

[Decision on the Confirmation of Charges in the Al Hassan case : Expert Commentary - Part II](#)

Par:

[Amoulgam Azé Kerté](#)

[Cheick Bougadar Diakite](#)

[Gonzague Dupas](#)

[Julia Grignon](#)

[Moussa Bienvenu Haba](#)

[Fannie Lafontaine](#)

[Claire Magnoux](#)

[Catherine Savard](#)

[Érick Sullivan](#)

[Philippe Tremblay](#)

Language English

Le:

7 July 2020

[Part I [here](#)]

2. More Accurate Charges

The charges against Al Hassan are highly accurate. The Prosecutor seems to have wanted to avoid repeating certain mistakes made in the context of the trial of Jean-Pierre Bemba, [acquitted](#) by the ICC Appeals Chamber in June 2018.

In that case, Jean-Pierre Bemba's conviction at trial was based in part on specific criminal acts that went beyond the facts and circumstances described in the charges. The Appeals Chamber found a violation of Article 74(2) of the [Rome Statute](#) (Bemba, [Judgement on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgement pursuant to Article 74 of the Statute'](#) [['Judgement'](#)], paras. 98-116) and affirmed that specific criminal acts, as factual allegations relating to the underlying offences, are an integral part of the charges. As such, they can only be used to establish the guilt of an accused if they are explicitly confirmed or brought into the charges by way of amendment in accordance with Article 61(9) of the [Rome Statute](#) (Bemba, [Judgement](#), paras. 110-112, 114-116).

In contrast, in the Al Hassan case, the [DCC](#) refers limitedly and exhaustively to the criminal acts that underline each confirmed charge (paras. 350, 352, 354-355, 515, 531, 655, 657, 659 and 707; pp. 451 and 465). In addition to meeting the accused's right to be informed with precision of the charges he will face at trial ([Rome Statute](#), art. 67(1)(a)), such an approach resonates with one of the main functions of the procedure of confirmation of charges, namely the determination of the precise framework of the case to be referred to trial ([Rome Statute](#), art. 61(7)(a) and 61(11)).

3. Fair Application of International Humanitarian Law

Confirmation of the charges of war crimes requires both the existence of an armed conflict and a nexus between that armed conflict and the facts alleged against the accused ([DCC](#), para. 200; Katanga, [Judgement](#), para. 1176). To this end, the reasoning of the Pre-Trial Chamber I in Al Hassan is consistent with international humanitarian law.

First, the Chamber concluded that there was an armed conflict that was not of an international character. In its analysis, it correctly relied on the findings of the Trial Chamber VIII in the Al Mahdi case, as the territorial and temporal framework of this case was similar to that of the Al Hassan case ([DCC](#), (para. 204; Al Mahdi, [Judgement](#), para. 49). It also identified the armed groups involved, namely the [Malian regular national forces](#), [Ansar Dine](#), [AQIM](#), [MNLA](#) and [MUJAO](#). It then highlighted their respective levels of organisation, as well as the

intensity of the violence and the prolonged nature of the armed conflict ([DCC](#), paras. 206-214). It noted that following the fighting between the Malian government armed forces and the Ansar Dine/AQIM/MUJAO alliance, which began on 17 January 2012 in the Gao region, government forces withdrew from the three northern regions of Gao, Kidal and Timbuktu. The insurgent alliance then took control until 2013, while driving the MNLA out of the area. The Malian government, with the support of France, did not regain control of the three regions until January 2013 ([DCC](#), para. 219).¹⁰¹ A UN peace mission was then set up ([DCC](#), para. 219). A two-step peace agreement was reached in 2015 and 2018, but did not prevent numerous clashes and ceasefire violations ([DCC](#), paras. 215-220).

It is notable that the judges removed the term ‘occupation’ from their analysis, thus definitively resolving the ambiguity resulting from the use of this notion by both Pre-Trial Chamber I and Trial Chamber VIII in the Al Mahdi case (Al Mahdi, [Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi](#), paras. 44, 45, p. 24; Al Mahdi, [Judgement](#), paras. 33, 36, 53). This concept, which had also been taken up by the OTP, only exists in the context of international armed conflicts (the Chamber highlights this in the [DCC](#), para. 225, footnote 588, p. 105). The judges rightly preferred the notion of ‘control’ of certain areas by armed groups. Note, however, the use of the term ‘combatants’ ([DCC](#), paras. 201, 213, 216), whose use in this case can be criticised since it is also reserved for international armed conflicts. Although there is no French equivalent of the term ‘fighters’, used in English to distinguish members of government armed forces (i.e. combatants in the legal sense) from members of armed groups, the Court could still have avoided the use of the term by referring to ‘members of armed groups’, for example, or by proposing another useful term for their designation.

The defence had attempted to withdraw the period from 1 April 2012 to 28 January 2013 from the Court’s analysis, arguing ‘the absence of armed fighting in Timbuktu during the period of the facts relating to the case’ ([DCC](#), para. 221, [our translation]). However, in a development that is in line with the previous jurisprudence of both the ICC and the *ad hoc* tribunals, the Pre-Trial Chamber found that the conflict persisted at the time of the perpetration of the acts alleged against the accused. At best, it concedes a ‘provisional truce’ ([DCC](#), para. 223 [our translation]), which does not reflect the end of the conflict or a period of peace. To do so, the Chamber relies on the date of the signing of the peace agreement (15 May 2015) and on the conclusion that Article 8 of the [Rome Statute](#) applies ‘from the beginning of armed violence, until a peace agreement has been reached throughout the territory under the control of one of the parties, even in the absence of actual armed fighting on that part of the territory’ ([DCC](#), para. 222 [our translation]). In other words, the Chamber confirms that the disappearance of one of the criteria necessary for the characterisation of a situation as non-international armed conflict, namely the organisation of the parties and the intensity of the violence, does not lead to the conclusion that this conflict is over. This requires a return to peace, of which a peace agreement may be the beginning of testimony ([DCC](#), paras. 221-224).

Version en français [ici](#).

¹⁰¹ It should be noted that this element is [controversial](#).



CPIJ
PCJI

CANADIAN PARTNERSHIP
FOR INTERNATIONAL JUSTICE

PARTENARIAT CANADIEN
POUR LA JUSTICE INTERNATIONALE

Twitter: [@CPIJ_PCJI](https://twitter.com/CPIJ_PCJI)

The Partnership is funded by a 5-year grant from the Social Sciences and Humanities Research Council of Canada as well as cash and in-kind contributions from each of the partner organisations.



Social Sciences and Humanities
Research Council of Canada

Conseil de recherches en
sciences humaines du Canada

Canada

Image: "[File:International Criminal Court building \(2016\) in The Hague.png](#)" by [OSeveno](#) licensed under [CC BY-SA 4.0](#)

Sujet:

[Cour pénale internationale](#)