/12-01/18-6-tENG.

⁵ ICC-01/12-01/18-11-US-Exp.

⁶ “Order Scheduling the First Appearance of Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud”, 3 April 2018, ICC-01/12-01/18-12-tENG.

⁷ Transcript of first appearance hearing, 4 April 2018, ICC-01/12-01/18-T-1-Red-FRA.

⁸ Warrant of Arrest, ICC-01/12-01/18-2-tENG, para. 4.

support the allegations in the body text, even though relevant material can be found elsewhere in the Application.⁹ In the interest of the proper conduct of proceedings, the Chamber sees fit to remind the parties to use precise and relevant references.

III. Applicable law, jurisdiction of the Court and admissibility of the case against Mr Al Hassan

10. The Chamber bases its decision on articles 7, 8, 11, 12(2)(a), 17(1)(a), 17(1)(d), 19(1), 21(1)(a) and (b), 21(2), 21(3), 25(3)(a) and (b), 30 and 58 of the Statute.

11. The Chamber notes that article 58(1) of the Statute sets out the two substantive prerequisites for the issuance of a warrant of arrest: in the first place, the Pre-Trial Chamber must be satisfied that “[t]here are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court” (article 58(1)(a) of the Statute); in the second place, the arrest of the person must appear necessary for at least one of the three reasons enumerated in article 58(1)(b) of the Statute.

12. Article 19(1) of the Statute provides that “[t]he Court shall satisfy itself that it has jurisdiction in any case brought before it”. It is therefore necessary at the outset to determine whether the case against Mr Al Hassan falls within the jurisdiction of the Court.

13. For a crime to come under the Court’s jurisdiction, the following three conditions must be met:

- (i) it must be one of the crimes listed in article 5 of the Statute (jurisdiction *ratione materiae*);
- (ii) it must have been committed within the time frame specified in article 11 of the Statute (jurisdiction *ratione temporis*); and
- (iii) it must satisfy one or the other of the two criteria laid down in article 12 of the Statute:¹⁰ either it was committed on the

⁹ See, for example, footnotes 4, 88, 177, 191, 194, 197, 322, 375, 566, 567, 660, 661, 666 and 720.

¹⁰ *The Prosecutor v. Germain Katanga*, Pre-Trial Chamber I, “Decision on the evidence and information

territory of a State Party to the Statute or by a national of that State, or it was committed on the territory of a State which has made a declaration under article 12(3) of the Statute or by nationals of that State¹¹ (jurisdiction *ratione loci* and jurisdiction *ratione personae*).

14. With regard to jurisdiction *ratione materiae*, the Chamber has decided, for the reasons set out below, that there are reasonable grounds to believe that the crimes attributed to Mr Al Hassan constitute, in the first place, crimes against humanity under article 7 of the Statute (namely paragraphs 7(1)(h), 7(1)(g), 7(1)(f) and 7(1)(k)) on the ground that they were committed as part of a widespread or systematic attack directed against the civilian population, and, in the second place, war crimes under article 8 of the Statute (and more precisely paragraphs 8(2)(c)(i), 8(2)(c)(ii), 8(2)(c)(iv), 8(2)(e)(iv) and 8(2)(e)(vi)) on the ground that they were committed in the context of the non-international armed conflict that began in Mali in January 2012. In all of these instances, the first condition, relating to jurisdiction *ratione materiae*, is satisfied.

15. As to jurisdiction *ratione temporis*, the Chamber notes that the Statute entered into force for Mali on 1 July 2002, Mali having deposited its instrument of ratification on 16 August 2000.

16. With respect to jurisdiction *ratione loci*, the events raised in the Prosecutor's Application took place from April 2012 to January 2013, approximately, on the territory of Mali, which on 18 July 2012 referred to the Court the situation prevailing

provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga" ("Decision of 5 November 2007 in *Katanga*"), dated 5 November 2007, and French translation registered on 13 November 2007, ICC-01/04-01/07-55, para. 11; *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, "Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6" ("Decision of 18 January 2006 in the *Situation in the Democratic Republic of the Congo*"), dated 17 January 2006, and French original registered on 18 January 2006, ICC-01/04-101-tEN-Corr, para. 85.

¹¹ Decision of 18 January 2006 in the *Situation in the Democratic Republic of the Congo*, ICC-01/04-101-tEN-Corr, para. 91.

on its territory since January 2012, in which several crimes within the Court's jurisdiction appear to have been committed.¹²

17. For these reasons, the Chamber concludes that the case against Mr Al Hassan falls within the jurisdiction of the Court.

18. As regards the admissibility of the case, article 19(1) of the Statute confers on the Chamber a discretionary power to rule on the admissibility of a case when it has received an application under article 58 of the Statute. The exercise of this discretion will depend on the circumstances of the case, with appropriate consideration being given to the interests of the persons concerned.¹³

19. In a judgment delivered on 13 July 2006, the Appeals Chamber held that when the application under article 58 of the Statute is made on a confidential and *ex parte* basis the Pre-Trial Chamber, for the purpose of preserving the interests of the relevant person, must exercise its discretion under article 19(1) of the Statute only in exceptional circumstances, as when, for example, an "ostensible cause" or a "self-evident factor" impels it to do so.¹⁴

20. In the present case, the Chamber notes, the Prosecutor raises the issue of admissibility but also observes that a ruling on admissibility is not necessary at this stage of the proceedings.¹⁵

21. The Chamber also notes the Prosecutor's submission that the case is admissible under article 17(1)(a) of the Statute¹⁶ on the ground that,

¹² MLI-OTP-0001-0003; MLI-OTP-0001-0002.

¹³ Decision of 5 November 2007 in *Katanga*, ICC-01/04-01/07-55, para. 17; ICC-01/04-01/07-262, para. 17; *The Prosecutor v. Ahmad Harun and Ali Kushayb*, Pre-Trial Chamber I, "Decision on the Prosecution Application under Article 58(7) of the Statute" ("Decision Pursuant to Article 58(7) of the Statute in *Harun*"), dated 27 April 2007, and French translation registered on 22 May 2007, ICC-02/05-01/07-1-Corr, para. 18.

¹⁴ *Situation in the Democratic Republic of the Congo*, Appeals Chamber, "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58'", dated 13 July 2006 and reclassified as public on 23 September 2008, ICC-01/04-169, paras. 52-53.

¹⁵ Application, ICC-01/12-01/18-1-Red, para. 289, and see footnote 688.

¹⁶ Application, ICC-01/12-01/18-1-Red, para. 289, and see footnote 688.

although Mr Al Hassan appears to be the subject of a judicial investigation in Mali,¹⁷ the allegations against him are limited in relation to the conduct alleged in the Application.¹⁸ The Prosecutor submits that the Malian authorities do not appear to have taken active steps to ascertain Mr Al Hassan's responsibility.¹⁹ The Prosecutor argues that "[TRANSLATION] the Malian authorities are 'unable genuinely to carry out' investigations and prosecutions of the crimes committed in northern Mali from January 2012 onwards, given the collapse of the country's security and judicial apparatus in the north and the constraints associated with peace talks".²⁰

22. The Prosecutor observes that within the framework of peace talks the Malian authorities have released 220 persons arrested for their alleged roles in crimes committed in northern Mali,²¹ and that an amnesty law is being drafted.²²

23. Having regard to the information submitted by the Prosecutor, the Chamber considers that the question whether there is a conflict of jurisdiction arises and that, consequently, the exercise of its discretionary power is justified in the present case.

24. In this connection, the Chamber notes the observation of various Chambers of the Court that:

[t]he admissibility test [...] is composed of two parts: the first relating to national investigations, prosecutions and trials concerning the facts alleged in the case at hand, and the second to the gravity threshold that the case should meet to be admissible before the Court.²³

¹⁷ Application, ICC-01/12-01/18-1-Red, para. 290.

¹⁸ Application, ICC-01/12-01/18-1-Red, para. 291.

¹⁹ Application, ICC-01/12-01/18-1-Red, para. 292.

²⁰ Application, ICC-01/12-01/18-1-Red, para. 293. See also Application, paras. 294-300.

²¹ Application, ICC-01/12-01/18-1-Red, paras. 297-298.

²² Application, ICC-01/12-01/18-1-Red, para. 300.

²³ *The Prosecutor v. Bahar Idriss Abu Garda*, Pre-Trial Chamber I, "Decision on the Confirmation of Charges" ("Decision on Confirmation of Charges in *Abu Garda*"), dated 8 February 2010, and French translation registered on 16 March 2010, ICC-02/05-02/09-243-Red, para. 28. See also *Situation in the Republic of Kenya*, Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya" ("Decision Pursuant to Article 15 of the Rome Statute in the *Situation in the Republic of Kenya*"), dated 31 March 2010, and French translation registered on 6 April 2011, ICC-01/09-19-Corr, para. 52; *Situation in the Republic of Burundi*, Pre-Trial Chamber III, "Public Redacted Version of 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi', ICC-01/17-X-9-US-Exp, 25 October 2017" ("Decision Pursuant to

25. With respect to the admissibility of the case vis-à-vis national proceedings, article 17(1) of the Statute sets out how to resolve a conflict of jurisdiction between the Court and a national jurisdiction. The Appeals Chamber has held that article 17(1)(a) of the Statute entails a two-step analysis to determine if a case is inadmissible:

[I]n considering whether a case is inadmissible under article 17(1)(a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse.²⁴

26. The Appeals Chamber accordingly concluded that:

in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court [...].²⁵

27. With regard to the term “case” in article 17(1)(a) of the Statute, the Appeals Chamber has held that “the question is not merely a question of ‘investigation’ in the abstract, but is whether the *same case* is being investigated by both the Court and a national jurisdiction”.²⁶ The Appeals Chamber held that the defining elements

Article 15 of the Rome Statute in the *Situation in the Republic of Burundi*”), dated 25 October 2017, and French translation registered on 30 November 2011, ICC-01/17-9-Red, paras. 145-148 and 183-184.

²⁴ Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case” (“Appeal Judgment on Admissibility in *Katanga*”), dated 25 September 2009, and French translation registered on 21 October 2009, ICC-01/04-01/07-1497 (OA 8), para. 78. See also *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Appeals Chamber, “Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’” (“Appeal Judgment on Admissibility in *Ruto*”), dated 30 August 2011, and French translation registered on 10 July 2013, ICC-01/09-01/11-307 (OA), para. 41; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Appeals Chamber, “Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’” (“Appeal Judgment on Admissibility in *Kenyatta*”), dated 30 August 2011, and French translation registered on 10 July 2013, ICC-01/09-02/11-274 (OA), para. 40.

²⁵ Appeal Judgment on Admissibility in *Katanga*, ICC-01/04-01/07-1497, para. 78.

²⁶ Appeal Judgment on Admissibility in *Ruto*, ICC-01/09-01/11-307, para. 37; Appeal Judgment on Admissibility in *Kenyatta*, ICC-01/09-02/11-274, para. 36.

of a concrete case before the Court are the individual named in the warrant of arrest and the conduct giving rise to criminal responsibility under the Statute, such as it is alleged in a warrant of arrest or summons to appear issued under article 58 of the Statute or in the charges brought by the Prosecutor and confirmed by the Pre-Trial Chamber under article 61 of the Statute; and that, accordingly, “for such a case to be inadmissible under article 17(1)(a), the national investigation must cover the same individual and *substantially the same conduct* as alleged in the proceedings before the Court” [emphasis added].²⁷

28. The Appeals Chamber has also clarified that:

the admissibility of a case must be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge. This is because the admissibility of a case under article 17 (1) (a), (b) and (c) of the Statute depends primarily on the investigative and prosecutorial activities of States having jurisdiction. These activities may change over time. Thus, a case that was originally admissible may be rendered inadmissible by a change of circumstances in the concerned States and *vice versa*.²⁸

29. For present purposes, the “case” in terms of article 17(1)(a) of the Statute is the case as defined in the Prosecutor’s Application. The case would be inadmissible before the Court only if the Government of Mali was investigating the same suspect for substantially the same conduct. On consideration of the material submitted by the Prosecutor, the Chamber notes that the same suspect, Mr Al Hassan, is the subject of a complaint in Mali.²⁹ The Chamber further notes that the allegations against him pertain to acts of torture and of arbitrary arrest and detention committed

²⁷ Appeal Judgment on Admissibility in *Ruto*, ICC-01/09-01/11-307, para. 40. See also *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Appeals Chamber, “Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’” (“Appeal Judgment on Admissibility in *Gaddafi*”), 21 May 2014, ICC-01/11-01/11-547-Red, paras. 1-2, para. 83. *The Prosecutor v. Simone Gbagbo*, Pre-Trial Chamber I, “Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo”, 11 December 2014, ICC-02/11-01/12-47-Red, paras. 26-35, and *The Prosecutor v. Simone Gbagbo*, Appeals Chamber, “Judgment on the appeal of Côte d’Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled ‘Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo’”, dated 27 May 2015, and French translation registered on 3 June 2016, ICC-02/11-01/12-75-Red, paras. 26 *et seq.*

²⁸ Appeal Judgment on Admissibility in *Katanga*, ICC-01/04-01/07-1497, para. 56.

²⁹ MLI-OTP-0024-2814, pp. 2815, 2822 and 2838. MLI-OTP-0039-0128, p. 0140.

against a complainant in Timbuktu in September 2012.³⁰ As set out below, the Chamber finds those allegations to be limited in relation to the conduct alleged in the Prosecutor's Application. Accordingly, although the national investigation covers the same individual, it does not cover *substantially the same conduct* as the proceedings brought before the Court.

30. The Appeals Chamber has further held that the words "is being investigated" in the language of article 17(1)(a) of the Statute are to be read as requiring the taking of "concrete and progressive investigative steps"³¹ to ascertain whether the person concerned is responsible for the conduct alleged against him or her, including "by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses".³²

31. The material shows that the investigating judges have begun interviewing victims in the complaint filed against Mr Al Hassan and others, but that no further investigative steps have been taken. The material shows in this regard that the lack of technical and financial resources and the difficulty of investigating due to the insecurity prevailing in northern Mali have been put forth as reasons for the state of progress in those proceedings.³³

32. Having regard to the material before it, the Chamber is not satisfied that the domestic authorities in Mali are currently taking tangible, concrete and progressive steps to investigate Mr Al Hassan's criminal responsibility for the crimes alleged in the Prosecutor's Application. Accordingly, the Chamber finds the case admissible in view of the inaction of the Malian domestic courts.

³⁰ MLI-OTP-0024-2814, pp. 2815, 2822 and 2838. MLI-OTP-0039-0128, p. 0140.

³¹ Appeal Judgment on Admissibility in *Gaddafi*, ICC-01/11-01/11-547-Red, paras. 54, 55 and 73. See also *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Pre-Trial Chamber I, "Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", 7 December 2012, ICC-01/11-01/11-239, para. 11.

³² Appeal Judgment on Admissibility in *Ruto*, ICC-01/09-01/11-307, para. 41; Appeal Judgment on Admissibility in *Kenyatta*, ICC-01/09-02/11-274, para. 40.

³³ MLI-OTP-0039-0128, p. 0140. See also MLI-OTP-0039-0128, pp. 0140-0142; MLI-OTP-0046-8902, p. 8906, para. 16, and p. 8908, paras. 24-25; and MLI-OTP-0041-0404, p. 410, para. 30.

33. As regards the “sufficient gravity” threshold in article 17(1)(d) of the Statute, the Chamber notes the Prosecutor’s emphasis that the crimes for which these proceedings are brought against Mr Al Hassan “[TRANSLATION] are among the most serious crimes which fall within the jurisdiction of the Court under article 5 of the Statute”.³⁴ The Prosecutor submits that the crimes “[TRANSLATION] were planned and committed in an organized and systematic manner through the enforcement bodies set up for that purpose by [the armed groups Al-Qaida in the Islamic Maghreb (“AQIM”) and Ansar Dine, a primarily Tuareg movement associated with AQIM] with the aim of subjecting the whole of the population to their rules and authority”.³⁵ The Prosecutor argues that “[TRANSLATION] the gravity of the case follows from the nature and scale of the crimes alleged in Timbuktu, the manner in which they were apparently committed”, their destructive and lasting consequences for the people of Timbuktu³⁶ and their “[TRANSLATION] national and international impact”.³⁷

34. The Chamber notes that article 17(1) of the Statute provides that “the Court shall determine that a case is inadmissible where: [...] (d) The case is not of sufficient gravity to justify further action by the Court”. In this connection, Pre-Trial Chamber I, sitting in its previous composition, observed 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.³⁸

35. In its previous composition Pre-Trial Chamber I considered that the factors referred to in rule 145(1)(c) of the Rules of Procedure and Evidence relating to the determination of sentence, namely “the extent of damage caused, in particular, the harm caused to victims and their families, the nature of the unlawful behaviour

³⁴ Application, ICC-01/12-01/18-1-Red, para. 302.

³⁵ Application, ICC-01/12-01/18-1-Red, para. 302.

³⁶ Application, ICC-01/12-01/18-1-Red, paras. 302-303.

³⁷ Application, ICC-01/12-01/18-1-Red, para. 301.

³⁸ Decision on Confirmation of Charges in *Abu Garda*, ICC-02/05-02/09-243-Red, para. 31. See also paras. 30-32.

and the means employed to execute the crime”, may be of use in assessing the required level of gravity under article 17(1)(d) of the Statute.³⁹

36. In this regard, the Chamber takes the view that the level of gravity must be assessed in a consistent way by the various organs of the Court to avoid applying an arbitrary test according to the situation.

37. Lastly, the Chamber recalls that the suspect’s role in the commission of the crimes is also a component in the assessment of the gravity of a case under article 17(1)(d) of the Statute.⁴⁰

38. Having regard to the foregoing, the Chamber is satisfied that the case is of sufficient gravity within the meaning of article 17(1)(d) of the Statute. As set out below in the analysis of applicable law and of the evidence submitted by the Prosecutor in support of her allegations, the Chamber observes, in particular: the commission of crimes against humanity and war crimes; the sheer number and scale of the underlying crimes perpetrated; the fact that they were committed over a period of approximately nine months; the high number of victims; the geographical and temporal impact of the crimes; the means employed to commit the crimes, including the creation of new institutions to carry them out; the general pattern of the way in which the crimes were committed, and especially the harassment and systematic gender-based violence perpetrated against women and girls; and the significant role played by Mr Al Hassan in the commission of the crimes. Lastly, the Chamber observes that the Court’s finding of sufficient gravity in the case of *The Prosecutor v. Ahmad Al Faqi Al Mahdi* (“Al Mahdi case”), which pertained to the

³⁹ Decision on Confirmation of Charges in *Abu Garda*, ICC-02/05-02/09-243-Red, para. 32.

⁴⁰ Decision Pursuant to Article 15 of the Rome Statute in the *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, para.188; *Situation in the Republic of Côte d’Ivoire*, Pre-Trial Chamber III, “Corrigendum to ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire’” (“Corrigendum to Decision Pursuant to Article 15 of the Rome Statute in the *Situation in the Republic of Côte d’Ivoire*”), dated 15 November 2011, and French translation registered on 8 February 2012, ICC-02/11-14-Corr, para. 204; Decision Pursuant to Article 15 of the Rome Statute in the *Situation in the Republic of Burundi*, ICC-01/17-9-Red, para. 184.

destruction of buildings dedicated to religion, entails a finding of sufficient gravity under article 17(1)(d) of the Statute in the present case, which concerns an attack directed not only against property but against a great many victims as well.⁴¹

39. On consideration of the above, the Chamber finds the case against Mr Al Hassan admissible. However, this ruling on admissibility is without prejudice to any decisions taken subsequently under article 19 of the Statute.

40. Turning its attention from the jurisdiction of the Court and the admissibility of the case, the Chamber notes that, pursuant to article 58(1) of the Statute, the Prosecutor's Application for the issuance of a warrant for the arrest of Mr Al Hassan may be granted only if the following three questions are answered in the affirmative:

- Are there reasonable grounds to believe that at least one crime within the jurisdiction of the Court has been committed? (IV)
- Are there reasonable grounds to believe that Mr Al Hassan has incurred criminal responsibility for such crimes under any of the modes of responsibility set forth in the Statute? (V)
- Does the arrest of Mr Al Hassan appear to be necessary under article 58(1)(b) of the Statute? (VI)

IV. Are there reasonable grounds to believe that one or more crimes within the jurisdiction of the Court have been committed?

(A) Crimes against humanity (article 7 of the Statute)

41. The Prosecutor submits in her Application that there are reasonable grounds to believe that Mr Al Hassan has incurred criminal responsibility for the commission of crimes against humanity under article 7(1)(f) (torture), (g) (rape and sexual slavery), (h) (persecution on religious and gender grounds) and (k) (other inhumane acts)

⁴¹ Decision Pursuant to Article 15 of the Rome Statute in the *Situation in the Republic of Burundi*, ICC-01/17-9-Red, para. 184.

of the Statute committed in Timbuktu, Mali, between April 2012 and January 2013.⁴² The Prosecutor alleges the multiple commission of acts forming part of a widespread and systematic attack directed against the civilian population of Timbuktu.⁴³

1. Contextual elements of crimes against humanity

(a) Applicable law

42. Under article 7(1) of the Statute, a crime against humanity involves any of the acts enumerated in that article when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

43. Article 7(2)(a) of the Statute provides that an “attack directed against any civilian population” involves the multiple commission of acts referred to in article 7(1) of the Statute. Trial Chamber III has held that this indicates a quantitative threshold requiring “more than a few”, “several” or “many” acts, and that “[t]he number of the individual types of acts referred to in Article 7(1) is, however, irrelevant provided that each of the acts fall within the course of conduct and cumulatively satisfy the required quantitative threshold.”⁴⁴

44. Furthermore, the acts in question need not constitute a military attack.⁴⁵ The term “attack” refers to “a campaign or operation carried out against the civilian population”.⁴⁶

45. The civilian population comprises all persons who are civilians, as opposed to members of armed forces or other persons referred to in article 50 of Additional Protocol I⁴⁷ to the Geneva Conventions.⁴⁸ Potential civilian victims, moreover, can be of

⁴² Application, ICC-01/12-01/18-1-Red, para. 50.

⁴³ Application, ICC-01/12-01/18-1-Red, paras. 99-131.

⁴⁴ Judgment in *Bemba*, ICC-01/05-01/08-3343, para. 150.

⁴⁵ Elements of Crimes, “Crimes against humanity”, Introduction, para. 3.

⁴⁶ See *The Prosecutor v. Laurent Gbagbo*, Trial Chamber III, “Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo”, dated 30 November 2011, and French translation registered on 18 January 2012, ICC-02/11-01/11-9-Red, para. 30.

⁴⁷ International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of

any nationality or ethnicity or have any distinguishing features. The civilian population must also be the primary object, not merely a incidental victim, of the attack.⁴⁹

46. Article 7(2)(a) of the Statute provides that the attack against the civilian population must have been committed pursuant to or in furtherance of a State or organizational policy to commit such an attack.

47. The Chamber agrees with the previous decisions of this Court laying down the following:

the connection of the term “organisation” to the very existence of the attack and not to its systematic or widespread nature presupposes that the organisation has sufficient resources, means and capacity to bring about the course of conduct or the operation involving the multiple commission of acts referred to in article 7(2)(a) of the Statute. It therefore suffices that the organisation have a set of structures or mechanisms, whatever those may be, that are sufficiently efficient to ensure the coordination necessary to carry out an attack directed against a civilian population.⁵⁰

48. With regard to the term “policy”, the decisions of this Court have laid down the following:

a) it must be thoroughly organised and follow a regular pattern; b) it must be conducted in furtherance of a common policy involving public or private resources; c) it can be implemented either by groups who govern a specific territory or by an organisation that has the capability to commit a widespread or

12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, article 50; see Judgment in *Bemba*, ICC-01/05-01/08-3343, para. 152.

⁴⁸ International Committee of the Red Cross, Geneva Conventions, 12 August 1949, 75 UNTS 287 (“Geneva Conventions of 12 August 1949”).

⁴⁹ Judgment in *Bemba*, ICC-01/05-01/08-3343, para. 154; see also *The Prosecutor v. Germain Katanga*, Trial Chamber II, “Judgment pursuant to article 74 of the Statute”, 7 March 2014 (“Judgment in *Katanga*”), ICC-01/04-01/07-3436-tENG, para. 1105; see also Corrigendum to Decision Pursuant to Article 15 of the Rome Statute in the *Situation in the Republic of Côte d’Ivoire*, ICC-02/11-14-Corr, paras. 31-33; see also *The Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II, “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo” (“Decision on Confirmation of Charges in *Bemba*”), dated 15 June 2009, and French translation registered on 29 August 2009, ICC-01/05-01/08-424, paras. 76-78; see also *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, “Decision on the confirmation of charges”, dated 30 September 2008, and French translation registered on 12 November 2008, ICC-01/04-01/07-717 (“Decision on Confirmation of Charges in *Katanga*”), para. 399.

⁵⁰ Judgment in *Bemba*, ICC-01/05-01/08-3343, para. 158; see also Judgment in *Katanga*, ICC-01/04-01/07-3436-tENG, para. 1119.

systematic attack against a civilian population; and d) it need not be explicitly defined or formalised [...].⁵¹

49. A policy with an attack against a civilian population as such as its objective is evinced by the action taken by a State or organization. According to previous decisions of this Court, in most cases it is possible to infer that such a policy exists when a State or organization repeats certain acts in the same sequence, carries out preparatory activities or orchestrates and coordinates collective mobilizations.⁵²

50. Lastly, the course of conduct must have been carried out pursuant to, or in furtherance of, the State or organizational policy. Decisions of this Court have required the course of conduct to reflect a link to the State or organizational policy. This condition is satisfied where a perpetrator deliberately acts to further the policy, but also where a perpetrator engages in conduct envisaged by the policy, with knowledge thereof. There is no requirement that perpetrators be motivated by the policy, or that they themselves be members of the State or organization.⁵³

51. The Chamber notes that article 7(1) of the Statute requires the attack to be either widespread or systematic. The term “widespread” means that an attack was large-scale, massive, frequent, carried out collectively, of considerable seriousness and directed against a large number of victims. The assessment of this element is not exclusively quantitative or geographical, but must be made on the basis of the facts. Accordingly, a widespread attack may be “the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude”.⁵⁴

⁵¹ Corrigendum to Decision Pursuant to Article 15 of the Rome Statute in the *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-14-Corr, para. 43, citing Decision Pursuant to Article 15 of the Rome Statute in the *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, paras. 84-86, which references Decision on Confirmation of Charges in *Katanga*, para. 396, and Decision on Confirmation of Charges in *Bemba*, ICC-01/05-01/08-424, para. 81.

⁵² Judgment in *Bemba*, ICC-01/05-01/08-3343, para. 160; see also Judgment in *Katanga*, ICC-01/04-01/07-3436-tENG, para. 1109.

⁵³ Judgment in *Bemba*, ICC-01/05-01/08-3343, para. 161; see also Judgment in *Katanga*, ICC-01/04-01/07-3436-tENG, para. 1115.

⁵⁴ Judgment in *Bemba*, ICC-01/05-01/08-3343, para. 163; see also Judgment in *Katanga*, ICC-01/04-01/07-3436-tENG, para. 1123; see also Corrigendum to Decision Pursuant to Article 15 of the Rome Statute in the *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-14-Corr, para. 53.

52. Regarding the term “systematic”, the Court has held that “[a]n attack’s systematic nature can often be expressed through patterns of crimes, in the sense of non-accidental repetition of similar criminal conduct on a regular basis”.⁵⁵ Trial Chamber II was of the opinion that the adjective “systematic” brings to the fore the existence of a “pattern of repeated conduct or the recurring or continuous perpetration of interlinked, non-random acts of violence”.⁵⁶

53. Article 7 of the Statute requires the individual acts under article 7(1) of the Statute to have been committed “as part of” a widespread or systematic attack. The Court’s decisions have made clear that determining whether this nexus exists requires an objective assessment of the characteristics, nature, aims and consequences of the acts in question, regard being had to the attack both as a whole and in respect of its various components.⁵⁷

54. Lastly, article 7(1) of the Statute and the Elements of Crimes require the underlying acts to have been committed “with knowledge of the attack”. The perpetrator had to know that his or her conduct was part of the attack.⁵⁸

(b) Analysis

55. The material submitted by the Prosecutor refers to a number of acts forming part of the attack carried out by the members of Ansar Dine and AQIM between early April 2012 and January 2013 in Timbuktu.⁵⁹ Ansar Dine and AQIM waged a campaign in the course of which were committed acts of torture,⁶⁰ whipping⁶¹ and harassment of women,⁶² deprivations of liberty under inhumane conditions,⁶³

⁵⁵ Corrigendum to Decision Pursuant to Article 15 of the Rome Statute in the *Situation in the Republic of Côte d’Ivoire*, ICC-02/11-14-Corr, para. 54.

⁵⁶ Judgment in *Katanga*, ICC-01/04-01/07-3436-tENG, para. 1113.

⁵⁷ Judgment in *Bemba*, ICC-01/05-01/08-3343, para. 165; see also Judgment in *Katanga*, ICC-01/04-01/07-3436-tENG, para. 1124.

⁵⁸ Judgment in *Katanga*, ICC-01/04-01/07-3436-tENG, para. 1125.

⁵⁹ [REDACTED].

⁶⁰ MLI-OTP-0030-0351, p. 0359, paras. 32-36.

⁶¹ [REDACTED]; MLI-OTP-0009-1749, from 00:06:07:00 to 00:06:58:00.

⁶² [REDACTED].

rape,⁶⁴ sexual violence,⁶⁵ sexual slavery, other inhumane acts (e.g. in the context of forced marriage)⁶⁶ and one act of amputation.⁶⁷

56. Having regard to the totality of this evidence, the Chamber finds, in satisfaction of the requirement under article 7(2)(a) of the Statute, that a large number of acts were committed by the members of Ansar Dine and AQIM between April 2012 and January 2013, and that a number of persons suffered as a result of those acts. It also appears that, once the apparatus of enforcement was in place, the members of Ansar Dine and AQIM went to every length to subject the population of Timbuktu to their newly decreed rules and prohibitions and cracked down violently on any behaviour considered contrary to the new established order.

57. It further transpires from the Chamber's analysis of some of the material submitted by the Prosecutor that the target was the civilian population, and especially the women and girls within the civilian population.⁶⁸

58. The Chamber therefore finds reasonable grounds to believe that an attack was directed against a civilian population within the meaning of article 7(2)(a) of the Statute.

59. The material submitted further shows that the armed groups Ansar Dine and AQIM acted jointly and could be considered organized,⁶⁹ and that they had logistical and communication capabilities.⁷⁰ The material also shows that a "local government" was set up, with control and investigative bodies including police, the *Hesbah*

⁶³ [REDACTED].

⁶⁴ [REDACTED].

⁶⁵ [REDACTED].

⁶⁶ MLI-OTP-0001-2113, p. 2118, para. 24.

⁶⁷ MLI-OTP-0001-7037 at 00:46:10:20; [REDACTED].

⁶⁸ The Chamber notes the civilian status of certain witnesses who suffered the crimes alleged by the Prosecution (see, e.g., [REDACTED]). The Chamber also notes that footnote 267 of the Prosecution Application refers to Trial Chamber VIII's findings in *Al Mahdi*, "Judgment and Sentence" ("Judgment in *Al Mahdi*"), 27 September 2016, ICC-01/12-01/15-171, para. 31.

⁶⁹ [REDACTED]. The Chamber further notes that footnote 262 of the Prosecution Application refers to Trial Chamber VIII's findings in the Judgment in *Al Mahdi*, ICC-01/12-01/15-171, para. 49.

⁷⁰ MLI-OTP-0012-0356, pp. 358 and 359; [REDACTED].

[Islamic vice squad] and a court,⁷¹ and hierarchically structured management entrusted to an emirate or presidency.⁷²

60. The material submitted by the Prosecutor further shows that there was a defined policy to attack the civilian population. The policy was defined in that the armed groups wished to impose their authority and their new religious order.⁷³ The policy followed a regular pattern in that it involved strict rules, prohibitions and punishments and was calculated to oppress anyone who failed to demonstrate the required religiosity,⁷⁴ in particular women and girls.⁷⁵ The policy was put in place by groups that had the means to carry out the attack and the underlying crimes (e.g. via instructions,⁷⁶ vehicles,⁷⁷ patrols⁷⁸ and a prison⁷⁹). Lastly, the policy was widely promulgated via radio broadcasts, video interviews, speeches and propaganda documents.⁸⁰

61. Accordingly, having regard to the evidence, the Chamber finds reasonable grounds to believe that the attack directed against the civilian population of Timbuktu by Ansar Dine and AQIM was carried out pursuant to or in furtherance of an organizational policy within the meaning of article 7(2)(a) of the Statute. The Chamber may revisit this question during the proceedings on confirmation of the charges, having regard to the evidence that will be submitted and the observations

⁷¹ [REDACTED]. The Chamber further notes that footnote 126 of the Prosecution Application refers to Trial Chamber VIII's findings in the Judgment in *Al Mahdi*, ICC-01/12-01/15-171, para. 31.

⁷² [REDACTED].

⁷³ [REDACTED]; MLI-OTP-0011-0259, from 00:03:18:00 to 00:03:51:00, and from 00:04:09:00 to 00:04:25:00.

⁷⁴ [REDACTED]. The Chamber further notes that footnote 296 of the Prosecution Application refers to Trial Chamber VIII's findings in the Judgment in *Al Mahdi*, ICC-01/12-01/15-171, para. 31; [REDACTED].

⁷⁵ MLI-OTP-0009-1749, from 00:07:53:00 to 00:08:18:00; [REDACTED].

⁷⁶ [REDACTED].

⁷⁷ [REDACTED]; MLI-OTP-0012-0356.

⁷⁸ [REDACTED].

⁷⁹ [REDACTED].

⁸⁰ [REDACTED]; MLI-OTP-0038-0870, pp. 0871 to 0872, English translation at MLI-OTP-0039-0937, pp. 0939 and 0940; [REDACTED].

that will be filed by the Prosecutor, the defence team for Mr Al Hassan and any victims participating in the proceedings.

62. As to whether the attack was widespread, the material submitted by the Prosecutor shows that the attack took place on the scale of the local population of Timbuktu. The members of Ansar Dine and AQIM seem to have directed a widespread and systematic attack against the people of Timbuktu and, using force, dramatically disrupted their lives: they severely violated their rights and fundamental freedoms, subjected them by force to oppressive and discriminatory new rules, and harshly punished any breach of those rules.⁸¹ The material also shows that the acts were committed frequently, as evinced by the string of judgments delivered by one court.⁸² It transpires from the material submitted that the attack was carried out collectively by the members of Ansar Dine and AQIM, through the institutions that those armed groups had set up,⁸³ against the people of Timbuktu, over a period of approximately nine months between April 2012 and January 2013.⁸⁴

63. As to whether the attack was systematic, the material before the Chamber shows that the subjection of the population to these rules and prohibitions took the form of a campaign of crimes and persecution. The promulgation of a number of new prohibitions was systematic. In this connection, the Chamber notes the violent *modus operandi* that was generally adopted, including the patrols,⁸⁵ arrests,⁸⁶ interrogations,⁸⁷ detention conditions⁸⁸ and punishments,⁸⁹ which were sometimes public.⁹⁰ Lastly, the Chamber notes the targeting of certain persons on the basis of

⁸¹ [REDACTED].

⁸² For example [REDACTED].

⁸³ MLI-OTP-0012-0119, pp. 0121 and 0122; MLI-OTP-0012-0356, pp.0358 and 0359; Judgment ICC-01/02-01/15-171, 27 September 2016, para. 31.

⁸⁴ [REDACTED].

⁸⁵ [REDACTED].

⁸⁶ [REDACTED].

⁸⁷ [REDACTED].

⁸⁸ [REDACTED].

⁸⁹ [REDACTED].

⁹⁰ [REDACTED].

specific criteria, namely the members of the local population – women and girls in particular – perceived as not adhering to the vision of religion held by Ansar Dine and AQIM.⁹¹

64. In conclusion, the Chamber finds reasonable grounds to believe that the attack was widespread and systematic, as demonstrated, *inter alia*, by the extended period over which the crimes were committed (between April 2012 and January 2013), the number of reported victims, the means employed to commit the crimes and the institutions set up to carry them out, and, lastly, the general pattern of the way in which the crimes were committed.

65. Furthermore, the material submitted by the Prosecutor relating to the violent nature of the underlying crimes,⁹² their impact⁹³ and their purpose of imposing religious order⁹⁴ on the population shows that these acts formed part of a regular and organized course of conduct and were based on instructions from a structured organization.⁹⁵

66. Accordingly, the Chamber finds reasonable grounds to believe that the acts were committed “as part of” the attack, as required by article 7(1) of the Statute.

(c) Conclusions of the Chamber

67. In view of the foregoing, the Chamber finds that the contextual elements of the crimes against humanity alleged by the Prosecutor in her Application are satisfied, and that there are reasonable grounds to believe that the acts alleged were committed pursuant to or in furtherance of an organizational policy and occurred as part of the attack described above, directed against the civilian population of Timbuktu, within the meaning of article 7(1) of the Statute.

⁹¹ [REDACTED].

⁹² [REDACTED].

⁹³ [REDACTED].

⁹⁴ [REDACTED].

⁹⁵ [REDACTED].

2. Acts under article 7(1) constituting crimes against humanity committed as part of a widespread and systematic attack

68. The Prosecutor submits that there are reasonable grounds to believe that between April 2012 and January 2013 Mr Al Hassan committed crimes against humanity of acts of torture, rape, sexual slavery, persecution on religious and gender grounds and other inhumane acts against a large number of civilians;⁹⁶ these are crimes under article 7(1)(f), (g), (h) and (k) of the Statute.

(a) Torture (article 7(1)(f) of the Statute)

69. The elements of this crime under the Elements of Crimes are as follows:

Article 7 (1) (f)

Crime against humanity of torture

[...]

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. Such person or persons were in the custody or under the control of the perpetrator.
3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

70. The Prosecutor submits that there are reasonable grounds to believe that the members of the armed groups Ansar Dine and AQIM committed crimes against humanity of acts of torture. The Prosecutor refers to several methods of interrogation, physical violence and other brutal sanctions allegedly constituting cases of torture.⁹⁷ The Prosecutor alleges that, in some cases, violations of the new rules by the population were referred to the Islamic court, which then ordered physical punishments, such as whipping in public.⁹⁸ The Prosecutor alleges that members of

⁹⁶ Application, ICC-01/12-01/18-1-Red, para. 50, p. 19.

⁹⁷ Application, ICC-01/12-01/18-1-Red, paras. 44, 150, 153 and 226.

⁹⁸ Application, ICC-01/12-01/18-1-Red, paras. 44, 79, 81, 82, 119, 136, 149 and 220-221.

the Islamic police and the *Hesbah* sometimes meted out extrajudicial punishments on the spot.⁹⁹ The Prosecutor alleges that persons who were interrogated were beaten so violently that some victims lost consciousness and/or had to be hospitalized.¹⁰⁰

71. The material submitted by the Prosecutor indicates that persons in custody were subjected to physical violence and ill-treatment,¹⁰¹ in some cases at the hands of members of the Islamic police,¹⁰² and shows the violence of the beatings received.¹⁰³ It transpires from the evidence that inhabitants of Timbuktu who were accused of breaking certain rules, such as the rule against drinking alcohol or smoking tobacco, could be beaten in the street by the Islamic police or *Hesbah*.¹⁰⁴

72. The evidence shows, in particular, that women were insulted, beaten and whipped relentlessly, sometimes until they bled, at the market and in their homes, for reasons such as that they were not sufficiently covered.¹⁰⁵ It transpires from the evidence submitted by the Prosecutor that women were detained together in cramped facilities for several days without food or access to toilets.¹⁰⁶ Women who were detained or confined might be beaten.¹⁰⁷ For example, one woman who was confined in a house for a month was punched and kicked.¹⁰⁸

73. The material submitted further shows that the court sentenced offenders to, among other things, whipping.¹⁰⁹ The evidence submitted by the Prosecutor, including videos, newspaper articles and statements from witnesses and victims,

⁹⁹ Application, ICC-01/12-01/18-1-Red, para. 119.

¹⁰⁰ Application, ICC-01/12-01/18-1-Red, para. 303.

¹⁰¹ [REDACTED].

¹⁰² [REDACTED]; MLI-OTP-0024-2814, p. 2833.

¹⁰³ [REDACTED]; MLI-OTP-0024-2814, p. 2834; [REDACTED].

¹⁰⁴ [REDACTED].

¹⁰⁵ MLI-OTP-0024-2814, p. 2827, p. 2833; [REDACTED]; MLI-OTP-0001-4894, p. 4895; [REDACTED]; MLI-OTP-0011-0415, from 00:01:06:00 to 00:01:37:20; MLI-OTP-0009-1749; [REDACTED]; MLI-OTP-0024-2814, pp. 2834-2837; [REDACTED]; MLI-OTP-0001-4887, p. 4890.

¹⁰⁶ [REDACTED]; MLI-OTP-0001-4887, p. 4890; MLI-OTP-0033-4306.

¹⁰⁷ MLI-OTP-0001-4887, p. 4890; [REDACTED].

¹⁰⁸ MLI-OTP-0024-2814, p. 2831.

¹⁰⁹ [REDACTED].

shows that whippings were carried out in public.¹¹⁰ The material shows that in at least one case the hand of a person found guilty of theft was amputated.¹¹¹

74. On the evidence submitted by the Prosecutor, after the armed groups Ansar Dine and AQIM captured Timbuktu, they inflicted on a number of persons, through enforcement bodies such as an Islamic police force and an Islamic court, severe physical or mental pain or suffering which did not arise only from, and was not inherent in or incidental to, lawful sanctions.

75. In the light of the material considered, the Chamber finds reasonable grounds to believe that crimes against humanity of acts of torture under article 7(1)(f) of the Statute were committed in Timbuktu, Mali, between April 2012 and January 2013.

(b) Rape (article 7(1)(g) of the Statute)

76. The elements of this crime under the Elements of Crimes are as follows:

Article 7 (1) (g)-1

Crime against humanity of rape

[...]

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

77. The Prosecutor submits that there are reasonable grounds to believe that at least thirty cases of rape, attempted rape and other sexual violence occurred against

¹¹⁰ [REDACTED]; MLI-OTP-0001-4878; [REDACTED].

¹¹¹ [REDACTED]; MLI-OTP-0001-7037 at 00:46:10:20; [REDACTED].

women in custody.¹¹² The Prosecutor further alleges that approximately forty cases of rape, sexual slavery and other sexual violence occurred in the context of forced marriage.¹¹³

78. The material submitted by the Prosecutor indicates that women and girls in Timbuktu were raped when they were arrested in the street or at home and taken into custody.¹¹⁴ For example, the material shows that women and girls were locked in a cell together, and that the victim was then taken to a different room where she would be undressed, touched and raped.¹¹⁵ In other cases, women and girls arrested by members of Ansar Dine were taken to a nearby house and raped there by several men.¹¹⁶ The material also shows that women and girls were raped in the context of forced marriage.¹¹⁷

79. On the basis of this evidence, the Chamber finds reasonable grounds to believe that crimes against humanity of rape under article 7(1)(g) of the Statute were committed in Timbuktu, Mali, between April 2012 and January 2013.

(c) Sexual slavery (article 7(1)(g) of the Statute)

80. The elements of this crime under the Elements of Crimes are as follows:

Article 7 (1) (g)-2

Crime against humanity of sexual slavery

[...]

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

¹¹² Application, ICC-01/12-01/18-1-Red, para. 126. See also Application, ICC-01/12-01/18-1-Red, paras. 48 and 123.

¹¹³ Application, ICC-01/12-01/18-1-Red, para. 126.

¹¹⁴ MLI-OTP-0024-2814, pp. 2828-2832; MLI-OTP-0014-5534; [REDACTED].

¹¹⁵ MLI-OTP-0024-2814, pp. 2828-2832.

¹¹⁶ MLI-OTP-0024-2814, pp. 2828-2832.

¹¹⁷ See IV(A)2(c).

4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

81. The Prosecutor submits that there are reasonable grounds to believe that women and girls in Timbuktu were forced to marry members of Ansar Dine and AQIM.¹¹⁸ The Prosecutor alleges that, although the families of the victims generally received a dowry in exchange, they were not free to object to the members' wishes and were either forced to submit or did so out of fear of retaliation. The Prosecutor alleges that the purpose of these marriages was to legitimize the rapes and sexual violence perpetrated against the victims by the members of the armed groups, and to integrate the members of the armed groups into the population.¹¹⁹ As noted above, the Prosecutor alleges that about forty cases of rape, sexual slavery and other sexual violence took place in the context of forced marriage.¹²⁰

82. The material establishes that women and girls in Timbuktu were married against their will to members of Ansar Dine and AQIM and suffered sexual violence in the course of those forced marriages.¹²¹ The material further establishes that the parents and families were threatened into agreeing to marry their daughters to members of Ansar Dine and AQIM.¹²² The material also shows that the girls were then removed by force to the homes of their "husbands", where they were confined, beaten and raped not only by their "husbands" but by other Ansar Dine and AQIM members as well.¹²³ Those who fled, once recaptured, were beaten and whipped.¹²⁴ The material also shows that victims' families were harrassed in order to find the victims and ensure that they returned to their homes.¹²⁵ In at least one case, the matter was referred to the Islamic court, which ruled in favour of the Ansar Dine

¹¹⁸ Application, paras. 114, 168-170 and 124.

¹¹⁹ Application, ICC-01/12-01/18-1-Red, para. 124.

¹²⁰ Application, ICC-01/12-01/18-1-Red, para. 126.

¹²¹ [REDACTED]; MLI-OTP-0024-2814, pp. 2831, 2832 and 2838; [REDACTED]; MLI-OTP-0001-2113, p. 2118, para. 24.

¹²² MLI-OTP-0033-1978, p. 1989, para. 54; MLI-OTP-0024-2814, pp. 2831, 2832 and 2838.

¹²³ MLI-OTP-0024-2814, pp. 2829 and 2831; [REDACTED].

¹²⁴ MLI-OTP-0024-2814, p. 2829; [REDACTED].

¹²⁵ MLI-OTP-0024-2814, p. 2831.

or AQIM member.¹²⁶ Furthermore, the material shows that these forced marriages were entered into as cover to legitimize instances of kidnapping and repeated rape by members of Ansar Dine and AQIM.¹²⁷

83. Lastly, some material shows that these forced marriages had the purpose of integrating the members of Ansar Dine and AQIM into the local population.¹²⁸

84. In the light of the material considered, the Chamber finds reasonable grounds to believe that, in the context of these forced marriages, powers attaching to the rights of ownership were exercised over the women and girls concerned. The material indeed shows that they were married without their consent. In exchange, the members of Ansar Dine might pay a small sum of money to the family. They were then confined and put in chains to prevent them from fleeing. When they did manage to flee, they were tracked down. Furthermore, in the context of these forced marriages, women were beaten, whipped and raped repeatedly, not only by the men they had been forced to marry but also by other members of Ansar Dine and AQIM. In the course of these forced marriages, women and girls were subjected to restrictions on their freedom of movement, repeated sexual abuse and forced pregnancies; in sum, they were enslaved.

85. Having regard to the foregoing, the Chamber finds reasonable grounds to believe that crimes against humanity of sexual slavery in the context of forced marriage under article 7(1)(g) of the Statute were committed in Timbuktu, Mali, between April 2012 and January 2013.

(d) Persecution (article 7(1)(h) of the Statute)

86. The elements of this crime under the Elements of Crimes are as follows:

Article 7 (1) (h)
Crime against humanity of persecution
 [...]

¹²⁶ MLI-OTP-0024-2814, p. 2831.

¹²⁷ MLI-OTP-0001-2113, p. 2118, para. 24; [REDACTED].

¹²⁸ [REDACTED].

1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.
2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.
4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.
5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

87. The Prosecutor submits that there are reasonable grounds to believe that the armed groups Ansar Dine and AQIM committed crimes against humanity of persecution on religious and gender grounds.

88. The Prosecutor alleges, first, that the people of Timbuktu suffered violations of their fundamental rights, *viz.* the rights to freedom of religion, freedom of expression, freedom of thought, freedom of association and assembly, freedom of movement, equality, education, privacy, personal dignity, security and property.¹²⁹ The Prosecutor further alleges that those violations of the fundamental rights of the inhabitants of Timbuktu were accompanied by various crimes against humanity and war crimes which were generally committed by way of punishment by the members of Ansar Dine and AQIM.¹³⁰

89. The Prosecutor submits that the connection between those crimes (violence to person and outrages upon personal dignity, passing of sentences without previous judgment pronounced by a regularly constituted court, other inhumane acts, rape, sexual slavery and attacking monuments dedicated to religion) and the denial of the

¹²⁹ Application, ICC-01/12-01/18-1-Red, paras. 140-142.

¹³⁰ Application, ICC-01/12-01/18-1-Red, para. 132.

population's fundamental rights makes out the crime of persecution on religious grounds under article 7(1)(h) of the Statute.¹³¹

90. The Prosecutor also submits that the armed groups Ansar Dine and AQIM targeted the population of Timbuktu, which they perceived as not adhering to their vision of religion, and imposed their own vision; and that they specifically targeted women and girls on gender and religious grounds.¹³²

91. The Prosecutor asserts in that regard that amid this persecution women and girls were particular targets.¹³³ The Prosecutor alleges that women were hounded in the city streets, in schools, at the hospital and on their doorsteps.¹³⁴ The Prosecutor alleges that women were harassed daily and subjected to abusive, systematic searches, which were accompanied by humiliating and degrading measures on all manner of pretexts, including breach of the dress code.¹³⁵ The Prosecutor further submits that women were detained in inhumane conditions regardless of their age or physical condition and that some were raped or subjected to other sexual violence while in custody.¹³⁶

92. The material shows that, during their occupation of the city, Ansar Dine and AQIM had the objective of imposing their own vision of religion on the population of Timbuktu,¹³⁷ and that the institutions put in place by these armed groups tracked down any violators of the new religious rules,¹³⁸ with a particular focus on women.¹³⁹ The material shows in this connection that any form of belief or practice contrary to

¹³¹ Application, ICC-01/12-01/18-1-Red, paras. 134 and 153.

¹³² Application, ICC-01/12-01/18-1-Red, paras. 137-139 and 156.

¹³³ Application, ICC-01/12-01/18-1-Red, paras. 110, 114, 119, 121 to 125, 137 to 139, 162 to 174 and 205.

¹³⁴ Application, ICC-01/12-01/18-1-Red, paras. 121 and 165.

¹³⁵ Application, ICC-01/12-01/18-1-Red, paras. 121 and 138.

¹³⁶ Application, ICC-01/12-01/18-1-Red, paras. 123 and 166-167.

¹³⁷ MLI-OTP-0001-6924; MLI-OTP-0001-3418 and MLI-OTP-0001-3551; MLI-OTP-0001-7037, from 00:19:30 to 00:20:12 (transcript, MLI-OTP-0024-2962, p. 2978); MLI-OTP-0001-3271; MLI-OTP-0009-1749 from 00:11:00:00 to 00:12:30:00.

¹³⁸ [REDACTED].

¹³⁹ [REDACTED]; MLI-OTP-0015-0495, MLI-OTP-0033-5189; MLI-OTP-0002-0019; [REDACTED].

the rules they had established was prohibited and punished.¹⁴⁰ The material further shows that Ansar Dine and AQIM went about destroying any religious symbol, from a mere piece of jewellery to a building dedicated to worship, that was perceived as contrary to their vision of religion.¹⁴¹

93. The material also shows that radio broadcasts of serials and music were prohibited and that readings from the Koran and messages from the armed groups were required to be played instead.¹⁴² The evidence shows that smoking, drinking alcohol and watching television, among other things, were proscribed on pain of immediate beating.¹⁴³

94. The material further shows that the most severe restrictions and prohibitions applied to women.¹⁴⁴ As noted above,¹⁴⁵ the material also shows that women were particular targets of physical violence and of degrading and humiliating treatment, and that they were subjected to sexual violence and forced marriage as part of the aforementioned persecution.

95. Having regard to the evidence above, the Chamber finds reasonable grounds to believe that Ansar Dine and AQIM, acting contrary to international law, deprived the civilian residents of Timbuktu of the fundamental rights to freedom of expression, freedom of thought, freedom of association and assembly, freedom of movement, equality, education, privacy, personal dignity, security and property. Furthermore, the members of Ansar Dine and AQIM targeted, in the first place, the population of Timbuktu on religious grounds, in that they perceived it as not adhering to their vision of religion. In the second place, they targeted women and girls in Timbuktu on gender grounds, applying stricter rules to them and attacking

¹⁴⁰ [REDACTED].

¹⁴¹ See IV(B)2(d); [REDACTED].

¹⁴² [REDACTED]; MLI-OTP-0009-1749, from 00:04:10:20 to 00:04:15:30.

¹⁴³ MLI-OTP-0009-1749, from 00:04:10:20 to 00:04:15:30.

¹⁴⁴ [REDACTED]; MLI-OTP-0009-1749, from 00:07:21:00 to 00:08:12:00; MLI-OTP-0001-5409; [REDACTED]; MLI-OTP-0011-0415.

¹⁴⁵ See IV(A)2(a), (b) and (c).

them for the slightest purported breach of those rules, bringing about the loss of their social status within the civilian population of Timbuktu. The members of Ansar Dine and AQIM did this through the following crimes: torture,¹⁴⁶ cruel treatment,¹⁴⁷ rape,¹⁴⁸ sexual slavery,¹⁴⁹ other inhumane acts,¹⁵⁰ the passing of sentences without previous judgment pronounced by a regularly constituted court¹⁵¹ and the directing of attacks against monuments dedicated to religion.¹⁵²

96. The Chamber accordingly finds reasonable grounds to believe that the crime against humanity of persecution on religious and gender grounds under article 7(1)(h) of the Statute was committed in Timbuktu, Mali, between April 2012 and January 2013.

(e) Other inhumane acts (article 7(1)(k) of the Statute)

97. The elements of this crime under the Elements of Crimes are as follows:

Article 7 (1) (k)

Crime against humanity of other inhumane acts

[...]

1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute.
3. The perpetrator was aware of the factual circumstances that established the character of the act.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

98. The Prosecutor submits that the whippings and amputation meted out by the members of Ansar Dine and AQIM and the treatment of women and young women

¹⁴⁶ See IV(A)2(a) and IV(B)2(a).

¹⁴⁷ See VI(B)2(a).

¹⁴⁸ See IV(A)2(b) and IV(B)2(e).

¹⁴⁹ See IV(A)2(c) and IV(B)2(f).

¹⁵⁰ See IV(A)2(e).

¹⁵¹ See VI(B)2(c).

¹⁵² See VI(B)2(d).

in the context of forced marriage also constitute the crime of other inhumane acts.¹⁵³ The Chamber emphasizes in this regard that it will require the Prosecutor to state as precisely as possible in the document containing the charges pursuant to article 61(3) of the Statute the most appropriate legal characterization of the facts imputed to the person proceeded against. In the course of the proceedings on confirmation of the charges the Chamber will revisit the legal characterization to be given to the facts presented by the Prosecutor, having regard to the evidence submitted and observations filed by the Prosecutor, the defence team for Mr Al Hassan and any victims participating in the proceedings.

99. The Chamber recalls its findings with regard to the forced marriages above.¹⁵⁴ The Chamber considers that forced marriages may also constitute other inhumane acts¹⁵⁵ having a similar character with respect to article 7(1)(a) to (j) and intentionally causing great suffering or serious injury to body or to mental or physical health.

100. In the light of the material considered, the Chamber therefore finds reasonable grounds to believe that crimes against humanity, namely other inhumane acts intentionally causing great suffering or serious injury to body or to mental or physical health – including forced marriages – under article 7(1)(k) of the Statute, were committed in Timbuktu, Mali, between April 2012 and January 2013.

3. Conclusions of the Chamber

101. Having considered the Application and the evidence adduced in support of it, the Chamber is satisfied that the facts set out in detail in the Application and subsequently recited in this decision are proved to the standard of proof articulated in article 58(1)(a) of the Statute, being “reasonable grounds to believe” that the person committed a crime within the Court’s jurisdiction.

¹⁵³ Application, ICC-01/12-01/18-1-Red, paras. 50, 173 and 221. See also Application, ICC-01/12-01/18-1-Red, paras. 162-173.

¹⁵⁴ See IV(A)2(c).

¹⁵⁵ See *The Prosecutor v. Dominic Ongwen*, Pre-Trial Chamber II, “Decision on the confirmation of charges against Dominic Ongwen” (“Confirmation of Charges Decision in *Ongwen*”), 23 March 2016, and French translation registered on 9 October 2016, ICC-02/04-01/15-422-Red, paras. 87-95.

102. The Chamber is satisfied that there are reasonable grounds to believe that the aforementioned crimes were committed pursuant to or in furtherance of an organizational policy and occurred as part of the attack, described above, directed against the civilian population of Timbuktu, from early April 2012 to January 2013, within the meaning of article 7(1) of the Statute. The Chamber is therefore satisfied that there are reasonable grounds to believe that the contextual and specific elements of the aforementioned crimes against humanity are satisfied.

(B) War crimes (article 8 of the Statute)

103. In her Application, the Prosecutor submits that there are reasonable grounds to believe that Mr Al Hassan has incurred criminal responsibility for the commission of war crimes under article 8(2)(c)(i) (cruel treatment and torture), (c)(ii) (humiliating and degrading treatment), (c)(iv) (the passing of sentences without previous judgment pronounced by a regularly constituted court), (e)(iv) (intentionally directly an attack against buildings dedicated to religion and historic monuments) and (e)(vi) (rape and sexual slavery) of the Statute in Timbuktu, Mali, between April 2012 and January 2013,¹⁵⁶ and between late June 2012 and mid-July 2012 as regards the intentional directing of attacks against religious and historic buildings.

104. The Prosecutor states that the above crimes were committed within the context of an armed conflict not of an international character that existed in Mali between January 2012 and January 2013,¹⁵⁷ throughout the time frame of the facts alleged in the Application.¹⁵⁸

¹⁵⁶ Application, ICC-01/12-01/18-1-Red, para. 50.

¹⁵⁷ Application, ICC-01/12-01/18-1-Red, para. 51. See also paras. 35-36.

¹⁵⁸ Application, ICC-01/12-01/18-1-Red, para. 54. See also paras. 37-44 and 55-98.

1. Contextual elements of war crimes

(a) Applicable law

105. Pursuant to article 8(2)(d) and (f) of the Statute, the provisions of article 8(2)(c) and (e) of the Statute “appl[y] to [...] conflicts not of an international character”.¹⁵⁹ Article 8(2)(f) of the Statute further provides that such conflicts “take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups”.

106. The concept of armed conflict, not being defined in the Statute or in the Elements of Crimes, has been developed at other international courts. In that regard, pursuant to article 21(1)(b) of the Statute, the Court has previously¹⁶⁰ drawn on the decisions of the International Criminal Tribunal for the former Yugoslavia (“ICTY”):

70. [...] an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a

¹⁵⁹ Common Article 3 to the Geneva Conventions of 12 August 1949 opens as follows: “In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties [...]”; Article 1(1) of Additional Protocol II reads: “This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol” (International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609 (“Protocol II”)); Article 1(2) of Additional Protocol II provides: “This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.” Whereas Common Article 2 is limited to international armed conflicts between signatories, Common Article 3 affords minimal protection to organized armed groups involved in any conflict not of an international character. See Gerhard Werle, *Principles of International Criminal Law* (2009), 2nd edition, T.M.C. Asser Press, p. 366; Andrew J. Carswell, “*Classification des conflits: le dilemme du soldat*”, *Revue internationale de la Croix-Rouge*, vol. 91 (2009), p. 150; Gary D. Solis, *The Law of Armed Conflict* (2010), Cambridge University Press, p. 157.

¹⁶⁰ *The Prosecutor v. Thomas Lubanga*, Trial Chamber I, “Judgment pursuant to Article 74 of the Statute”, (“Judgment in *Lubanga*”), 18 March 2012, ICC-01/04-01/06-2842, paras. 531-533; Judgment in *Katanga*, ICC-01/04-01/07-3436-tENG, para. 1173.

peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.¹⁶¹

107. In the absence of a definition of the concept of “organized armed groups” in the Statute or Elements of Crimes, the Court has found that such groups must have a sufficient degree of organization to enable them to engage in a protracted armed conflict.¹⁶² Following Trial Chambers I and II, the Chamber does not consider it necessary for the Prosecutor to establish that the relevant armed groups exercised control over part of the territory of the State,¹⁶³ or for the organized armed groups to have been “under responsible command” as set out in article 1(1) of Additional Protocol II.¹⁶⁴ The Chamber follows Trial Chambers I and II in considering that:

[w]hen deciding if a body was an organised armed group (for the purpose of determining whether an armed conflict was not of an international character), the following non-exhaustive list of factors is potentially relevant: the force or group’s internal hierarchy; the command structure and rules; the extent to which military equipment, including firearms, are available; the force or group’s ability to plan military operations and put them into effect; and the extent, seriousness, and intensity of any military involvement. None of these factors are individually determinative. The test, along with these criteria, should be applied flexibly when the Chamber is deciding whether a body was an organised armed group, given the limited requirement in Article 8(2)(f) of the Statute that the armed group was “organized”.¹⁶⁵

¹⁶¹ ICTY, *Prosecutor v. Tadić*, Appeals Chamber, “Decision on the defence motion for interlocutory appeal on jurisdiction”, 2 October 1995, case no. IT-94-1-AR72.

¹⁶² Judgment in *Lubanga*, ICC-01/04-01/06-2842, para. 536; Judgment in *Katanga*, ICC-01/04-01/07-3436-tENG, para. 1185.

¹⁶³ Judgment in *Katanga*, ICC-01/04-01/07-3436-tENG, para. 1186, referring to Judgment in *Lubanga*, ICC-01/04-01/06-2842, paras. 536-537.

¹⁶⁴ Judgment in *Katanga*, ICC-01/04-01/07-3436-tENG, para. 1186, referring to Judgment in *Lubanga*, ICC-01/04-01/06-2842, paras. 536-537 and footnote 1635. This appears to be the approach adopted by Pre-Trial Chamber I in *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, “Decision on the confirmation of charges”, dated 29 January 2007, and French original registered on 2 February 2007 (“Decision on Confirmation of Charges in *Lubanga*”), ICC-01/04-01/06-803-tEN, paras. 232 and 233; Decision on Confirmation of Charges in *Bemba*, ICC-01/05-01/08-424, para. 234.

¹⁶⁵ Judgment in *Lubanga*, ICC-01/04-01/06-2842, para. 537; Judgment in *Katanga*, ICC-01/04-01/07-3436-tENG, para. 1186. See also ICTY, *Prosecutor v. Limaj et al.*, Trial Chamber, Judgment, 30 November 2005, case no. IT-03-66-T, para. 90; ICTY, *Prosecutor v. Haradinaj et al.*, Trial Chamber, Judgment, 3 April 2008, case no. IT-04-84-T, (“Judgment in *Haradinaj*”), para. 60; ICTY, *Prosecutor v. Boškoski*, Trial Chamber, Judgment, 10 July 2008, case no. IT-04-82-T, paras. 199-203.

108. To make out the existence of an armed conflict not of an international character under article 8(2)(d) and (f) of the Statute, the violence must go beyond internal disturbances such as riots or sporadic, isolated acts.¹⁶⁶

109. The Chamber notes that article 8(2)(f) of the Statute, which applies to article 8(2)(e) of the Statute, contains a second sentence additionally requiring that there be a “protracted armed conflict”. This is in contrast to article 8(2)(d) of the Statute, which applies to article 8(2)(c) and does not include such a requirement.

110. The Chamber notes that the concept of “protracted conflict” has not been explicitly defined in the decisions of this Court, but has generally been addressed within the framework of assessment of the intensity of the conflict. Nevertheless, when assessing whether an armed conflict not of an international character was protracted, different Chambers of this Court have emphasized the duration of the violence as a relevant factor.¹⁶⁷ The Chamber will apply the same principles in the present decision, pursuant to article 21(2) of the Statute.

¹⁶⁶ Judgment in *Katanga*, ICC-01/04-01/07-3436-tENG, paras. 1186 and 1187; Judgment in *Lubanga*, ICC-01/04-01/06-2842, para. 538. The requirement set out in article 8(2)(f) is also a jurisdictional requirement in that, if the necessary level of intensity is not reached, the alleged crimes do not fall within the jurisdiction of the Court. See Decision on Confirmation of Charges in *Bemba*, ICC-01/05-01/08-424, para. 225. The ICTY has held that the intensity of the conflict should be “used solely as a way to distinguish an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law” (ICTY, *Prosecutor v. Đorđević*, Trial Chamber, Public Judgment with Confidential Annex – Volume I of II, 23 February 2011, case no. IT-05-87/1-T, para. 1522). In order to assess the intensity of a potential conflict, the ICTY has indicated that a chamber should take into account, *inter alia*, the seriousness of attacks and potential increase in armed clashes, their spread over territory and over a period of time, the increase in the number of government forces, the mobilization and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and, if so, whether any resolutions on the matter have been passed (ICTY, *Prosecutor v. Mrkšić et al.*, Trial Chamber, Judgment, 27 September 2007, case no. IT-95-13/1-T, para. 407; Judgment in *Lubanga*, ICC-01/04-01/06-2842, para. 538).

¹⁶⁷ Judgment in *Lubanga*, ICC-01/04-01/06-2842, paras. 538, 545, 546 and 550, and Judgment in *Katanga*, ICC-01/04-01/07-3436-tENG, paras. 1217 and 1218. See also ICTY, Judgment in *Haradinaj*, para. 49, determining that the criterion of protracted armed violence has been interpreted in practice, including by the Trial Chamber itself in *Prosecutor v. Duško Tadić*, as referring more to the intensity of the armed violence than to its duration.

111. The Elements of Crimes require that the alleged criminal conduct “took place in the context of and was associated with an armed conflict”.¹⁶⁸ The Chamber endorses the approach of Trial Chamber II, which considered that:

[the conduct] must have been closely linked to the hostilities taking place in any part of the territories controlled by the parties to the conflict. The armed conflict alone need not be considered to be the root of the conduct [...] and the conduct need not have taken place in the midst of battle. Nonetheless, the armed conflict must play a major part in the perpetrator’s decision, in his or her ability to commit the crime or the manner in which the crime was ultimately committed.¹⁶⁹

112. Lastly, under the Elements of Crimes, a further common element of war crimes is that “the perpetrator was aware of factual circumstances that established the existence of an armed conflict”. For such purposes, the Introduction to article 8 in the Elements of Crimes provides the following clarification: (a) there is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international; (b) in that regard there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international; (c) there is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms “took place in the context of and was associated with”. The relevant awareness for these purposes is that of the perpetrators of the crimes.¹⁷⁰

(b) Analysis

113. The Prosecutor refers to the evidence presented in its application for a warrant for the arrest of Ahmad Al Faqi Al Mahdi¹⁷¹ (“Mr Al Mahdi”) and the Judgment in *Al Mahdi*, in which Trial Chamber VIII found that an armed conflict not

¹⁶⁸ See Elements of Crimes, article 8, War Crimes, Introduction, p. 14.

¹⁶⁹ Judgment in *Katanga*, ICC-01/04-01/07-3436-tENG, para. 1176.

¹⁷⁰ Judgment in *Bemba*, ICC-01/05-01/08-3343, para. 147.

¹⁷¹ Application, ICC-01/12-01/18-1-Red, para. 52.

of an international character had existed in Mali during the time frame of the facts alleged in that case, namely in June/July 2012.¹⁷²

114. Although Trial Chamber VIII found in its Judgment in *Al Mahdi* that an armed conflict not of an international character had existed in Mali during the time frame of the facts alleged in that case, namely between approximately 30 June 2012 and 11 July 2012,¹⁷³ the Chamber considers it necessary to deal with this question in respect of the case now before it.

115. The Chamber notes that, according to the material tendered by the Prosecutor, the conflict in Mali began in January 2012, when the *Mouvement national de libération de l’Azawad* [National Movement for the Liberation of Azawad] (“MNLA”) attacked the Ménaka military base in northeastern Mali,¹⁷⁴ from which time onward clashes between the Malian armed forces and armed groups – MNLA, Ansar Dine, AQIM and the *Mouvement pour l’unicité et le jihad en Afrique de l’Ouest* [Movement for Unity and Jihad in West Africa] (“MUJAO”) – became increasingly numerous and protracted and affected an ever wider area.¹⁷⁵

116. The material submitted by the Prosecutor further indicates that in the space of less than three months the northern part of Mali had come under the control of these armed groups.¹⁷⁶

117. The evidence presented by the Prosecutor indicates that in early April 2012, following news of an upcoming offensive against Timbuktu by the armed groups in late March 2012,¹⁷⁷ the civilian authorities and armed forces of Mali left the city.¹⁷⁸ The evidence indicates that in early April 2012 the MNLA,¹⁷⁹ followed by Ansar Dine

¹⁷² Application, ICC-01/12-01/18-1-Red, para. 53, citing para. 49 of the Judgment in *Al Mahdi*, ICC-01/12-01/15-171.

¹⁷³ Judgment in *Al Mahdi*, ICC-01/12-01/15-171, para. 49.

¹⁷⁴ MLI-OTP-0012-0098; MLI-OTP-0001-3379.

¹⁷⁵ [REDACTED]; MLI-OTP-0001-6924 from 00:01:59:10 to 00:05:43:00.

¹⁷⁶ [REDACTED]; MLI-OTP-0012-0098; [REDACTED]; MLI-OTP-0013-3500.

¹⁷⁷ [REDACTED].

¹⁷⁸ [REDACTED].

¹⁷⁹ [REDACTED].

and AQIM,¹⁸⁰ entered Timbuktu and took over the city.¹⁸¹ The latter groups then expelled the MNLA, which withdrew to a distance of a few kilometres.¹⁸²

118. The evidence indicates that in January 2013 Ansar Dine and AQIM fled Timbuktu as the Malian armed forces advanced with French troops in support.¹⁸³

119. The evidence indicates that, as early as March 2012 and throughout the months that followed, various regional and international bodies responded,¹⁸⁴ in particular the United Nations Security Council, which adopted several resolutions under Chapter VII of the Charter of the United Nations and authorized the deployment of the International Support Mission in Mali, replaced in July 2013 by the United Nations Multidimensional Integrated Stabilization Mission in Mali.¹⁸⁵

(c) Conclusions of the Chamber

120. In view of the totality of the material submitted, the Chamber finds reasonable grounds to believe that an armed conflict not of an international character existed in Mali between January 2012 and January 2013 between the forces of the Government of Mali and several armed groups including Ansar Dine and AQIM.

121. The Chamber further finds reasonable grounds to believe that Ansar Dine and AQIM were capable of being considered organized armed groups at the material time.¹⁸⁶ The Chamber notes in particular that they had the military capability to drive

¹⁸⁰ [REDACTED]; MLI-OTP-0011-0259, from 00:02:56:00 to 00:05:13:00, and from 00:06:50:00 to 00:07:32:00; transcript MLI-OTP-0033-5211, p. 5214, lines 76-85, and p. 5217, lines 200-208; MLI-OTP-0012-0157.

¹⁸¹ MLI-OTP-0012-0119, p. 0122; MLI-OTP-0012-0356, p. 0358; [REDACTED]; MLI-OTP-0012-0938.

¹⁸² MLI-OTP-0012-0157; [REDACTED]; MLI-OTP-0012-0938; [REDACTED].

¹⁸³ [REDACTED].

¹⁸⁴ MLI-OTP-0013-3500, p. 3507, para. 14.

¹⁸⁵ [REDACTED]; Resolution 2295 (2016), S/RES/2295 (2016), 29 June 2016, para. 16; Resolution 2364 (2017), S/RES/2364 (2017), 29 June 2017, para. 17.

¹⁸⁶ Given that the crimes alleged in the Application are attributed to the armed groups Ansar Dine and AQIM, the Chamber does not consider it necessary to determine whether MUJAO and the MNLA were *organized* armed groups. Moreover, the Chamber has found reasonable grounds to believe that there existed an armed conflict between the Malian armed forces and the armed groups Ansar Dine and AQIM.

out the Malian army, capture Timbuktu and exercise control over Timbuktu for approximately nine months.

122. With respect to the legal requirement that the armed violence reach a certain level of intensity to be distinguishable from mere internal disturbances and tensions, the Chamber considers that, as these groups exercised control over a large swathe of northern Mali for a protracted period – from January 2012 to January 2013 – there are reasonable grounds to believe that the conflict attained a sufficient degree of intensity.

123. The Chamber further finds reasonable grounds to believe that the acts attributed to Ansar Dine and AQIM took place in the context of that conflict and were associated with it. Ansar Dine and AQIM would not have been able to exercise control over the civilian population, and so commit the acts imputed to them, without first capturing Timbuktu. The justification given by these groups when the acts were committed was the same justification they gave for taking over Timbuktu and, more generally, northern Mali, namely the imposition of their vision of religion on the local civilian population.¹⁸⁷

124. Lastly, the Chamber finds reasonable grounds to believe, having regard to the fact that the members of Ansar Dine and AQIM, including Mr Al Hassan, were based in Timbuktu and operated according to the rules for governing the city dictated by Ansar Dine, that they were aware of the factual circumstances that established the existence of the armed conflict.

125. In view of these findings, the Chamber considers that the contextual elements of war crimes are established.

¹⁸⁷ MLI-OTP-0001-6924; MLI-OTP-0001-3418 and MLI-OTP-0001-3551; MLI-OTP-0001-7037, from 00:19:30 to 00:20:12 (transcript, MLI-OTP-0024-2962, p. 2978); MLI-OTP-0001-3271.

2. Underlying acts constituting war crimes committed in the context of and in association with an armed conflict not of an international character

126. The Prosecutor submits that there are reasonable grounds to believe that, in the context of the aforementioned armed conflict not of an international character, war crimes of violence to person and outrages upon personal dignity under article 8(2)(c)(i) and (ii) of the Statute, respectively, passing sentences without previous judgment pronounced by a regularly constituted court affording all judicial guarantees which are generally recognized as indispensable under article 8(2)(c)(iv) of the Statute and rape and sexual slavery under article 8(2)(e)(vi) of the Statute were committed in Timbuktu, Mali, between April 2012 and January 2013.¹⁸⁸

127. The Prosecutor also submits that there are reasonable grounds to believe that, in the context of that conflict, war crimes of intentionally directing attacks against buildings dedicated to religion and historic monuments under article 8(2)(e)(iv) of the Statute were committed in Timbuktu, Mali, between late June 2012 and mid-July 2012.¹⁸⁹

(a) Violence to person (article 8(2)(c)(i) of the Statute)

128. The corresponding elements under the Elements of Crimes are as follows:

Article 8 (2) (c) (i)-3

War crime of cruel treatment

[...]

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. Such person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities.
3. The perpetrator was aware of the factual circumstances that established this status.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

¹⁸⁸ Application, ICC-01/12-01/18-1-Red, para. 50, p. 21.

¹⁸⁹ Application, ICC-01/12-01/18-1-Red, para. 50, p. 21.

Article 8 (2) (c) (i)-4
War crime of torture

[...]

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.
3. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.
4. The perpetrator was aware of the factual circumstances that established this status.
5. The conduct took place in the context of and was associated with an armed conflict not of an international character.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

129. The Prosecutor submits that there are reasonable grounds to believe that torture was used to extract confessions from arrestees and that several persons were subjected to physical violence and ill-treatment during interrogations by the Islamic police.¹⁹⁰

130. First, the Chamber recalls its findings with regard to the facts constituting torture as a crime against humanity.¹⁹¹

131. Second, the Chamber notes that according to the material submitted by the Prosecutor the Islamic police had authority to use torture on arrestees who refused to cooperate or confess.¹⁹² The evidence shows that civilians living in Timbuktu were beaten, threatened and subjected to violent interrogation methods and imprisonment for indeterminate periods, sometimes without access to food or water, for the purpose of intimidating them and obtaining information or confessions.¹⁹³

¹⁹⁰ Application, ICC-01/12-01/18-1-Red, paras. 47, 50, 82, 92, 118, 125, 150, 151, 187, 211, 212, 213, 214, 225, 226, 245 and 268.

¹⁹¹ See IV(A)2(a).

¹⁹² [REDACTED].

¹⁹³ [REDACTED]; MLI-OTP-0024-2814, p. 2834; [REDACTED].

132. In the light of the material considered, the Chamber finds reasonable grounds to believe that the inhabitants of Timbuktu were subjected by the members of Ansar Dine and AQIM to violence to person consisting of cruel treatment and acts of torture causing severe physical or mental suffering or serious injury to body or to physical or mental health. The Chamber also finds reasonable grounds to believe that the perpetrators inflicted this treatment for purposes of obtaining information or confessions or intimidating and/or punishing the civilian population of Timbuktu, within the meaning of article 8(2)(c)(i), while Timbuktu was occupied by those groups, from early April 2012 to January 2013.

(b) Outrages upon personal dignity (article 8(2)(c)(ii) of the Statute)

133. The elements of this crime under the Elements of Crimes are as follows:

Article 8 (2) (c) (ii)

[...]

1. The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.
2. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.
3. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.
4. The perpetrator was aware of the factual circumstances that established this status.
5. The conduct took place in the context of and was associated with an armed conflict not of an international character.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

134. The Prosecutor alleges that the outrages upon personal dignity suffered by the people of Timbuktu took the form of whipping and torture in custody, depending on the case.¹⁹⁴ The Prosecutor alleges in this connection that the carrying

¹⁹⁴ Application, ICC-01/12-01/18-1-Red, para. 150, referring to paras. 211-214.

out of punishments was first announced over the radio or by criers¹⁹⁵ and took place in public for the purpose of terrorizing and humiliating the civilian population and reducing it to silence and obedience.¹⁹⁶

135. The Chamber recalls, first, its findings with regard to the facts constituting the crime against humanity of torture. The Chamber notes in particular the instances in which women were beaten in custody.¹⁹⁷

136. Some material also shows the humiliation and psychological violence that was inflicted on the population of Timbuktu by the armed groups Ansar Dine and AQIM.¹⁹⁸ The material submitted by the Prosecutor indicates that Ansar Dine and AQIM used criers to announce the carrying out of punishments, and that whippings were administered in public; in that regard it discloses the feelings of profound humiliation and shame experienced by the persons to whom such punishments were meted out.¹⁹⁹ Some, for example, had their private parts exposed in plain sight, compounding a sense of public humiliation.²⁰⁰

137. Lastly, the material shows that the inhabitants of Timbuktu gradually stopped leaving their homes, for fear of being beaten or humiliated by the members of Ansar Dine and AQIM.²⁰¹

138. In the light of the material considered, the Chamber finds reasonable grounds to believe that outrages upon the dignity of the inhabitants of Timbuktu under article 8(2)(c)(ii) of the Statute were committed by the members of Ansar Dine and AQIM during their occupation of the city between April 2012 and January 2013. The Chamber notes, in particular, the manner in which punishments were carried out,

¹⁹⁵ Application, ICC-01/12-01/18-1-Red, paras. 83 and 85.

¹⁹⁶ Application, ICC-01/12-01/18-1-Red, paras. 80, 117, 120, 121, 127 and 304.

¹⁹⁷ See, above, para. 72.

¹⁹⁸ MLI-OTP-0009-1749, from 00:06:07:00 to 00:06:58:00; [REDACTED].

¹⁹⁹ [REDACTED].

²⁰⁰ [REDACTED].

²⁰¹ MLI-OTP-0017-0027, from 00:01:44:00 to 00:02:27:30, MLI-OTP-0033-5228, p. 5231, lines 52-73, MLI-OTP-0017-0027, MLI-OTP-0033-5405, p. 5409, lines 63-74.

the insults and daily harassment suffered by women and the inhumane conditions and physical violence inflicted on persons in custody.

(c) Sentencing without due process (article 8(2)(c)(iv) of the Statute)

139. The elements of this crime under the Elements of Crimes are as follows:

Article 8 (2) (c) (iv)

War crime of sentencing or execution without due process

[...]

1. The perpetrator passed sentence or executed one or more persons.
2. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.
3. The perpetrator was aware of the factual circumstances that established this status.
4. There was no previous judgement pronounced by a court, or the court that rendered judgement was not “regularly constituted”, that is, it did not afford the essential guarantees of independence and impartiality, or the court that rendered judgement did not afford all other judicial guarantees generally recognized as indispensable under international law.

140. The Prosecutor submits that there are reasonable grounds to believe that between April 2012 and January 2013 sentences were passed on various persons by a court which was not regularly constituted and which afforded neither the essential guarantees of independence and impartiality nor the other judicial guarantees generally recognized as indispensable under international law.²⁰² The Prosecutor submits that those judicial guarantees include at a minimum the right to be informed without delay of the nature and cause of the crime alleged, the right to have the necessary means of defence, the right to be presumed innocent and the right not to be compelled to testify against oneself or to confess guilt.²⁰³

141. The Prosecutor alleges that some members of the court were also part of the executive of the city and that their role was in fact to represent and enforce the

²⁰² Application, paras. 50, 90 and 225.

²⁰³ Application, ICC-01/12-01/18-1-Red, footnote 236.

orders of Iyad Ag Ghaly (founder and leader of Ansar Dine) and Abou Zeid (member of AQIM and Iyad Ag Ghaly's appointee as governor of Timbuktu), and that these persons were in a position to interfere in the judicial process.²⁰⁴ The Prosecutor alleges that the court's judgments were generally issued summarily and without the opportunity of representation by counsel, and that imprisonment was employed as a means of coercion to compel prisoners to confess.²⁰⁵ The Prosecution further alleges that the sentences passed by the court were not predictable²⁰⁶ and consisted of physical violence such as whipping or, in one case, amputation.²⁰⁷

142. The material shows that a court was set up in April 2012, while the city of Timbuktu was occupied by Ansar Dine and AQIM.²⁰⁸

143. The material shows that in some instances members of the executive of the city of Timbuktu intervened in matters before the court, going so far as to take the place of the judges.²⁰⁹

144. As set out above, the material shows that torture was employed as a means of coercion to obtain confessions of guilt;²¹⁰ that the court ordered the use of physical violence to punish persons who were found guilty;²¹¹ and that persons were imprisoned for indeterminate periods in insalubrious conditions.²¹² One document further shows at least one instance of unpredictable sentencing.²¹³

145. In the light of the material considered, the Chamber finds reasonable grounds to believe that sentences were passed on members of the population of Timbuktu

²⁰⁴ Application, ICC-01/12-01/18-1-Red, para. 91.

²⁰⁵ Application, ICC-01/12-01/18-1-Red, para. 92.

²⁰⁶ Application, ICC-01/12-01/18-1-Red, para. 92.

²⁰⁷ Application, ICC-01/12-01/18-1-Red, para. 93.

²⁰⁸ [REDACTED].

²⁰⁹ [REDACTED]; MLI-OTP-0055-0267 and its translation MLI-OTP-0054-0335, p. 0336; [REDACTED].

²¹⁰ See IV(A)2(a) and IV(B)2(a).

²¹¹ See IV(A)2(a).

²¹² See IV(A)2(a).

²¹³ [REDACTED].

without previous judgment pronounced by a regularly constituted court affording the judicial guarantees generally recognized as indispensable, within the meaning of article 8(2)(c)(iv) of the Statute.

(d) Attacking protected objects (article 8(2)(e)(iv) of the Statute)

146. The elements of this crime under the Elements of Crimes are as follows:

Article 8 (2) (e) (iv)

War crime of attacking protected objects

[...]

1. The perpetrator directed an attack.
2. The object of the attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives.
3. The perpetrator intended such building or buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives, to be the object of the attack.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

147. The Prosecutor submits that there are reasonable grounds to believe that, between late June 2012 and mid-July 2012, during their occupation of the city, Ansar Dine and AQIM destroyed the mausoleums of Muslim saints of Timbuktu.²¹⁴ The Prosecutor alleges that 22 buildings dedicated to religion were so destroyed²¹⁵ and that attacks were directed against mausoleums, historic monuments and buildings dedicated to religion.²¹⁶ The Prosecutor claims that the civilian population of Timbuktu shared a common spiritual and religious heritage embodied by the mausoleums and that the mausoleums were an element of their collective identity.²¹⁷

²¹⁴ Application, ICC-01/12-01/18-1-Red, para. 152.

²¹⁵ Application, ICC-01/12-01/18-1-Red, para. 126.

²¹⁶ Application, ICC-01/12-01/18-1-Red, para. 154.

²¹⁷ Application, ICC-01/12-01/18-1-Red, para. 158.

The Prosecutor alleges that, when the members of Ansar Dine and AQIM fled Timbuktu in January 2013, they also destroyed “[TRANSLATION] precious manuscripts that were the pride of the city and the source of its renown, and which bore witness, like the mausoleums, to the rich history of Timbuktu and its inhabitants”.²¹⁸

148. The material before the Chamber shows that buildings, monuments, statuettes and manuscripts in the city of Timbuktu were destroyed by persons wielding a variety of tools and weapons.²¹⁹ The material shows that the Islamic police participated in the destruction of these objects.²²⁰ It transpires from the evidence that the monuments and buildings were dedicated to religion.²²¹ The material also shows that Ansar Dine and AQIM targeted these monuments, buildings and manuscripts for the purpose of repressing the religious practices of the population of Timbuktu and imposing on it their vision of religion.²²² The evidence confirms that the buildings, monuments and manuscripts played an important role in the lives of the inhabitants of Timbuktu and that their destruction was regarded by the local population as an aggression against their faith and their culture.²²³

149. The Chamber finds reasonable grounds to believe that buildings and monuments were destroyed or seriously damaged, and that ancient manuscripts were burned.

150. The Chamber finds reasonable grounds to believe that those buildings and monuments were dedicated to religion and that the ancient manuscripts were

²¹⁸ Application, ICC-01/12-01/18-1-Red, para. 129.

²¹⁹ MLI-OTP-0011-0324; MLI-OTP-0033-0923; [REDACTED].

²²⁰ [REDACTED].

²²¹ MLI-OTP-0001-6927; [REDACTED].

²²² MLI-OTP-0001-6927. See also [REDACTED]. See also MLI-OTP-0002-0757; translation MLI-OTP-0034-1363; [REDACTED].

²²³ MLI-OTP-0009-1749, from 00:07:53:00 to 00:08:18:00, and 00:13:47:00 to 00:16:25:00.

historic property. The Chamber also finds no indication that these were military objectives.

151. The Chamber finds reasonable grounds to believe that the buildings were specifically targeted by the perpetrators as objects of their attack precisely because of their religious and historical character.

152. Accordingly, the Chamber finds reasonable grounds to believe that the acts of destruction or damage committed against the buildings and monuments and against the ancient manuscripts constituted “attacks” within the meaning of article 8(2)(e)(iv) of the Statute.

(e) Rape (article 8(2)(e)(vi) of the Statute)

153. The elements of this crime under the Elements of Crimes are as follows:

Article 8 (2) (e) (vi)-1

War crime of rape

[...]

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent .
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

154. The Prosecutor submits that the acts of rape which she characterizes as crimes against humanity also constitute war crimes.²²⁴

155. The Chamber recalls its findings with regard to the facts constituting the crime against humanity of rape.²²⁵ In the light of the material considered, the Chamber finds

²²⁴ Application, ICC-01/12-01/18-1-Red, para. 50, p. 21.

²²⁵ See IV(A)2(b).

reasonable grounds to believe that war crimes of rape under article 8(2)(e)(vi) of the Statute were committed in Timbuktu, Mali, between April 2012 and January 2013.

(f) Sexual slavery (article 8(2)(e)(vi) of the Statute)

156. The elements of this crime under the Elements of Crimes are as follows:

Article 8 (2) (e) (vi)-2

War crime of sexual slavery

[...]

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

157. The Prosecutor submits that the acts of sexual slavery which she characterizes as crimes against humanity also constitute war crimes.²²⁶

158. The Chamber recalls its findings above with regard to the facts constituting the crime against humanity of sexual slavery.²²⁷ In the light of the material examined, the Chamber finds reasonable grounds to believe that crimes against humanity of sexual slavery, in the context of forced marriage, under article 8(2)(e)(vi) of the Statute, were committed in Timbuktu, Mali, between April 2012 and January 2013.

3. Conclusions of the Chamber

159. Having considered the Application and the evidence adduced in support of it, the Chamber is satisfied that the facts set out in detail in the Application and subsequently recited in this decision are proved to the standard of proof articulated in article 58(1)(a) of the Statute, being “reasonable grounds to believe” that the person committed a crime within the Court’s jurisdiction.

²²⁶ Application, ICC-01/12-01/18-1-Red, para. 50, p. 21.

²²⁷ See IV(A)2(c).

160. The Chamber is satisfied that there are reasonable grounds to believe that the acts above took place within the context of an armed conflict not of an international character and more specifically within the context of, and being associated with, the particular episode of the conflict constituted by the occupation of the city of Timbuktu by Ansar Dine and AQIM, as described above. The Chamber is accordingly satisfied that there are reasonable grounds to believe that the contextual and specific elements of the aforementioned war crimes are satisfied.

V. Are there reasonable grounds to believe that the crimes alleged by the Prosecutor were committed by Mr Al Hassan?

161. The Chamber notes that the alternative modes of liability which the Prosecutor attaches to the facts alleged against Mr Al Hassan in the Application are those contemplated in article 25(3)(a) (commission or direct or indirect co-perpetration), (b) (soliciting or inducing), (c) (aiding, abetting or otherwise assisting) and (d) (contributing in any other way) of the Statute. The Chamber will deal with these in succession.

(A) Mr Al Hassan's responsibility under article 25(3)(a) of the Statute

1. Direct commission

162. With regard to some of the crimes which are imputed to him in the Application, the Prosecutor submits that there are reasonable grounds to believe that Mr Al Hassan has incurred individual criminal responsibility as a "direct perpetrator" under article 25(3)(a) of the Statute. The Prosecutor relies on the fact that Mr Al Hassan participated directly in the carrying out of sentences of whipping which constituted torture and other inhumane acts intentionally causing victims great suffering or serious injury to body or to mental or physical health.²²⁸ [REDACTED].²²⁹

²²⁸ Application, ICC-01/12-01/18-1-Red, paras. 219, 220 and 232.

163. Article 25(3)(a) of the Statute provides that “a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person [...] [c]ommits such a crime [...] as an individual”. The Chamber recalls that in order for a person to be found criminally responsible as a direct perpetrator under article 25(3)(a) of the Statute he or she must, in his or her own person, “physically carry out the objective elements of the offence” with the requisite *mens rea*, being intent and/or knowledge as defined in article 30 of the Statute.²³⁰

164. Some of the material shows that in July 2012 Mr Al Hassan himself whipped [REDACTED].²³¹ [REDACTED].²³²

165. On the basis of the material examined, the Chamber finds reasonable grounds to believe that Mr Al Hassan is criminally responsible as a direct perpetrator under article 25(3)(a) of the Statute for acts of torture as a crime against humanity under article 7(1)(f) of the Statute and as a war crime under article 8(2)(c)(i) of the Statute [REDACTED].

2. Co-perpetration

166. The Prosecutor argues, first, that there are reasonable grounds to believe that Mr Al Hassan has incurred individual criminal responsibility as a “direct co-perpetrator” under article 25(3)(a) of the Statute for committing jointly with other persons some of the crimes alleged in the Application, “[TRANSLATION] beginning with the crime of persecution on religious grounds and persecution on gender grounds”, with the exception of the rapes committed against persons in custody at

²²⁹ [REDACTED].

²³⁰ See, for example, Decision on Confirmation of Charges in *Lubanga*, ICC-01/04-01/06-803-tEN, para. 332; Pre-Trial Chamber II, *The Prosecutor v. Bosco Ntaganda*, “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda” (“Decision on Confirmation of Charges in *Ntaganda*”), 9 June 2014, ICC-01/04-02/06-309, para. 136; Decision on Confirmation of Charges in *Katanga*, ICC-01/04-01/07-717, paras. 488 and 527; Decision on Confirmation of Charges in *Bemba*, ICC-01/05-01/08-424, para. 353.

²³¹ [REDACTED]; MLI-OTP-0051-0967, pp. 0975-0983, lines 257-548.

²³² [REDACTED].

the *Hesbah* headquarters.²³³ In seeking to establish Mr Al Hassan's responsibility the Prosecutor relies on the fact that: (i) there was a common plan between Mr Al Hassan and the various co-perpetrators – members of Ansar Dine and AQIM – to establish total control over the city by terror from early April 2012 to January 2013;²³⁴ (ii) Mr Al Hassan, as a key member and the *de facto* chief of the Islamic police, made an essential contribution to the common plan;²³⁵ and (iii) either it was Mr Al Hassan's intention that the objective elements of the crimes would be satisfied or he was aware that the crimes now the subject of the proceedings would occur in the ordinary course of implementing the common plan.²³⁶

167. Article 25(3)(a) of the Statute provides that "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person [...] [c]ommits such a crime [...] jointly with another [...] person".

168. For an individual to be found criminally responsible under the concept of "control over the crime",²³⁷ the Prosecutor must show that there was an agreement or

²³³ Application, ICC-01/12-01/18-1-Red, paras. 50 and 233.

²³⁴ Application, paras. 234-239.

²³⁵ Application, paras. 243-248.

²³⁶ Application, paras. 249-251.

²³⁷ The Court has accepted the notion of "control over the crime" as a distinguishing criterion between principals and accessories where a crime is committed by more than one person. For discussion of this definitional criterion, see, for example, *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction", 1 December 2014 ("Appeal Judgment in *Lubanga*"), ICC-01/04-01/06-3121-Red, paras. 469-472; Judgment in *Katanga*, paras. 1382-1396; Decision on Confirmation of Charges in *Lubanga*, ICC-01/04-01/06-803-tEN, paras. 327-338; Decision on Confirmation of Charges in *Katanga*, ICC-01/04-01/07-717, paras. 480-486; Decision on Confirmation of Charges in *Bemba*, ICC-01/05-01/08-424, paras. 347 and 348; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Pre-Trial Chamber II, "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", dated 23 January 2012, and French translation registered on 9 December 2014, ICC-01/09-01/11-373, paras. 289-290; Decision on Confirmation of Charges in *Lubanga*, ICC-01/04-01/06-803-tEN, paras. 326-341; Decision on Confirmation of Charges in *Katanga*, ICC-01/04-01/07-717, paras. 480-486; *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", dated 4 March 2009, and French translation registered on 10 February 2010, ICC-02/05-01/09-3, para. 210; *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Trial Chamber VII, "Judgment pursuant to Article 74 of the Statute", 19 October 2016 ("Judgment in *Bemba et al.*"), ICC-01/05-01/13-1989-Red, paras. 63-64.

common plan with other persons which led to the commission of the crime.²³⁸ The agreement or common plan may be express or implied, be previously arranged or materialize extemporaneously.²³⁹ Its existence may be inferred from subsequent concerted action of the co-perpetrators,²⁴⁰ and proven by direct evidence or inferred from circumstantial evidence.²⁴¹ It is this agreement or common plan that ties the co-perpetrators together and justifies reciprocal imputation of their respective acts.²⁴² Accordingly, participation in the commission of a crime without coordination with one's co-perpetrators falls outside the scope of co-perpetration.²⁴³

169. Further, the agreement or common plan need not be specifically directed at the commission of a crime and may include non-criminal goals.²⁴⁴ However, it is necessary for the agreement or common plan to involve a "critical element of criminality".²⁴⁵ During inquiry into the existence and scope of the agreement or common plan, guidance may be found in the manner in which the agreement or common plan is mirrored in the co-perpetrators *mens rea*. The question posed is whether the co-perpetrators know that the implementation of the common plan will lead to the commission of the crimes at issue.²⁴⁶ The standard for the foreseeability of

²³⁸ Appeal Judgment in *Lubanga*, ICC-01/04-01/06-3121-Red, paras. 445 and 446; Judgment in *Lubanga*, paras. 980 and 981; Decision on Confirmation of Charges in *Bemba*, para. 350; Decision on Confirmation of Charges in *Ruto*, para. 301; *The Prosecutor v. Charles Blé Goudé*, Pre-Trial Chamber I, "Decision on the confirmation of charges against Charles Blé Goudé", dated 11 December 2014, and French translation registered 20 January 2015, ICC-02/11-02/11-186 ("Decision on Confirmation of Charges in *Blé Goudé*"), para. 134.

²³⁹ Appeal Judgment in *Lubanga*, ICC-01/04-01/06-3121-Red, para. 445; Judgment in *Lubanga*, para. 988; Decision on Confirmation of Charges in *Katanga*, ICC-01/04-01/07-717, para. 523.

²⁴⁰ Decision on Confirmation of Charges in *Lubanga*, ICC-01/04-01/06-803-tEN, para. 345; Decision on Confirmation of Charges in *Katanga*, ICC-01/04-01/07-717, para. 523; Decision on Confirmation of Charges in *Ruto*, para. 301.

²⁴¹ Judgment in *Lubanga*, para. 988.

²⁴² Appeal Judgment in *Lubanga*, ICC-01/04-01/06-3121-Red, para. 445; Judgment in *Lubanga*, para. 981.

²⁴³ Decision on Confirmation of Charges in *Lubanga*, ICC-01/04-01/06-803-tEN, para. 343; Decision on Confirmation of Charges in *Katanga*, ICC-01/04-01/07-717, para. 522.

²⁴⁴ Decision on Confirmation of Charges in *Lubanga*, ICC-01/04-01/06-803-tEN, para. 344; Judgment in *Lubanga*, para. 984.

²⁴⁵ Appeal Judgment in *Lubanga*, ICC-01/04-01/06-3121-Red, para. 446; Judgment in *Lubanga*, paras. 984-985; Decision on Confirmation of Charges in *Ruto*, para. 301.

²⁴⁶ Judgment in *Lubanga*, para. 985; confirmed in Appeal Judgment in *Lubanga*, ICC-01/04-01/06-3121-Red, paras. 446 and 451.

future events is that of “virtual certainty”,²⁴⁷ meaning that in the context of the specificities of the case it was virtually certain that the implementation of the common plan would lead to the commission of the crimes.²⁴⁸

170. The Prosecutor must also show that the person made an essential contribution leading to the satisfaction of the material elements of the crime,²⁴⁹ with the resulting power to frustrate the commission of the crime.²⁵⁰ The requirement that the contribution be “essential” presupposes that only those to whom “essential” tasks have been assigned – and who consequently have the power to frustrate the commission of the crime by not performing their task – can be said to have joint control over the crime.²⁵¹ It is not necessary that each co-perpetrator personally and directly carry out the crime, or that he or she be present at the scene of the crime,²⁵² as long as he or she exercised, jointly with others, control over the crime. What is required is a normative assessment of the role and activities of the accused person in the specific circumstances of the case, taking into account the division of tasks.²⁵³ The appropriate yardstick in this assessment is whether the accused exercised control over the crime by virtue of his or her essential contribution.²⁵⁴ On this approach, a person who, for example, jointly with others formulates the relevant strategy or plan, becomes involved in directing or controlling other persons or determines the roles of

²⁴⁷ Judgment in *Bemba et al.*, ICC-01/05-01/13-1989-Red, para. 29.

²⁴⁸ Judgment in *Bemba et al.*, ICC-01/05-01/13-1989-Red, para. 67.

²⁴⁹ Appeal Judgment in *Lubanga*, ICC-01/04-01/06-3121-Red, paras. 468 and 469; Judgment in *Lubanga*, para. 989 *et seq.*; Decision on Confirmation of Charges in *Lubanga*, ICC-01/04-01/06-803-tEN, para. 346; Decision on Confirmation of Charges in *Bemba*, para. 350.

²⁵⁰ Appeal Judgment in *Lubanga*, ICC-01/04-01/06-3121-Red, paras. 7, 469 and 473; Decision on Confirmation of Charges in *Blé Goudé*, ICC-02/11-02/11-186, para. 135.

²⁵¹ Appeal Judgment in *Lubanga*, ICC-01/04-01/06-3121-Red, para. 473; Decision on Confirmation of Charges in *Lubanga*, ICC-01/04-01/06-803-tEN, para. 347.

²⁵² Appeal Judgment in *Lubanga*, ICC-01/04-01/06-3121-Red, paras. 458, 460, 465 and 466 (in support of this interpretation, the Appeals Chamber draws on article 25(3)(a), third alternative, of the Statute, which provides for the commission of a crime “through another person”. In this case, the perpetrator, who did not carry out the incriminated conduct, may bear the same or even more blameworthiness than the person who actually committed the crime); Judgment in *Lubanga*, paras. 1003-1005.

²⁵³ Appeal Judgment in *Lubanga*, ICC-01/04-01/06-3121-Red, paras. 466 and 473; Judgment in *Lubanga*, paras. 1000 and 1001.

²⁵⁴ Appeal Judgment in *Lubanga*, ICC-01/04-01/06-3121-Red, para. 473.

those involved in the crime would also be held accountable.²⁵⁵ The assumption is that the co-perpetrator may compensate for his or her lack of contribution at the execution stage of the crime if, by virtue of his or her essential contribution, the person nevertheless had control over the crime.²⁵⁶ The essential contribution can be made as early as the planning and preparation stage and as late as the execution stage of the crime.²⁵⁷

171. Lastly, as regards the subjective elements, (a) the suspect must satisfy the elements of intent and knowledge required under article 30 of the Statute with respect to the various material elements of the crime alleged; (b) the suspect and his or her co-perpetrators must all – mutually – know and accept that the material elements of the crimes will be brought about as a result of the implementation of the common plan (all of the co-perpetrators must be aware that the implementation of the common plan will bring about the material elements of the crimes, and they carry out their acts with the purposeful will [intent] to bring about the elements of the crimes or are aware that the objective elements will be brought about as a result of their actions in the ordinary course of events, those material elements being a virtually certain consequence of their acts); and (c) the suspect must be aware of the factual circumstances enabling him or her to exercise joint control over the crimes with the other co-perpetrators (this criterion requires the suspect to be aware of his or her essential role in the implementation of the crime and to be capable, owing to that essential role, of frustrating the implementation of the plan and accordingly the commission of the crime).²⁵⁸

²⁵⁵ Judgment in *Lubanga*, para. 1004.

²⁵⁶ Appeal Judgment in *Lubanga*, ICC-01/04-01/06-3121-Red, para. 469.

²⁵⁷ Appeal Judgment in *Lubanga*, ICC-01/04-01/06-3121-Red, para. 469; Decision on Confirmation of Charges in *Lubanga*, ICC-01/04-01/06-803-tEN, para. 348; Decision on Confirmation of Charges in *Katanga*, ICC-01/04-01/07-717, para. 526.

²⁵⁸ Decision on Confirmation of Charges in *Katanga*, ICC-01/04-01/07-717, paras. 527-538; Decision on Confirmation of Charges in *Lubanga*, ICC-01/04-01/06-803-tEN, paras. 349-367; Decision on Confirmation of Charges in *Ruto*, para. 333; Decision on Confirmation of Charges in *Bemba*, paras. 351-370; Judgment in *Bemba et al*, ICC-01/05-01/13-1989-Red, para. 70; see Appeal Judgment in *Lubanga*, ICC-01/04-01/06-3121-Red, paras. 447-451; Judgment in *Lubanga*, ICC-01/04-01/06-2842,

172. The material shows that there was a common plan among the members of the groups Ansar Dine and AQIM to take over the city of Timbuktu and impose their religious vision on the population by force.²⁵⁹ The material shows that this common plan existed before the capture of Timbuktu²⁶⁰ and that, after Timbuktu was captured by Ansar Dine and AQIM in early April 2012, these armed groups established a hierarchical command structure for the city,²⁶¹ based on control and enforcement bodies such as an Islamic court,²⁶² an Islamic police force²⁶³ and the *Hesbah*,²⁶⁴ whose task it was to impose the common plan by force, together with other bodies²⁶⁵ in charge of promulgating the new prohibitions.²⁶⁶

173. The material also shows that the common plan led to the commission of acts of torture, rape, sexual slavery, persecution on religious and gender grounds and other inhumane acts, violence to person, outrages upon personal dignity and the passing of sentences without previous judgment pronounced by a regularly constituted court affording all judicial guarantees generally recognized as indispensable, perpetrated in Timbuktu, Mali, between April 2012 and January 2013, and to attacks intentionally directed against buildings dedicated to religion and historic monuments, perpetrated in Timbuktu, Mali, between late June 2012 and mid-July 2012.²⁶⁷

174. The material further shows that the members of the common plan included, in particular: Iyad Ag Ghaly (the leader of Ansar Dine);²⁶⁸ Abou Zeid,²⁶⁹ Yahya Abou

paras. 1014-1018.

²⁵⁹ MLI-OTP-0001-6924; MLI-OTP-0001-3418 and MLI-OTP-0001-3551; MLI-OTP-0001-7037, from 00:19:30 to 00:20:12 (transcript, MLI-OTP-0024-2962, p. 2978); MLI-OTP-0001-3271; MLI-OTP-0009-1749 from 00:11:00:00 to 00:12:30:00.

²⁶⁰ [REDACTED]; MLI-OTP-0001-4193, p. 4194.

²⁶¹ [REDACTED].

²⁶² [REDACTED].

²⁶³ [REDACTED].

²⁶⁴ [REDACTED].

²⁶⁵ [REDACTED].

²⁶⁶ [REDACTED].

²⁶⁷ See IV.

²⁶⁸ [REDACTED]; MLI-OTP-0001-4193, p. 4194.

Hamam²⁷⁰ and Abdallah Al Chinguetti²⁷¹ (AQIM members and chiefs of Timbuktu); Ahmad Al Faqi Al Mahdi and Mohamed Moussa (first- and second-in-command of the vice squad);²⁷² Adama²⁷³ and Khaled Abou Souleymane²⁷⁴ (first and second Emirs of the Islamic police); Houka Houka (judge of the Islamic court);²⁷⁵ and Mr Al Hassan (*de facto* chief of the Islamic police).²⁷⁶

175. Moreover, the material shows that Mr Al Hassan was aware of the common plan to control the civilian population of Timbuktu and impose new prohibitions,²⁷⁷ and that he took part in the plan.²⁷⁸

176. In addition the material shows that Mr Al Hassan played a central role in Ansar Dine's Islamic police and that, by dint of that role, he made an essential contribution to the common plan from no later than early May 2012 to January 2013. The material establishes that Mr Al Hassan directed,²⁷⁹ ran the administrative affairs of,²⁸⁰ and on certain occasions represented the Islamic police,²⁸¹ and that Mr Al Hassan collaborated actively with the other bodies in charge of enforcement, such as the Islamic court,²⁸² and maintained close relationships with his superiors,²⁸³ making him a significant figure in the apparatus of enforcement in Timbuktu.

177. Lastly, it transpires from the material that Mr Al Hassan was aware that the alleged crimes would occur, and intended them to occur, in the ordinary course of

²⁶⁹ MLI-OTP-0001-2001, p. 2027; [REDACTED].

²⁷⁰ [REDACTED].

²⁷¹ [REDACTED].

²⁷² [REDACTED]; MLIOTP-0015-0406.

²⁷³ [REDACTED].

²⁷⁴ [REDACTED].

²⁷⁵ [REDACTED]; MLI-OTP-0033-4314, p. 4315.

²⁷⁶ [REDACTED].

²⁷⁷ [REDACTED].

²⁷⁸ [REDACTED].

²⁷⁹ [REDACTED].

²⁸⁰ [REDACTED].

²⁸¹ [REDACTED].

²⁸² [REDACTED].

²⁸³ [REDACTED].

the implementation of the common plan.²⁸⁴ He was also aware, by dint of his role as *de facto* chief of Islamic police,²⁸⁵ that he was making an essential contribution to the common plan and that he had the ability, owing to his role in the Islamic police, to frustrate the implementation of the plan and accordingly the commission of the crime.

178. In the light of the material considered, the Chamber finds, in the first place, reasonable grounds to believe that Mr Al Hassan is, jointly with other persons, criminally responsible as a direct co-perpetrator under article 25(3)(a) of the Statute for acts of torture, rape and sexual slavery, persecution on religious and gender grounds and other inhumane acts as crimes against humanity under article 7(1)(f), (g) and (h) of the Statute committed in Timbuktu, Mali, between April 2012 and January 2013. The Chamber further finds reasonable grounds to believe that Mr Al Hassan is, jointly with other persons, criminally responsible as a direct co-perpetrator under article 25(3)(a) of the Statute for violence to person and outrages upon personal dignity, the passing of sentences without previous judgment pronounced by a regularly constituted court affording all judicial guarantees which are generally recognized as indispensable, rapes and sexual slavery committed in Timbuktu, Mali, between April 2012 and January 2013, and for intentionally directing attacks against buildings dedicated to religion and historic monuments, committed in Timbuktu, Mali, between late June 2012 and mid-July, as war crimes under article 8(2)(c)(i), (ii) and (iv) of the Statute and article 8(2)(e)(iv) and (vi) of the Statute.

179. In the second place, the Prosecutor argues that there are reasonable grounds to believe that Mr Al Hassan has also incurred individual criminal responsibility as an “indirect co-perpetrator” under article 25(3)(a) of the Statute for having

²⁸⁴ [REDACTED].

²⁸⁵ [REDACTED].

participated in the commission of crimes against humanity of persecution on religious and gender grounds in Timbuktu from April 2012 to January 2013.²⁸⁶

180. Having found, according to the evidential standard provided in article 58 of the Statute, reasonable grounds to believe that Mr Al Hassan has incurred criminal responsibility as a direct co-perpetrator under article 25(3)(a) of the Statute, the Chamber takes the view that it is not necessary at this stage of the proceedings to consider Mr Al Hassan's responsibility as an indirect co-perpetrator. The Chamber may consider this form of liability during the proceedings on confirmation of the charges, having regard to the evidence that will be adduced and the submissions that will be filed by the Prosecutor, the defence team for Mr Al Hassan and any victims participating in the proceedings.

**(B) Mr Al Hassan's responsibility under article 25(3)(b) of
the Statute**

181. The Prosecutor argues that Mr Al Hassan has incurred individual criminal responsibility under article 25(3)(b) of the Statute for soliciting or encouraging the commission of the crimes alleged in the Application: (i) by characterizing the violence against the civilian population as justified by the enforcement of the new rules to achieve the objective of the armed groups Ansar Dine and AQIM; and (ii) by upholding the fact that the physical violence inflicted was justified by their vision of religion, and by extolling its effectiveness on the population.²⁸⁷

182. Pursuant to article 25(3)(b) of the Statute, "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person [...] [o]rders, solicits or induces the commission of a crime which in fact occurs or is attempted".

²⁸⁶ Application, ICC-01/12-01/18-1-Red, paras. 50, 252-264. The Prosecution does not impute to Mr Al Hassan the rapes committed against persons in custody at the *Hesbah* headquarters (Application, ICC-01/12-01/18-1-Red, para. 233).

²⁸⁷ Application, ICC-01/12-01/18-1-Red, paras. 265-270.

183. This form of liability is designed essentially to capture the conduct which consists of prompting another person to commit a crime within the jurisdiction of the Court.²⁸⁸

184. “Soliciting” and “inducing” are distinguished from liability for “ordering” insofar as they do not require the perpetrator to hold a position of authority vis-à-vis the physical perpetrator.²⁸⁹ The *actus reus* of “soliciting” or “inducing” can be done by any means, either by implied or express conduct.²⁹⁰ Furthermore, the accessory is held responsible only if the crime in fact occurs or is attempted.²⁹¹ It follows from the above that the instigator does not carry out the crime and has no control over it. Control over the crime lies entirely with the physical perpetrator.²⁹²

185. Moreover, the “soliciting” or “inducing” must have had a direct effect on the commission or attempted commission of the crime.²⁹³ This means that the conduct of the accessory needs to have a causal effect on the crime. If the physical perpetrator, however, was already determined to commit the crime, then the contribution of the

²⁸⁸ See Decision on Confirmation of Charges in *Ntaganda*, ICC-01/04-02/06-309, para. 153; *The Prosecutor v. Laurent Gbagbo*, Pre-Trial Chamber I, “Decision on the confirmation of charges against Laurent Gbagbo” (“Decision on Confirmation of Charges in *Gbagbo*”), dated 12 June 2014, and French translation registered on 21 July 2014, ICC-02/11-01/11-656-Red, para. 243; *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Pre-Trial Chamber II, “Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute”, dated 11 November 2014, and French translation registered on 25 November 2014, ICC-01/05-01/13-749, para. 34; Decision on Confirmation of Charges in *Blé Goudé*, ICC-02/11-02/11-186, para. 159; Decision on Confirmation of Charges in *Ongwen*, para. 42; *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Pre-Trial Chamber I, “Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi”, dated 24 March 2016, and French translation registered on 27 September 2016, ICC-01/12-01/15-84-Red, para. 25.

²⁸⁹ Decision on Confirmation of Charges in *Gbagbo*, para. 243; Decision on Confirmation of Charges in *Blé Goudé*, ICC-02/11-02/11-186, para. 159; Decision on Confirmation of Charges in *Ntaganda*, ICC-01/04-02/06-309, paras. 145 and 153; Pre-Trial Chamber II, *The Prosecutor v. Sylvestre Mudacumura*, “Decision on the Prosecutor’s Application under Article 58” (“Article 58 Decision in *Mudacumura*”), dated 13 July 2012, and French translation registered on 28 August 2012, ICC-01/04-01/12-1-Red, para. 6; Judgment in *Bemba et al.*, ICC-01/05-01/13-1989-Red, para. 77.

²⁹⁰ Judgment in *Bemba et al.*, ICC-01/05-01/13-1989-Red, para. 78.

²⁹¹ Decision on Confirmation of Charges in *Ntaganda*, ICC-01/04-02/06-309, para. 153; Judgment in *Bemba et al.*, ICC-01/05-01/13-1989-Red, para. 79.

²⁹² This element assists in demarcating the forms of liability under article 25(3)(b) of the Statute from those contained in article 25(3)(a) of the Statute.

²⁹³ Article 58 Decision in *Mudacumura*, ICC-01/04-01/12-1-Red, para. 63; Decision on Confirmation of Charges in *Ntaganda*, ICC-01/04-02/06-309, paras. 145 and 153.

instigator did not have a direct effect on the commission of the crime. In that case, the encouragement or moral support may be characterized as “abetting” within the meaning of article 25(3)(c) of the Statute.²⁹⁴

186. With regard to the subjective elements, the perpetrator must have meant to “solicit” or “induce” the commission of the crime, or must have been at least aware that the crime(s) would be committed “in the ordinary course of events” as a consequence of the fulfilment of his or her act or omission.²⁹⁵

187. The material shows that Mr Al Hassan, by dint of his authority as *de facto* chief of the Islamic police,²⁹⁶ his direct participation in the commission of the foregoing crimes,²⁹⁷ his participation in the common plan as set out above,²⁹⁸ and more specifically the arrangement of marriages,²⁹⁹ had a direct effect on the members of the Islamic police in their commission of the crimes.

188. It transpires from the material considered that Mr Al Hassan meant to “solicit” or “induce” the commission of the crimes alleged in the Application, or was at least aware that the crimes would be committed “in the ordinary course of events” as a consequence of the fulfilment of his or her act or omission.

189. Having regard to the foregoing, the Chamber finds reasonable grounds to believe that Mr Al Hassan is criminally responsible under article 25(3)(b) of the Statute for soliciting or inducing the commission of: acts of torture, rape and sexual slavery, persecution of the population of Timbuktu on religious and gender grounds and other inhumane acts as crimes against humanity under article 7(1)(f), (g) and (h) of the Statute, committed in Timbuktu, Mali, between April 2012 and January 2013. The Chamber further finds reasonable grounds to believe that Mr Al Hassan is

²⁹⁴ Judgment in *Bemba et al.*, ICC-01/05-01/13-1989-Red, para. 81, referring to ICTY case law.

²⁹⁵ Decision on Confirmation of Charges in *Ntaganda*, ICC-01/04-02/06-309, para. 153; Article 58 Decision in *Mudacumura*, ICC-01/04-01/12-1-Red, para. 6; Judgment in *Bemba et al.*, ICC-01/05-01/13-1989-Red, para. 82.

²⁹⁶ [REDACTED].

²⁹⁷ See, above, V(A)1.

²⁹⁸ See, above, V(A)2.

²⁹⁹ [REDACTED].

criminally responsible under article 25(3)(b) of the Statute for soliciting or encouraging the commission of: violence to person and outrages upon personal dignity, the passing of sentences without previous judgment pronounced by a regularly constituted court affording all judicial guarantees which are generally recognized as indispensable and acts of rape and sexual slavery as war crimes under article 8(2)(c)(i), (ii) and (iv) of the Statute, and under article 8(2)(e)(iv) and (vi) of the Statute, committed in Timbuktu, Mali, between April 2012 and January 2013.

(C) Mr Al Hassan's responsibility under articles 25(3)(c) and 25(3)(d) of the Statute

190. The Prosecutor submits that Mr Al Hassan has incurred individual criminal responsibility under article 25(3)(c) of the Statute by aiding, abetting or otherwise assisting in the commission of the foregoing crimes referred to in the Application. The Prosecutor further submits that Mr Al Hassan has incurred individual criminal responsibility under article 25(3)(d) of the Statute by intentionally contributing "in any other way" to the commission of the foregoing crimes referred to in the Application.³⁰⁰

191. Having found, according to the standard of proof provided in article 58 of the Statute, reasonable grounds to believe that Mr Al Hassan has incurred criminal responsibility under article 25(3)(a) and (b) of the Statute, the Chamber takes the view that it is not necessary at this stage of the proceedings to consider other forms of participation as an accessory to the foregoing crimes, such as those under article 25(3)(c) or (d) of the Statute. During the proceedings on confirmation of the charges, following the authority of the Appeals Chamber,³⁰¹ the Chamber will first consider whether the person charged is criminally responsible as a perpetrator under article 25(3)(a) of the Statute before contemplating other, accessorial modes of criminal liability. This issue will be canvassed during the proceedings on confirmation

³⁰⁰ Application, ICC-01/12-01/18-1-Red, paras. 271-287.

³⁰¹ Appeal Judgment in *Lubanga*, ICC-01/04-01/06-3121-Red, para. 462.

of the charges in the light of the evidence that will be presented and the submissions that will be filed by the Prosecutor, the defence and any victims participating in the proceedings. The Chamber recalls that it is for the Prosecutor, in conformity with regulation 52(c) of the Regulations of the Court, to state in the document containing the charges filed pursuant to article 61(3) of the Statute “the precise form of participation” in the offence which it imputes to the person proceeded against, detailing, for each form of participation, which crimes are imputed to that person under that mode of participation in the offence and the reasons why that mode of participation has been chosen for those crimes.

VI. Are the conditions under article 58(1)(b) of the Statute for arresting Mr Al Hassan satisfied?

192. Under article 58(1)(b) of the Statute, the Pre-Trial Chamber may issue a warrant of arrest only if it is satisfied that the arrest appears necessary: (i) to ensure the person’s appearance at trial; (ii) to ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) to prevent the person from continuing with the commission of the crime.

193. The Prosecutor submits that, although Mr Al Hassan is currently in custody in Bamako, the three alternative criteria under article 58(1)(b) for issuing a warrant of arrest are met.³⁰² In support of her submission the Prosecutor argues that (i) were it not for his arrest, Mr Al Hassan would still be active with the armed groups; (ii) in view of his contact with Iyad Ag Ghaly, he has means to abscond; and (iii) he could use his contacts with the armed groups to interfere with the collection of evidence and to intimidate prosecution witnesses.³⁰³

194. The Appeals Chamber has held that “[w]hat may justify arrest [...] under article 58 (1) (b) of the Statute is that it must ‘appear’ to be necessary. The question

³⁰² Application, ICC-01/12-01/18-1-Red, para. 306.

³⁰³ Application, ICC-01/12-01/18-1-Red, paras. 307-309.

revolves around the possibility, not the inevitability, of a future occurrence”³⁰⁴ (when addressing the risk of further offending). The Appeals Chamber has held that the seriousness of the crimes allegedly committed is a relevant factor, given this may make a person more likely to abscond.³⁰⁵

195. Pre-Trial Chamber I, sitting in its previous composition, stated that issuing a summons to appear for a person currently detained by national authorities would be contrary to the object and purpose of article 58(7) of the Statute. It concluded that the possibility provided by the Statute to issue a summons to appear with conditions restricting liberty clearly indicates that a summons to appear is intended to apply only to persons who are not already being detained.³⁰⁶

196. The Appeals Chamber has also held that the financial status of an individual is a relevant factor in determining whether that person would have the means to abscond or even to interfere with the investigation or the safety of witnesses.³⁰⁷ In addition, it held that the length of the sentence a suspect is likely to receive if convicted is a further incentive for him to abscond.³⁰⁸

³⁰⁴ *The Prosecutor v. Germain Katanga*, Appeals Chamber, “Judgment in the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release” (“Appeal Judgment on Interim Release in *Ngudjolo*”), dated 10 June 2008, and French translation registered on 1 April 2009, ICC-01/04-01/07-572, para. 21; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber, “Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled ‘Decision on application for interim release’” (“Appeal Judgment of 16 December 2008 on Interim Release in *Bemba*”), 16 December 2008, and French translation registered on 3 November 2009, ICC-01/05-01/08-323, paras. 55 and 67.

³⁰⁵ Appeal Judgment on Interim Release in *Ngudjolo*, ICC-01/04-01/07-572, para. 21, and Appeal Judgment of 16 December 2008 on Interim Release in *Bemba*, ICC-01/05-01/08-323, para. 55.

³⁰⁶ Decision Pursuant to Article 58(7) of the Statute in *Harun*, ICC-02/05-01/07-1-Corr, para. 120.

³⁰⁷ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber, “Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’”, dated 2 December 2009, and French translation registered on 2 October 2012 (“Appeal Judgment of 2 December 2009 on Interim Release in *Bemba*”), ICC-01/05-01/08-631-Red, para. 74.

³⁰⁸ Appeal Judgment of 2 December 2009 on Interim Release in *Bemba*, ICC-01/05-01/08-631-Red, para. 70.

197. The Prosecutor's arguments satisfy the Chamber that the arrest of Mr Al Hassan is necessary to ensure his appearance before it and to ensure that he does not obstruct or endanger the investigation or proceedings. The Chamber takes particular note of the fact that, had he not been arrested, Mr Al Hassan would still be active with the armed groups.³⁰⁹ The Chamber further notes that Mr Al Hassan has previously fled to Libya,³¹⁰ where locating him could be difficult. Moreover, it is not inconceivable that Iyad Ag Ghaly – founder of Ansar Dine and now leader of a new armed group combining various armed groups from northern Mali – and the armed groups under his authority could mobilize sufficient resources and means to enable Mr Al Hassan to abscond and thereby elude prosecution.³¹¹

198. The Chamber is also satisfied that, were he to be left at large, Mr Al Hassan would be able to interfere with prosecution witnesses, having regard to the fact that on the day he was arrested he was still in the service of Iyad Ag Ghaly and the armed groups.³¹² The Chamber notes in this regard the statements of Ansar Dine members declaring their intention to harm any persons suspected of cooperating with international organizations and claiming responsibility for attacks perpetrated on United Nations facilities and Malian and French forces.³¹³

³⁰⁹ [REDACTED].

³¹⁰ [REDACTED].

³¹¹ MLI-OTP-0041-0041, p. 0043; MLI-OTP-0042-0178, from 00:02:36:00 to 00:03:06:00; MLI-OTP-0043-0498.

³¹² [REDACTED].

³¹³ MLI-OTP-0037-1394; MLI-OTP-0022-0404; MLI-OTP-0035-0908, p. 0909; MLI-OTP-0050-0038, pp. 0042-0043, para. 18; MLI-OTP-0046-8902, p. 8906, para. 17; MLI-OTP-0046-9012; and MLI-OTP0046-9011.

FOR THESE REASONS, THE CHAMBER

GRANTS the Application.

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

[signed]

Judge Péter Kovács

Presiding Judge

[signed]

Judge Marc Perrin de Brichambaut

[signed]

Judge Reine Adélaïde Sophie

Alapini-Gansou

Dated this 22 May 2018

At The Hague, Netherlands