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TRIAL CHAMBER X

**Before: Judge Antoine Kesia-Mbe Mindua, Presiding
Judge Tomoko Akane
Judge Kimberly Prost**

SITUATION IN THE REPUBLIC OF MALI

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

Public with Confidential Annexes A and B

**Public redacted version of “THIRD CORRIGENDUM TO “FINAL DEFENCE
BRIEF, 17 April 2023, ICC-01/12-01/18-2485-Conf””**

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

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1 INTRODUCTION

1. Mr Al Hassan should be fully acquitted of the charges the Prosecution has brought against him. This case is a misstep by the Prosecution, and the Chamber should not follow its path into error. Its allegations are predicated on an exaggerated and specious portrait that does not correspond to the complex reality of what transpired in Mali in 2012. They are also predicated on flawed assumptions of *Shari'a* and a contaminated and muddled evidential foundation.

2. From the outset, the Prosecution based its charges on a fictional concept. A unified “Ansar Dine/AQIM” entity did not exist. There were two distinct groups, within which existed various sub-groups, all acting for diverse reasons and seeking to achieve different objectives. There were no direct and prolonged hostilities between these groups or against the Malian State. In a volatile area that had experienced chronic State abandonment, poverty, under-development, and State-abetted ethnic cleansing, different groups and individuals tried to deal with the fallout from the events in Libya. Within this context, Ansar Dine was established by individuals known for fighting for justice and against oppression, with the goal of unifying and protecting the local populations in Northern Mali through the application of shared traditional values. The application of such values through *Shari'a* does not equal to a common criminal purpose.

3. The word “*Shari'a*” derives from the Arabic for “the clear, well-trodden path to water.”¹ It refers to the law “revealed” to its followers through the texts of the *Quran* and the teachings of the Prophet (peace be upon him). *Shari'a* is applied throughout the world and throughout Northern Mali. Mali’s Constitution may have been secular in name, but in content, it was based on *Shari'a*; in any case, it was suspended before the charged events. Timbuktu was not a cosmopolitan wonderland: It was a socially conservative city controlled by religious notables opposed to any practices inconsistent with these traditionalist values. Before, during, and after 2012, *Qādīs* (individuals empowered to resolve disputes under *Shari'a*) and *sheikhs* (religious leaders) applied *Shari'a* to resolve disputes in matters ranging from marriages, divorce, adultery, theft, and murder. The Malian authorities were aware they exercised this role. Indeed, the Malian authorities recently awarded Houka Houka, a judge on the Islamic Tribunal in 2012 and well-known *Qādī*, a certification of recognition for his contributions to peace in Timbuktu.²

4. In April 2012, there were no lawyers, judges, or police in Timbuktu. They left before Ansar Dine arrived, for reasons that cannot be placed at the feet of Ansar Dine. There was a *coup d'état* in Bamako and the *Mouvement National pour la Liberation d'Azawad* (MNLA) were at

¹ “[Sharia](#)”. *Vocabulary.com* (last accessed on 17 April 2023).

² [MLI-D28-0006-9109](#), [MLI-D28-0006-9122](#).

the gates, bringing with them a reputation for racism and rape. The Malian State gave the keys of the town to the Arab militia, instilling fear in the Songhaï population that the Arab militia would embark on a “settling of scores” due to Timbuktu’s bloodied past. Within the framework of the pyramid of needs governing daily life in 2012, *Shari’a* was the path to water for a population thirsty for justice. Its application brought a recognised and well-trodden manner of regulating disputes and deterring crime through shared religious values derived from the Malikite doctrine (*Madhab*), the school of Islam followed in Timbuktu well before 2012. This system was not imposed: The local population welcomed the arrival of Ansar Dine. They were viewed as “saviours”, bringing to the abandoned local population security, essential services, protection from other groups, and a commitment to equal treatment and protection.

5. During the charged time-period, Ansar Dine navigated the same rocky path to governance as any other newly fledgling entity. Though individual exactions may have been committed by undisciplined individuals, there was no organisational policy intended to harm the civilian population; to the contrary, the goal was to protect them and improve their standards of living. When concerns or complaints were brought to the leaders’ attention, they swiftly consulted with local representatives to find and implement solutions.

6. The Prosecution was misdirected when it set its sights on Mr Al Hassan as a member of the Islamic Police. Locals, who were mostly ignorant of the group’s internal structures and hierarchy, mistook the Islamic Police (the *Shurta*) – which mainly functioned like a normal police service – for the Morals Brigade (*Hesbah*), the section responsible for devising and enforcing the moral rules. The charges were formulated on flawed evidence that, when tested, demonstrated no credible link to Mr Al Hassan and his daily activities in the Islamic Police.

7. In its drive to promote secular justice, it appears that the Prosecution may have failed to research or investigate the role of the Islamic Police within *Shari’a* proceedings. Within this context, the Islamic Police was the equivalent of a letter box: If it received complaints, it was obliged to notarise them and transmit them to the Islamic Tribunal. It had no influence over proceedings at the Tribunal, which conducted its own investigations. Members of the Police also had no power to question or refuse to implement Tribunal decisions.

8. Scrutiny of the evidence tested at trial reveals that Mr Al Hassan was no more than another member of the local population who became part of the governance framework necessary to keep Timbuktu afloat. He was part of the backdrop, not the equation. He had no decision-making powers or authority to influence matters which were already *fait accompli* at the time he started working with the Police. Locals knew his name and face because he was helpful and

kind. They came to him when they had problems, and he did what he could to help solve them. His contributions were directed towards lawful aims that assisted the local population in a non-discriminatory manner. His actions should not incur criminal responsibility.

9. Through this brief, the Defence has demonstrated that Mr Al Hassan should be acquitted of all charges because:

- He was prosecuted on the basis of materially defective charges;
- The Prosecution has not demonstrated the existence of necessary threshold elements, such as the existence of a non-international armed conflict or widespread or systematic attack against the civilian population;
- The Prosecution has not proven the underlying alleged criminal incidents through evidence satisfying the standard of beyond reasonable doubt;
- The elements of the charged offences have not been fulfilled;
- The Prosecution has not established the charged offences were committed pursuant to the charged common purpose; and
- The Prosecution has not established that Mr Al Hassan made culpable contributions to the charged incidents, particularly in light of clear Defence evidence that Mr Al Hassan was operating under the constraints of duress, superior orders, and mistakes of law or fact.

2 Mr Al Hassan was prosecuted on the basis of defective charges

10. Mr Al Hassan's right to be informed promptly and in detail of the nature, cause, and content of the charges was not satisfied due to significant defects in the charges. These defects concern the impermissibly vague nature of the alleged common purpose, the absence of information or particulars concerning critical material facts, and the defective way the charges were pleaded. Nor were these defects cured by auxiliary documents or evidence submitted at trial. As a result, the Defence was prevented from exercising key rights under Article 67(1) of the Statute. When the Defence raises the issue of defects at trial, the burden falls on the Prosecution to demonstrate lack of prejudice against the Defence.³ The appropriate remedy is to dismiss all parts of the charges impacted by these defects.⁴

2.1 The impermissibly vague and broad nature of the pleaded common purpose

11. The confirmed charges fail to disclose a common purpose with a "critical element of criminality".⁵ This element requires that the purpose entail either the commission of criminal acts or that the commission of such acts are a "virtually certain" consequence of the plan's execution.⁶ The material facts in the charges must establish this critical connection between a

³ [Renzaho AJ](#), para. 125.

⁴ [Semanza TJ](#), paras 50-52, 61.

⁵ [Lubanga TJ](#), paras 984, 1012.

⁶ [Lubanga TJ](#), para. 984; [Al Hassan Confirmation Decision](#), fn. 2127.

common purpose and the alleged crimes.⁷ In the absence of such particulars, the charges should be dismissed.⁸

12. The Confirmation Decision defines the alleged common purpose in the following manner:⁹

la Chambre estime que les membres d'Ansar Dine/AQMI avaient un projet qui leur était propre (même s'il s'intégrait dans un projet plus large d'instaurer un état islamique dans la région de l'Azawad): celui d'instaurer à Tombouctou et dans sa région un nouvel appareil de pouvoir fondé sur l'idéologie religieuse d'Ansar Dine/AQMI et de contraindre, par le recours à la force et à des menaces d'utilisation de la force, la population civile de Tombouctou à s'y conformer (le « dessein commun »).

13. From the outset, the charges are unclear as to whether the critical element of criminality relates to the alleged common purpose (to install an apparatus of power based on religious ideology) or the means through which the common purpose was implemented (by force or by recourse to force). If the charges should be understood as being based on the purpose of a group or groups, then the charges fail to clearly specify what is meant by the “apparatus of power”. Given that adherence to a religious ideology or belief cannot attract criminal liability,¹⁰ the charges are deficient as they fail to establish or clarify (i) the critical criminal elements of this alleged purpose; (ii) the specific nature of the religious ideology attributed to and shared by both Ansar Dine and AQIM; (iii) if the common purpose was limited to the installation of this power apparatus or extended to subsequent acts of administration; and (iv) if extended, which subsequent acts of administration should be deemed as criminal components of the common purpose or as a virtually certain consequence of the purpose.

14. If the critical element of criminality derives from use of force or the threat to use force to establish this apparatus of power, then the pleadings are impermissibly vague as concerns (i) the nature of force and the material facts underpinning the criminality of the use of force; (ii) whether the common purpose also concerns the use of force after the apparatus of power was established and if so, in which particular circumstances; and (iii) whether members of the common purpose shared an intent about the manner in which force would be used or threatened.

15. The confirmed charges are also impermissibly silent concerning whether the “shared purpose” extends to specific measures and conduct used to implement the purpose. In practice, it is unclear if the allegation is that there was a generic common purpose implemented by sub-groups through specific means shared by those sub-groups, or if the larger group knew and

⁷ [Ntagerura TJ](#), paras 50-52.

⁸ [Ntagerura TJ](#), paras 50-52.

⁹ [Al Hassan Confirmation Decision](#), para. 957.

¹⁰ [International Covenant on Civil and Political Rights; CCPR General Comment No. 22: Article 18](#), para. 1.

intended for specific means to be executed by each sub-group. This distinction is important due to the question as to whether the “critical element of criminality” relates to the purpose or the means through which the alleged common purpose was implemented. If the latter, the group acts with a criminal purpose if it shares the intention to use specific criminal means to achieve this purpose. Otherwise, the group simply encompassed some individual criminal members.

16. These defects in the charges as concerns the criminal nature of the alleged common purpose were not cured by timely disclosure of consistent and coherent evidence or argumentation in auxiliary documents,¹¹ such as the Self-Contained Charges or Trial Brief. The Self-Contained Charges replicate language from the Confirmation Decision and do not provide any further assistance.¹² The above ambiguities are also not resolved by the evidence. To the contrary, both Prosecution and Defence evidence are replete with examples concerning the disjunct between the objective of Abu Zeid and Droukdel to protect and respect the local population as compared to the unsanctioned actions of undisciplined individuals.¹³

17. The flawed nature of the alleged common purpose infects all the confirmed charges. This confusion and prejudice is enhanced by charges of rape in detention, which the Prosecution Trial Brief expressly concedes “did not fit within the proclaimed ideology or the rules imposed by the Organisation in Timbuktu.”¹⁴ The defining feature of Article 25(3)(d) is the existence of shared intent to commit a crime or activity that will result in a crime: Each group member must know and intend for the crime to occur in the ordinary course of events. Alleged crimes committed by individual members of the organisation are insufficient to invoke Article 25(3)(d). Causation must be accompanied by the knowledge and intent of each group member alleged to act with the common purpose.¹⁵ Not only has the Prosecution failed to plead that Mr Al Hassan knew of and intended for the occurrence of rape in detention, but it has also pleaded the opposite – that the commission of such rapes was antithetical to the common purpose they allege. This aspect of the charges is therefore defective due to vagueness, the absence of pleaded material facts, and the inherently self-contradictory nature of the allegation.¹⁶

¹¹ [Lubanga AJ](#), para. 129.

¹² [Decision on Charges](#), para. 4.

¹³ **P-0152**: T-032, p. 25, line 23 – p. 25, line 20 (Conf); **P-0150**: T-089, p. 65, lines 5-25 (Conf); T-113, p. 13, line 8-16 (Conf); **P-0654**: T-132, p. 25, lines 16-25 (Conf).

¹⁴ [OTP Trial Brief](#), para. 256 (emphasis added).

¹⁵ [Al Hassan Confirmation Decision](#), para. 940.

¹⁶ [Prlić AJ](#), para. 24.

2.2 Absence of information regarding identity and composition of the “group” and its linkage to Mr Al Hassan

18. The Prosecution seeks to consolidate distinct groups with different motivations into a single group with one alleged purpose. As a result, Mr Al Hassan’s ability to conduct his defence was fatally compromised by the absence of material details concerning the identities of group members alleged to have shared and executed the charged common purpose.¹⁷ These details are germane to the proper application of Article 25(3)(d), which requires the Prosecution to demonstrate the same shared criminal intent amongst group members¹⁸ and that the charged crimes were physically perpetrated by Mr Al Hassan as a member of the group.¹⁹ While it is futile to identify and name all members of the “group”, it is nevertheless necessary to define group characteristics with sufficient clarity and specificity to allow for a meaningful defence.²⁰ In practice, this means that the identity of any individual who is alleged to have acted as the link between Mr Al Hassan and the commission of the charged incidents should be described with sufficient precision to allow for verification as to **first**, whether the individual was a member of the group or groups that shared the common purpose and **second**, whether Mr Al Hassan knew this at the time he made the alleged contribution. The language of the confirmed charges does not fulfil this requirement.

19. Rather than identifying perpetrators by name, section, or group, the confirmed charges use generic terms such as “Islamists” and “jihadists”.²¹ Evidence was adduced at trial that multiple “Islamists” and Islamic groups were present in Timbuktu.²² There was also a degree of fluidity between the groups, with individuals moving between the MNLA and Ansar Dine, or AQIM and Ansar Al Sharia (which was also composed of former members of the Arab militia).²³ The Prosecution did not demonstrate a shared criminal common purpose between groups. It cannot be assumed that any alleged Islamist or jihadist was a member of Ansar Dine or AQIM or of the “group” adhering to the charged common purpose. The charges also fail to specify whether all members of Ansar Dine or AQIM or only certain leaders or chiefs shared the common

¹⁷ See [Ruto/Sang Decision on Updated DCC](#), para. 35.

¹⁸ [Al Hassan Confirmation Decision](#), para. 940; [Katanga TJ](#), para. 1627.

¹⁹ [Katanga TJ](#), para. 1628.

²⁰ [Nizeyimana AJ](#), para. 325.

²¹ [Al Hassan DCC](#), paras 750, 787, 802.

²² **P-0065**: T-037, p. 13, lines 18-23 (Conf).

²³ **P-0654**: T-135, p. 22, lines 1-20 (Conf); **P-0150**: T-117, p. 7, lines 7-22 (Conf); **D-0605**: T-192, p. 36, line 25 – p. 37, line 6; T-192, p. 48, lines 6-9 (Conf); **D-0511**: [MLI-D28-0005-9310-R01](#) at 9314, para. 47; [MLI-D28-0006-2629-R01](#) at 2637, para. 47 (Translation).

purpose, making it impossible to ascertain if each perpetrator was alleged to have acted pursuant to the charged common purpose.²⁴

20. The confirmed charges also fail to clearly define the relationship between Ansar Dine and AQIM: that is, whether it can be considered “one uniform group” sharing an identical purpose in all aspects concerning the conception and execution of the common purpose. The label “AQIM” is also used throughout even though it encompassed diametrically opposed groups adhering to different leaders (i.e. Moktar Belmoktar as opposed to Abu Zeid) with different ideologies and approaches.

2.3 Insufficient detail concerning the nature of Mr Al Hassan’s contributions and linkage to the common purpose or the commission of charged crimes

21. The DCC does not specify how Mr Al Hassan is alleged to have intentionally contributed to each crime. Instead, the DCC sets out a general role²⁵ and general actions²⁶ without linking either to specific incidents or charged crimes or describing the “particular acts” or “course of action” that triggers his responsibility for each incident.²⁷ Such generality is insufficient, as Mr Al Hassan can only be convicted for crimes falling within the alleged common purpose if he made a culpable contribution to these specific crimes.²⁸ This linkage requirement stems from the clear wording in Article 25(3)(d)²⁹ and is a distinguishing feature between Article 25(3)(d) and the notion of joint criminal enterprise (JCE) as applied at the ad hoc tribunals.³⁰

22. Article 25(3)(d) requires actual knowledge and intentionality. The essence of common purpose liability is a mutual awareness, and mutual acceptance, that implementation of the common purpose will, in the ordinary course of events, result in the commission of specific crimes under the Statute.³¹ The nature of the common purpose must be such that the members are not only fully aware of its existence, but can foresee that taking steps to implement it will result in the commission of the charged crimes in question. Knowledge alone of general crimes is insufficient to establish liability under Articles 25 and 30 of the Statute because Article 30(2)(b) refers to specific consequences: The defendant must know and intend that his or her conduct will result in a specific consequence (“that person means to cause that consequence”)

²⁴ See e.g. [Krajišnik AJ](#), paras 156-157.

²⁵ [Al Hassan DCC](#), para. 417.

²⁶ [Al Hassan DCC](#), para. 419.

²⁷ [Lubanga AJ](#), paras 122-123, referring to [Blaškić AJ](#), paras 210-213.

²⁸ [Al Hassan Confirmation Decision](#), para. 945; [Katanga TJ](#), para. 1632.

²⁹ [Rome Statute](#), Art. 25(3)(d) (“[i]n any other way contributes to the commission or attempted commission of such a crime”).

³⁰ [Al Hassan Confirmation Decision](#), para. 943, fn. 2348.

³¹ [Banda Confirmation Decision](#), para. 150.

which occurs in the ordinary course of events. Trial Chamber II in the *Katanga* case observed in the context of Article 25(3)(d) that the defendant must have known that his actions would contribute to the commission of each specific crime.³² Article 25(3)(d)(ii) also only applies where the crimes are “part and parcel” of the common purpose (“where such activity or purpose involves the commission of a crime”).³³ As such, not just any contribution would suffice to incur responsibility under Article 25(3)(d).³⁴

23. Consistent with *Katanga*, the ICTY and ICTR have also extended to the elements of aiding and abetting the requirement that the accused must know that his or her conduct will contribute to the commission of specific crimes.³⁵ Knowledge of crimes and “mere suspicion” that certain individuals might have been involved does not equate to criminal *mens rea*; the latter requires proof that the accused had actual knowledge that his conduct could aid and abet the commission of the crimes in question and intended to engage in such conduct in the knowledge that this conduct would result in certain consequences, namely the commission of the charged crimes.³⁶

24. It would also be unduly prejudicial for this Chamber to adopt a different interpretation of Article 25(3)(d). Changes in legal interpretation cannot be made at the expense of legality and fair trial preparation.³⁷ The Chamber must be satisfied that “such an interpretation is reasonably foreseeable and consistent with the essence of the language in the Statute.”³⁸ This prejudice cannot be cured through the Trial Chamber’s judgment, as Mr Al Hassan is entitled to know, in advance, which alleged conduct could incur responsibility so as to prepare his defence. For the purpose of adjudicating this case, the Chamber must assess whether the Prosecution has demonstrated that Mr Al Hassan made sufficient contributions to charged incidents, that fell within the charged common purpose.

25. This connection is thus a material fact that should have been appropriately described and pleaded in the charges.³⁹ Material facts concerning the personal actions of the accused have to be clearly and specifically pleaded in the charges.⁴⁰ This includes the requirement of providing sufficient details concerning the link between the conduct of the alleged perpetrator and a

³² [Katanga TJ](#), paras 1641-1642 (emphasis added).

³³ [Katanga TJ \(Minority Opinion of Judge Van den Wyngaert\)](#), para. 38.

³⁴ [Mbarushimana Confirmation Decision](#), paras 276-277.

³⁵ [Muhimana AJ](#), para. 189 (“[t]he requisite mental element of aiding and abetting is knowledge that the acts assist the commission of the **specific crime** of the principal perpetrator”) (emphasis added).

³⁶ [Krnjelac TJ](#), para. 319.

³⁷ [Lubanga TJ \(Separate Opinion of Judge Fulford\)](#), p. 594, para. 2.

³⁸ [Yekatom et al. Appellate Decision on Scope](#), para. 47.

³⁹ See [Kupreškić AJ](#), para. 89; [Krnjelac AJ](#), para. 132; [Yekatom et al. Confirmation Decision](#), para. 57, citing [Abu Garda Confirmation Decision](#), pp. 99-103, para. 4

⁴⁰ See [Kupreškić AJ](#), para. 89; [Krnjelac AJ](#), paras 132-133.

historical incident as charged.⁴¹ The Confirmation Decision, however, merely describes Mr Al Hassan's contributions by reference to his daily activities in the office of the Islamic Police between 7 May 2012 and 28 January 2013.⁴² The Confirmation Decision does not describe either the link between these activities and each alleged crime in the confirmed charges or the link between these activities and the actions of the alleged perpetrator. These links are necessary to understand the basis for attributing responsibility to Mr Al Hassan. Without them, Mr Al Hassan cannot be found to have made any culpable contributions or even to have received timely notice of the nature, cause, and content of the charges.⁴³

26. This omission is particularly problematic and prejudicial as concerns charges or incidents that are not related to the work of the Islamic Police, and which do not contain sufficient particulars to identify the involvement of either the Islamic Police or Mr Al Hassan. This includes:

- the alleged whipping of "Foma" on an undisclosed date;⁴⁴
- the destruction of different mausoleums, in respect of which the OTP does not set out any material facts that would allow the Defence to understand how the actions of Mr Al Hassan contributed to the alleged destruction of particular monuments, in light of the evidence elicited at trial.⁴⁵ The only specific allegations – concerning Mr Al Hassan's alleged presence in a vehicle with a person (Abou Baccar), who was himself seen in videos destroying the mausoleums⁴⁶ and the frequency of his contacts with ■■■■■ on these dates – were not established or explored at trial;
- in respect of forced marriage/sexual slavery, the lack of particulars within the DCC as concerns Mr Al Hassan's knowledge of or contribution to the "forced" characteristics of the marriages: non-criminal conduct cannot engage a defendant's responsibility, in the absence of pleaded facts that the defendant knew and intended that such non-criminal conduct would contribute to the realisation of crimes;
- in respect of sexual violence or rape, the charges merely plead that Mr Al Hassan knew that rapes would be committed in the ordinary course of events pursuant to the execution of the common plan,⁴⁷ without specifying either the link between the commission of rape and/or the manner in which Mr Al Hassan contributed to their commission; and

⁴¹ [Yekatom et al. Confirmation Decision](#), para. 57, citing [Abu Garda CoC Decision](#), pp. 99-103, para. 4.

⁴² [Al Hassan Confirmation Decision](#), para. 951.

⁴³ [Yekatom et al. Appellate Decision on Scope](#), para. 1, 43. See also [Semanza TJ](#), paras 50-52.

⁴⁴ [Al Hassan DCC](#), paras 576, 588.

⁴⁵ [Al Hassan DCC](#), para. 728.

⁴⁶ [Al Hassan DCC](#), para. 728.

⁴⁷ [Al Hassan DCC](#), para. 875.

- in respect of persecution, the charges do not plead the special intent *mens rea* underpinning each incident of persecution nor Mr Al Hassan's awareness of the commission of actions with discriminatory intent.

27. The charges also do not plead that Mr Al Hassan had knowledge of any of the requisite chapeau elements for war crimes and crimes against humanity nor do they plead or describe the nexus between specific cases at the Islamic Tribunal and the existence of a NIAC. Instead, the Prosecution relies on an assortment of *de minimus* and neutral contributions to suggest Mr Al Hassan's culpability, none of which – either individually or taken together – are reflective of the threshold for criminality as an aider/abettor.

28. The Confirmation Decision describes Mr Al Hassan's contributions by reference to his daily activities in the office of the Islamic Police between 7 May 2012 and 28 January 2013 and the importance of his role in the Police.⁴⁸ It does not thereafter describe the link between these activities and each of the crimes set out in the confirmed charges or even the link between these activities and the actions of the alleged perpetrator. These links are necessary to understand the basis for attributing responsibility to Mr Al Hassan; without it, he cannot be deemed to have received timely notice as concerns his right to be informed promptly, of the nature, cause, and content of the charges.⁴⁹ The prejudice concerning the lack of details concerning the nature of Mr Al Hassan's alleged contribution is aggravated by the current vagueness in ICC jurisprudence concerning the nature and degree of the contribution required to trigger individual criminal responsibility.

29. The Prosecution has also failed to provide a link between Mr Al Hassan's conduct, the charged common purpose, and the commission of the charged crimes. Its pleadings on connection between Mr Al Hassan's conduct and the common purpose is so impermissibly vague as to make it impossible to discern the temporal or substantive scope of the alleged common purpose: when precisely it is alleged to have begun, when and what Mr Al Hassan's specific contributions were, and whether the Prosecution has sufficiently demonstrated Mr Al Hassan's ability to frustrate the commission of the charged acts or to otherwise influence in a concrete manner the means by which they were carried out.

30. Nor has the Prosecution been clear as to when, precisely, Mr Al Hassan is alleged to have become aware of the criminality of the groups or groups' actions or the common purpose, such that *mens rea* might be imputed or inferred from his actions. This obscures key issues that are

⁴⁸ [Al Hassan Confirmation Decision](#), para. 951.

⁴⁹ [Yekatom et al. Appellate Decision on Scope](#), paras 1 and 43. See also [Semanza TJ](#), paras 50-52 (with the ICTR confirming that charges are impermissibly vague where a broad or vague date range is coupled with a lack of information concerning the "Accused's conduct or his relationship with any known principal perpetrator").

essential to assessing the totality of the evidence in its proper context and to properly assessing what inferences can be drawn beyond reasonable doubt. The presumption of innocence and the requirement of proof beyond reasonable doubt require close scrutiny of whether post facto events and/or knowledge demonstrate retrospectively the existence of knowledge at an earlier time, an exercise made impossible by the vagueness of the Prosecution's pleadings.

31. Indeed, precision is required in making findings as to when an accused possessed the relevant *mens rea*. The ICTY Appeals Chamber has quashed convictions where it has found that the Trial Chamber was either unable to have found precisely when the *mens rea* came into existence or where it could not have found beyond a reasonable doubt that the accused possessed the *mens rea* until six weeks subsequent to the actions at issue.⁵⁰ In *Krajišnik*, for example, the Appeals Chamber faulted the Trial Chamber for using such vague terms as “soon”, “very soon”, or even referring to a “particular month” in imputing knowledge to the accused,⁵¹ ultimately finding that the Trial Chamber had committed legal error by issuing a conviction in the absence of any findings as to precisely when the group members were supposed to have become aware of the crimes at issue.⁵²

2.4 Incidents were pleaded in a defective manner

32. The absence of dates,⁵³ locations, or identities of perpetrators prevented the Defence from investigating the incidents, contesting their temporal scope, establishing an alibi defence, or challenging the link between the incidents and the “group” allegedly responsible for executing the alleged common purpose. This prejudice was emphasised by overly vague allegations of sexual violence in detention and forced marriage.

33. Mr Al Hassan's alleged responsibility derives from his personal actions. Given that he was mostly present *in situ* and allegedly near the location of the charged crimes, there is a greater onus on the Prosecution to provide particulars of the “historical events” comprising the confirmed charges. Material facts known to the Prosecution must be pleaded in the charges and not subsequently notified through disclosure of evidence:⁵⁴ to that end, “the Prosecutor must provide details as to the date and location of the underlying acts and identify the alleged victims

⁵⁰ [Šainović AJ](#), para.1667 (“Lazarević’s issuance of the *Grom 3* order (...) cannot be considered as an act of assistance to the commission of deportation and forcible transfer by the VJ forces, as it was not established that **at the time of its issuance**, he had the requisite *mens rea* for aiding and abetting” (emphasis added)).

⁵¹ [Krajišnik AJ](#), para.173.

⁵² [Krajišnik AJ](#), para. 203.

⁵³ See [Kvočka AJ](#), para. 31.

⁵⁴ [Uwinkindi Appellate Decision on Indictment Defects](#), para. 39; [Renzaho AJ](#), para. 128.

to the greatest degree of specificity possible in the circumstances”.⁵⁵ A conviction should not be delivered based on such defectively pleaded facts.⁵⁶

34. Regarding violence in detention, several incidents lack the date on which the victim was allegedly detained,⁵⁷ which made it impossible for the Defence to establish Mr Al Hassan’s location, the group or section allegedly working at the BMS at the relevant time, and whether the incident occurred when Mohamed Moussa was a member of the MNLA (and not Ansar Dine). This opacity also prevented the Defence from using inconsistencies to dismantle witness credibility or question the accuracy of their memory recall and ability to provide reliable evidence. Similarly, concerning allegations of forced marriages, the charges do not specify perpetrator identities (which made it impossible to investigate the perpetrators’ linkage to groups in Timbuktu) or any clear connection to Mr Al Hassan.

35. Regardless, the absence of material facts was not cured by the adduced evidence because details were either missing or contradictory.⁵⁸ Several witnesses provided different details concerning the husband’s name and particulars of the marriage when testifying under oath. P-0538 is a prime example, initially describing her husband [REDACTED].⁵⁹ P-0520 also recounted to Prosecution investigators that she first stayed at a building that mimics video images of the [REDACTED] and the second place she stayed during her marriage was the [REDACTED],⁶⁰ while she referred to the [REDACTED] in her testimony,⁶¹ a completely different building in a different neighbourhood.⁶² The Defence had no timely notice of this change in account. The same occurred with P-0602, who discussed being arrested by Moussa to Prosecution investigators,⁶³ but was unable to describe Moussa during her testimony.⁶⁴ The lack of notice concerning such material differences prevented the Defence investigating these details and preparing adequately for its cross-examination. Prejudice was heightened by evidence contamination, such that victims appeared to recycle names corresponding to photographs shown by NGOs (such as FIDH) without providing any

⁵⁵ [Lubanga AJ](#), paras 3, 123.

⁵⁶ [ICC Chambers Practice Manual](#), para. 33.

⁵⁷ **P-0538**: T-161, p. 32, lines 24-25 (Conf); **P-0636**: T-072, p. 18, line 10 (Conf); **P-0547**: T-151, p. 21, lines 16-22 (Conf); MLI-OTP-00049-0047-R05, para. 24.

⁵⁸ **P-0602**: T-085, p. 6, line 24; p. 14, line 5 (Conf); **P-0610**: T-158, p. 38, lines 1-9 (Conf); **P-0538**: T-161, p. 25, line 5; pp. 27-28 (Conf).

⁵⁹ [MLI-OTP-0039-0072-R04](#) at 0083, para. 55.

⁶⁰ [OTP Trial Brief](#), pp. 102-103. [MLI-OTP-0060-1857-R03](#) at 1866, para. 36.

⁶¹ **P-0520**: T-149, p. 27, line 5 – p. 26, line 1 (Conf).

⁶² **P-0520**: T-149, p. 28, lines 13-15 (Conf).

⁶³ [OTP Trial Brief](#), fn. 849; **P-0602**: [MLI-OTP-0038-0210-R03](#) at 0212.

⁶⁴ **P-0602**: T-084, p. 80, line 24 – p. 25, line 2 (Conf).

description that would allow the Defence or the Chamber to independently verify such identifications.⁶⁵

36. In line with established case law, the Prosecution cannot benefit from changes in material facts that have not been promptly notified and addressed through pre-trial amendments to the charges. Given the advanced stage of the proceedings, the only appropriate remedy for such trial modifications is to quash the related charges.⁶⁶ At the very least, the Chamber must fully consider the prejudice caused by the absence of critical particulars when determining the weight that can be placed on the witness's evidence. This is factor that reinforces the conclusion that the Prosecution's evidence fails to satisfy the threshold of beyond reasonable doubt.

3 THE PROSECUTION FAILED TO PROVE THE ALLEGED COMMON CRIMINAL PURPOSE

3.1 The Prosecution failed to establish the existence of a clearly demarcated group acting with a common purpose

37. Article 25 requires the Prosecution to establish the existence of a clearly defined group acting pursuant to a shared common purpose. This purpose must be defined by reference to the group that shares the common purpose as well as the temporal and geographic scope of the purpose.⁶⁷ If this purpose is only attributed to some elements of the group or groups, the criterion of collective action is not satisfied in relation to the group or groups as such.

38. The Prosecution's attempt to create a "group" or "organisation" (as referred to in the charges) from a collection of individuals and entities pursuing alternative objectives throughout the charged period is fundamentally flawed. Ansar Dine and AQIM approached different objectives through different means. Ansar Dine's religious approach was not the same as AQIM's. Ansar Dine also had multiple objectives that were directed at assisting the local population and which did not entail the commission of crimes as a "virtually certain consequence". Ansar Dine's presence and activities also counteracted the activities and objectives of AQIM. The lack of coherence between the two groups contradicts the assumption that they shared a common criminal plan. The charges also do not contain allegations pertaining to co-perpetration (as between Ansar Dine and AQIM) or indirect co-perpetration. Therefore, the Prosecution cannot argue that Mr Al Hassan contributed to the actions of one group through his role or contribution in another group, which did not share the charged common purpose.

⁶⁵ See *infra*, paras 184-187.

⁶⁶ [Krajišnik AJ](#), paras 176-178; [Semanza TJ](#), paras 50-52, 61.

⁶⁷ [Stanišić & Simatović AJ](#), para. 82.

3.2 Ansar Dine and AQIM pursued different objectives

39. The evidence shows that Ansar Dine had different objectives to AQIM. According to P-0150, Ansar Dine was “a local national movement rather than an international armed group.”⁶⁸ Its goal was to achieve social justice for Azawad communities; in that respect, its objectives were closer to those of the MNLA, than AQIM.⁶⁹ Ansar Dine members in Timbuktu did not participate in AQIM decision-making processes and were not apprised of AQIM projects.⁷⁰

40. Locals joining Ansar Dine did not know the level of connection, if any, with AQIM.⁷¹ Any relation between Ansar Dine and AQIM were actively kept secret; as such, it is impossible to establish that a local person joining Ansar Dine shared the common plan of AQIM.⁷² ██████ explained that the AQIM-Ansar Dine relationship was kept confidential precisely to attract local individuals who shared Ansar Dine’s ideas of non-extremism and independence.⁷³

3.3 Ansar Dine did not pursue an extremist religious ideology

41. Ansar Dine explained to the local population in Timbuktu that its goal was to promote justice and security through *Quranic* principles.⁷⁴ D-0551, a notable local, explained that “Ansar Dine ensured that [the people’s] rights were served. After [people] had complained to Ansar Dine, they received justice.”⁷⁵ ██████ a local notable, also explained that given the specific circumstances of Timbuktu, Islamic law was the best way to achieve justice in a non-discriminatory manner.⁷⁶

42. Respect for justice, protection of human life, and dignity are central principles in Islamic law, also known as *Shari’a*.⁷⁷ Although Ansar Dine was in favour of applying Islamic law, the objective was to follow local traditions and customs.⁷⁸ According to ██████ Iyad Ag Ghaly’s

⁶⁸ P-0150: T-090, p. 62, lines 18-21 (Conf).

⁶⁹ P-0150: T-089, p. 16, lines 20-25 (Conf); D-0006: T-205, p. 24, lines 10-20 (Conf); D-0511: Original: [MLI-D28-0005-9310-R01](#) at 9314, paras 42-43; Translation (ENG): [MLI-D28-0006-2629-R01](#); [MLI-D28-0004-1138](#); [MLI-OTP-0012-2028](#); [MLI-D28-0005-7056](#).

⁷⁰ P-0065: T-037, p. 15, lines 8-15 (Conf); P-0150: T-118, p. 17, line 18 – p. 18, line 6 (Conf).

⁷¹ D-0605: T-194, p. 90, line 15 – p. 91, line 12 (Conf).

⁷² P-0150: T-101, p. 37, lines 16-22 (Conf); D-0605: T-194, p. 90, line 15 – p. 91, line 12 (Conf); P-0065: T-038, p. 19, lines 1 – 6 (Conf).

⁷³ ██████

⁷⁴ P-0150: T-106, p. 77, lines 22-24 (Conf); D-0551: T-200, p. 61, lines 21-25 (Conf); [MLI-D28-0006-4002](#); [MLI-D28-0005-9306](#).

⁷⁵ D-0551: T-200, p. 65, lines 18-19 (Conf).

⁷⁶ ██████ Video ██████; Transcript: ██████ Translation (ENG): ██████

⁷⁷ P-0150: T-105, p. 24, lines 3-9 (Conf). See also A. Karapetyan, “[A Recurring Phenomenon: The Lawful Sanctions Clause in the Definition of Torture and the Question of Judicial Corporal Punishment Under International Human Rights Law](#)” (2016) 36 Polish Yearbook Int’l L. 137, 157 (“there is a general agreement of the importance of human dignity in *Sharia* as the basis of religious values”).

⁷⁸ D-0605: T-192, p. 25, line 15 – p. 26, lines 1, 12-15 (Conf); D-0006: T-207, p. 39, line 24 – p. 42, line 20; [MLI-OTP-0033-5492](#); [MLI-D28-0006-3335](#) at 3340. See also *infra* fn. 120.

goal was to apply the type of Sharia the people of Timbuktu used in daily life. As such, the local population were present at the meeting with Iyad and agreed with his proposals.⁷⁹ Iyad Ag Ghaly also did not support the application of *Hudud* punishments before Ansar Dine had full control over the territory.⁸⁰ In areas where Ansar Dine was not constrained by AQIM's presence, *Hudud* punishments were not applied.⁸¹

43. Several tribes joined Ansar Dine because they saw it as a non-extremist alternative to AQIM and were told that joining would help resist the encroachment of AQIM.⁸² High-ranking Tuareg individuals also joined Ansar Dine to ensure it remained non-extremist.⁸³ Given this backdrop, the intent to work with or contribute to the actions of Ansar Dine cannot equate to an informed decision to further the goals of AQIM.

3.4 Ansar Dine objectives did not involve the virtually certain commission of crimes

44. The Prosecution has failed to establish that the alleged common plan to install a new apparatus of power involved a critical and virtually certain element of criminality. International law, international humanitarian law (IHL), and international criminal law (ICL) do not prohibit the installation of transitional or traditional forms of governance.⁸⁴ Moreover, as will be explained further in Section 8.6.2, IHL and international human rights law (IHRL) may require groups to ensure the provision of security and basic services to protect the overall interests of the civilian population. IHL, for example, allows non-state actors (NSAs) to arrest, detain, and prosecute individuals in accordance with the laws promulgated by that NSA.⁸⁵ NSAs are not required to obtain the local population's consent to exercise this power. The effective installation of security and basic rule of law services also requires monopolisation of the use of force. The existence of a plan to ensure governance and security in accordance with the NSA's laws does not incur criminal liability under the Rome Statute.⁸⁶ It was not unlawful to use Islamic law as a reference point, when pursuing such legitimate goals. This is demonstrated

⁷⁹ [REDACTED]

⁸⁰ [REDACTED]

⁸¹ **P-0065**: T-046, p. 64, lines 16-24 (Conf).

⁸² **P-0150**: T-106, p. 15, lines 9-15; p. 16, lines 13-17 (Conf); **P-0065**: T-050, p. 21, line 23 – p. 22, line 23 (Conf).

⁸³ **P-0150**: T-106, p. 17, lines 16-18 (Conf); **P-0152**: T-032, p. 64, line 12 – p. 66, line 8 (Conf); p. 68, line 22 – p. 69, line 14; **P-1086**: T-122, p. 46, line 25 – p. 47, line 15; **D-0511**: [MLI-OTP-0005-9310-R01](#) at 9314, para. 44 (Translation (ENG): [MLI-OTP-0006-2629](#) at 2636, para. 44). *See also* [MLI-OTP-0078-2592](#) at 2596.

⁸⁴ E. Heffes, “[Detention in Non-International Armed Conflicts: From Prohibitions to Restrictions and Acceptance](#)” (Cambridge: CUP 2022) pp. 167, 179, fn. 165.

⁸⁵ S. Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford: OUP 2012) p. 303; E. Heffes, “[Detention in Non-International Armed Conflicts: From Prohibitions to Restrictions and Acceptance](#)” (Cambridge: CUP 2022) p. 172.

⁸⁶ [Popović AJ](#), para. 774.

by the fact that the UN Security Council resolutions issued in connection with the events of 2012 did not call upon the parties to cease applying Islamic law.⁸⁷

45. The Prosecution has also failed to demonstrate that the installation of a form of governance, regulated by Islamic law, involved the virtually certain commission of Rome Statute crimes. Indeed, if that were the case, then the leaders of any State, which applies Islamic law, would face the threat of prosecution before this Court. In Timbuktu, the steps taken to ensure security were also proportionate and did not cross the threshold of Rome Statute crimes. Group members were given instructions not to use force against the local population and to respond to threats of force or use of force in a proportionate manner.⁸⁸ Punishments also aimed to ensure deterrence, thus protecting the population against the further commission of crimes.⁸⁹

46. The Prosecution has also failed to demonstrate that the conduct of specific organs, sections, or alleged perpetrators was a virtually certain consequence of the alleged common purpose. *Hesbah* as an organ had a degree of independence and autonomy in how it discharged its mandate.⁹⁰ Al Mahdi, for example, interpreted and executed his mandate in a lenient manner that did not entail the commission of crimes against the local population.⁹¹ Most of the group leaders supported his lenient approach⁹² and the bulk of evidence demonstrates that, apart from random or isolated incidents, there were no complaints or exactions during this period.⁹³ The role of *Hesbah* included carrying out charitable acts to help the local population and ensure the availability of services and infrastructure.⁹⁴

47. Throughout the trial proceedings, the Prosecution failed to provide a clear temporal period as to when Mohamed Moussa worked with *Hesbah*, which impeded Defence preparation. The Prosecution has also failed to establish that actions imputed to Mohamed Moussa fell within the scope of *Hesbah*'s approved activities or the alleged common purpose. The bulk of the evidence demonstrates that concerns were brought to the leaders' attention in October 2012 (during or after Tabaski).⁹⁵ These concerns pertained to the specific approach adopted by Mohamed Moussa and the influx of unpredictable and undisciplined former MNLA

⁸⁷ [MLI-D28-0005-4947](#); [MLI-OTP-0001-1924](#); [MLI-D28-0005-4963](#).

⁸⁸ **P-0150**: T-117, p. 34, line 13 – p. 35, line 4 (Conf); **D-0529**: T-189, p. 15, line 16 – p. 16, line 16 (Conf).

⁸⁹ See *infra*, paras. 483-485.

⁹⁰ [REDACTED]
⁹¹ **P-0065**: T-046, p. 44, lines 6-12 (Conf);

⁹² **P-0065**: T-046, p. 44, lines 13-16 (Conf).

⁹³ **P-0641**: T-139, p. 57, lines 7-14 (Conf). See also **P-0004**: T-166, p. 88, lines 23-25 (Conf).

⁹⁴ [REDACTED]

⁹⁵ [REDACTED]
D-0312: T-185, p. 39, line 21 – p. 40, line 6; p. 53, line 12 – p. 54, line 11.

members.⁹⁶ Their actions were opportunistic and did not intend to further the charged common criminal plan and were not envisaged by the charged common purpose.⁹⁷ This is demonstrated by the leaders' reaction to Mohamed Moussa's actions, including apologising to victims and ultimately replacing him and the other offenders.⁹⁸ Although the charges never pleaded that the common purpose expanded in scope during the charged period, the leaders' actions also did not constitute ratification of these disparate and sporadic actions.

48. With respect to the Islamic Police, there were no Malian police officers present in Timbuktu when Ansar Dine arrived,⁹⁹ and the local population wanted Ansar Dine to fill the vacuum.¹⁰⁰ The evidence demonstrates that the Islamic Police functioned as a "normal police" force.¹⁰¹ Its objectives related to the installation of basic law and order as opposed to the imposition of religious rules, which fell within *Hesbah*'s purview.¹⁰² The Islamic Police services were neutral and were provided on a consensual basis.¹⁰³ The Islamic Police was not engaged in military actions; rather, it responded to calls or complaints initiated by members of the local population.¹⁰⁴ Its purpose was to prevent the commission of crimes by group members or the local population.¹⁰⁵ The complaint system also ensured accountability of the groups vis-à-vis the local population, as locals filed complaints against group members.¹⁰⁶ The leaders would hear complaints brought by all ethnicities.¹⁰⁷ Incidentally, police actions are not prohibited

⁹⁶ **D-0211**: T-190, p. 40, lines 10-18 (Conf); **P-1086**: T-122, p. 24, lines 4-17 (Conf); **P-0150**: T-117, p. 14, lines 13-25 (Conf); T-092, p. 22, lines 2-16; p. 32, line 14 – p. 33, line 19; p. 45, lines 3-12 (Conf); T-110, p. 67, line 11 – p. 68, line 2 (Conf).

⁹⁷ See for comparison [Limaj AJ](#), paras 109-110.

⁹⁸ **D-0551**: T-200, p. 82, lines 5-10; p. 83, lines 9-15 (Conf); [MLI-D28-0006-4212-R01](#) at 4216, paras 24-25; **P-0004**: T-167, p. 15, lines 5-18 (Conf).

⁹⁹ **P-0004**: T-164, p. 29, line 19 – p. 31, line 22; p. 37, lines 4-6 (Conf).

¹⁰⁰ **P-0065**: T-039, p. 26, lines 1-6 (Conf); T-046, p. 50, lines 8-12 (Conf).

¹⁰¹ **P-0065**: T-046, p. 53, lines 23-24 (Conf); T-039, p. 26, lines 1-6 (Conf); T-038, p. 47, lines 9-12 (Conf); p. 48, lines 8-10, 14 (Conf).

¹⁰² **P-0654**: T-128, p. 33, lines 22-23 (Conf); **P-0150**: T-094, p. 35, line 21 – p. 36, line 5; T-099, p. 39, lines 23-25 (Conf); **D-0202**: T-203, p. 27, lines 11-13 (Conf).

¹⁰³ **P-0065**: T-038, p. 48, lines 8-10 (Conf); T-046, p. 53, lines 9-16 (Conf); **P-0582**: [MLI-OTP-0062-3773](#), p. 3783, line 344 – p. 3784, line 369; **D-0554**: [MLI-D28-0006-2623-R01](#), paras 13-15;

(original), [REDACTED] (transcript), [REDACTED] at 7542, lines 36-44, lines 64-65 (translation); [REDACTED] (original), [REDACTED] (transcript), [REDACTED] (translation); **P-0150**: T-110, p. 51, line 14 – p. 53, line 9 (Conf).

¹⁰⁴ **P-0065**: T-038, p. 47, lines 9-12; p. 48, lines 9-10 (Conf); **P-0654**: T-132, p. 65, lines 12-13, 16 (Conf).

¹⁰⁵ **D-0605**: T-192, p. 84, lines 8-15 (Conf); **P-0150**: T-094, p. 58, lines 1-5 (Conf); **P-0654**: T-132, p. 65, line 16 (Conf); **D-0315**: p. 53, line 12 – p. 54, line 11.

¹⁰⁶ **P-0150**: T-90, p. 15, lines 2-9 (Conf).

¹⁰⁷ [REDACTED]

under IHL.¹⁰⁸ Since IHL is the *lex specialis* during an armed conflict,¹⁰⁹ if the Chamber finds that an armed conflict occurred and that a nexus existed between this conflict and the charged incidents, it cannot conclude that actions lawful under IHL are simultaneously criminal under the common purpose.¹¹⁰

49. The Police agreed not to take weapons into the hospital or populated civilian areas and were prohibited from using weapons except in defence and as a last resort.¹¹¹ There is no credible evidence that they pursued a policy of mistreating detainees or persons they arrested. When leaders received complaints that individual members had acted inappropriately, they took steps to discipline the offender, apologise to victims,¹¹² and issue instructions to avoid further occurrences.¹¹³ The Police had no control or influence over the work of *Hesbah* or the decisions of the Islamic Tribunal.¹¹⁴ The means used by the Islamic Police were no different from those used by the Malian police.¹¹⁵

50. In terms of the adjudication of crimes, there were no Malian judges present in Timbuktu or the North of Mali when Ansar Dine arrived in Timbuktu.¹¹⁶ Nor were there any lawyers,¹¹⁷ so no one could apply Malian law. The Islamic Tribunal was established several months after the group arrived.¹¹⁸ Ansar Dine was of the understanding that the Tribunal would follow the Malikite approach native to Timbuktu and the surrounding areas,¹¹⁹ since the principles and procedures were long known to the local population and based on pre-existing texts.¹²⁰ Leaders

¹⁰⁸ See United Nations General Assembly (UNGA), [Report of the Independent International Commission of Inquiry on the Syrian Arab Republic \(2018\)](#), UN Doc A/HRC/37/72, p. 29; United States Department of Defense, [Law of War Manual](#) (2016), p. 1064.

¹⁰⁹ [ICJ Nuclear Weapons Advisory Opinion](#), p. 226, para. 25; [IACHR, Coard v. US](#), paras 38-44; ICRC, “[Rights protected by both branches: the *lex specialis*](#)” in *IHL and Human Rights*, Ch. 14, part. II.

¹¹⁰ See [Popović AJ](#), para. 774.

¹¹¹ **D-0605**: T-195, p. 10, lines 4-17 (Conf); **P-0150**: T-117, p. 30, line 25 – p. 31, line 8 (Conf); T-093, p. 43, lines 17-20 (Conf); [MLI-OTP-0037-0778-R02](#) at 0799; **D-0605**: T-195, p. 10, lines 11-17 (Conf); **D-0093**: T-211, p. 15, lines 5-13.

¹¹² [REDACTED]

¹¹³ **P-0065**: T-038, p. 47, lines 9-12; p. 48, lines 9-10 (Conf); **P-0150**: T-106, p. 37, lines 16-18 (Conf); [MLI-D28-0006-3064](#) at 3065; **P-0150**: T-108, p. 20, line 17 – p. 24, line 17 (Conf); **P-0004**: T-165, p. 75, lines 16-20 (Conf); **P-0004**: T-167, p. 6, line 8 – p. 15, line 18; p. 24, line 17 – p. 25, line 2 (Conf); [MLI-D28-0006-2629-R01](#) at 2636; [MLI-D28-0005-9317-R01](#) at 9322; [MLI-D28-0006-3044](#).

¹¹⁴ [REDACTED] **D-0605**: T-192, p. 60, line 25 – p. 61, line 2; p. 72, lines 18-25 (Conf).

¹¹⁵ [MLI-OTP-0037-0714-R01](#) at 0737-0740, lines 812-894; **P-0150**: T-105, p. 81, lines 11-16 (Conf).

¹¹⁶ **P-0004**: T-167, p. 42, lines 7-9; **D-0540**: T-184, p. 11, lines 22-24; **D-0211**: T-190, p. 50, lines 6-9; **D-0202**: T-202, p. 77, lines 9-12.

¹¹⁷ **D-0202**: T-202, p. 72, lines 6-24 (Conf); **P-0643**: T-083, p. 48, line 23 – p. 49, line 2 (Conf); **P-0643**: T-084, p. 16, lines 14-15 (Conf).

¹¹⁸ [REDACTED] **P-0654**: T-128, p. 66, line 7 – p. 67 (Conf).

¹¹⁹ **D-0219**: [MLI-D28-0006-5593-R01](#) at 5601, para. 51.

¹²⁰ **P-0150**: T-089, p. 65, lines 9-19 (Conf); T-110, p. 60, lines 15-18 (Conf); **P-0004**: T-165, p. 47, lines 4-7 (Conf); **P-0654**: T-130, p. 28, line 16 – p. 29, line 9 (Conf); **P-0464**: T-077, p. 8, lines 10-12 (Conf).

of Ansar Dine (Iyad Ag Ghaly) and AQIM (Droukdel) were opposed to the imposition of *Hudud* punishments during the charged period.¹²¹ Stricter punishments were the product of outside influence imposed on the Tribunal in a temporary and *ad hoc* manner, in cases where it was also not possible to apply exceptions or lenience under Islamic law.¹²²

51. The decision of whether or not to apply such punishment rested exclusively with Tribunal members¹²³ and was based on the evidence presented.¹²⁴ Therefore, it was not possible to predict the Tribunal's adopted position.¹²⁵ The Tribunal also tried to avoid imposing *Hudud* punishments, as reflected by the number of theft cases that did not result in amputation.¹²⁶ As set out in Section 9.4.2, the penalties issued by the Tribunal are not crimes under the Rome Statute.

52. Islamic law would have been applied to regulate disputes or crimes even if Ansar Dine or AQIM were not in Timbuktu. The MNLA also used Sheikhs to resolve disputes,¹²⁷ and members of the Tribunal were affiliated with the MNLA.¹²⁸ In the absence of Malian judges and prosecutors, there were no feasible alternatives.¹²⁹ The penalties imposed by the Islamic Tribunal in pursuit of law and order were less harsh than the peoples' justice exacted on the streets of Bamako in the same period,¹³⁰ and protected the local population against a "settling of scores" between ethnic groups.¹³¹ Indeed, the mortality rate in Timbuktu was the lowest in Mali during this timeframe.¹³² In contrast, after Ansar Dine left Timbuktu, the city spun into disarray and violence: locals started breaking into Arab shops and homes,¹³³ and the Malian authorities enforced order by beating people on the streets, while killing, disappearing or

¹²¹ [MLI-OTP-0007-0172](#) at 0176; [REDACTED]; **P-0654**: T-132, p. 25, line 16 – p. 26, line 3 (Conf).

¹²² [REDACTED]

¹²³ **D-0605**: T-192, p. 60, line 25 – p. 61, line 2 (Conf); **P-0065**: T-046, p. 6, line 18 – p. 7, line 22 (Conf).

¹²⁴ See *infra*, para. 380.

¹²⁵ [Katanga TJ](#), paras 775, 1632; see [Lubanga TJ](#), para. 1011.

¹²⁶ [REDACTED]

¹²⁷ **D-0211**: T-190, p. 50, lines 10-24 (Conf).

¹²⁸ See *infra*, para. 514.

¹²⁹ **P-0643**: T-083, p. 48, line 23 – p. 49, line 2 (Conf). See also *infra* para. 376.

¹³⁰ **P-0152**: T-032, p. 48, line 18 – p. 49, line 8 (Conf); [MLI-OTP-0078-3678](#) at 3680; [MLI-D28-0004-0993](#); [MLI-D28-0004-3560](#); [MLI-D28-0004-3561](#); [MLI-D28-0004-3563](#); [MLI-OTP-0001-3329](#).

¹³¹ **D-0512**: [MLI-D28-0006-2611-R02](#) at 2614, para. 13 (Conf); **P-0608**: T-154, p. 93, line 24 – p. 94, line 7 (Conf); **D-553**: [MLI-D28-0005-0325-R01](#) at 9329-9330, paras 26-29.

¹³² [MLI-OTP-0060-1897-R01](#) at 1904.

¹³³ Original: [MLI-D28-0004-0003](#); Transcript: [MLI-D28-0004-3961](#); **P-0557**: T-056, p. 18, line 13 – p. 20, line 16 (Conf); **P-0065**: T-045, p. 56, line 24 – p. 58, line 11.

torturing anyone suspected of having worked with the groups, targeting many on skin colour alone.¹³⁴

53. The Prosecution failed to establish any nexus between the purpose and goals of Ansar Dine or AQIM, and the commission of sexually violent offences. Members of both Ansar Dine and AQIM were informed that any form of *Zina* (including rape) was prohibited and would be punished. This rule was actively applied to members of Ansar Dine and AQIM. Members were given sermons and training on the procedures for marriage under the Malikite approach that was followed throughout the region before and after 2012.¹³⁵ These procedures required the husband to obtain consent from the guardian or from the woman if she was married before.¹³⁶

54. The Prosecution failed to establish that Ansar Dine exercised any influence or control over such marriages. Marriages were negotiated on an individual basis outside the official structures of the group. Women were able to reject such requests without negative consequences.¹³⁷ Several witnesses testified that the families consented to the marriages, and the wives stayed with their families and were visited at night by their husbands.¹³⁸ Women could file complaints to the Islamic Tribunal against their husbands or families.¹³⁹ Under the Malikite approach, women could also obtain divorces if consent procedures were not followed, and the Tribunal granted divorces on such grounds.¹⁴⁰ The procedures applied by the Tribunal for divorces were no more restrictive than those under Malian law or pre-existing practices.¹⁴¹

55. As will be further elaborated in Section 7.5, the Prosecution failed to demonstrate that the actions of individual perpetrators, who allegedly committed forced marriage or rape, can be attributed to a “group” or a common criminal purpose. There is no credible evidence that Ansar Dine adopted an approach to marriage different from existing local practices.¹⁴² When foreigners tried to apply foreign practices, local members of Ansar Dine would assist to resolve

¹³⁴ **P-0010**: T-021, p. 8, line 20 – p. 9, line 3 (Conf); [MLI-D28-0004-0109](#) at 0110; **P-0065**: T-045, p. 54, line 8 – p. 55, line 11; p. 56, line 24 – p. 58, line 11 (Conf); **P-0150**: T-105, p. 78, line 20 – p. 79, line 1 (Conf); **P-0654**: T-133, p. 75, line 8 – p. 82, line 14 (Conf); **P-0641**: T-140, p. 12, line 23 – p. 13, line 17 (Conf); **D-0202**: T-0202, p. 16, line 17 – p. 17, line 1 (Conf); p. 70, lines 5-16; **D-0211**: T-190, p. 8, line 16 – p. 9, line 13 (Conf); [MLI-OTP-0033-1584](#); **D-0511**: Original: [MLI-D28-0005-9310-R01](#) at 9315, paras 48-49; Translation (ENG): [MLI-D28-0005-9310-R01](#) at 2637, paras 48-49; **D-0529**: T-189, p. 37, line 21 – p. 39, line 7 (Conf).

¹³⁵ **D-0529**: T-189, p. 8, line 24 – p. 9, line 11 (Conf); **D-0540**: T-184, p. 17, lines 11-14 (Conf).

¹³⁶ **D-0529**: T-189, p. 8, line 24 – p. 9, line 11 (Conf); **D-0540**: T-184, p. 17, lines 11-14 (Conf); **D-0202**: T-203, p. 55, lines 15-21 (Conf).

¹³⁷ **P-0065**: T-045, p. 73, lines 14-24 (Conf).

¹³⁸ See *infra*, para. 278, fn. 981.

¹³⁹ See *infra*, para. 272275, fn. 964.

¹⁴⁰ [MLI-OTP-0001-7353](#); [MLI-OTP-0052-0015](#).

¹⁴¹ See *infra*, para. 163, fn. 430; para. 273, fn. 956; para. 279, fn. 989.

¹⁴² See *infra*, para. 136, fn. 429; para. 273; para. 290, fn. 1026.

issues by explaining local traditions.¹⁴³ None of the forced marriages have been attributed to members of Ansar Dine.

56. The actions of foreigners and rogue elements were also independent of Ansar Dine or AQIM and cannot be attributed to the alleged common plan as charged. Foreigners came to Timbuktu and Northern Mali before, during, and after 2012, and entered into temporary marriages with local women.¹⁴⁴ These marriages were not considered forced marriages.¹⁴⁵ Women were not required to work and were allowed to conduct visits with friends and family in compliance with religious traditions.¹⁴⁶ Miscommunications in the negotiation processes were attributable to locals acting independently of the groups,¹⁴⁷ but these misunderstandings lessened once locals understood the foreigners bore no ill-motives.¹⁴⁸ Threats and use of force were counter to the objectives of either Ansar Dine or AQIM, which were to establish collaboration and integration with the local population as well as against the specific directives issued to treat the local population well and to not use force.¹⁴⁹ As set out in paragraph 53 above, given that the charged common purpose involved the prohibition and penalisation of *Zina* (including rape), acts of rape clearly fall outside the ambit of the charged common purpose.

57. The goal of administering Timbuktu also did not entail the virtually certain commission of discriminatory conduct on either religious or gender grounds. Both Ansar Dine and AQIM consulted with the local population to ensure compliance with local values and traditions, and the groups applied their rules to men and women equally.¹⁵⁰ The purpose of the rules was to ensure social harmony and stability, and any interference with personal rights was proportionate to this objective. The evidence is that *Shari'a* ensures equality through the allocation of different rights and duties between men and women.¹⁵¹ There is no prohibition on participation in political or working life, as female intelligence is valued and praised.¹⁵² Systemic sexism was embedded in Mali and Timbuktu before the arrival of Ansar Dine and

¹⁴³ **P-0150**: T-092, p. 42, lines 4-24; p. 44, lines 13-22 (Conf); **D-0605**: T-193, p. 20, lines 5-14; p. 26, line 18 – p. 27, line 6 (Conf); **D-0006**: T-207, p. 39, line 24 – p. 42, line 20 (Conf).

¹⁴⁴ **P-0152**: T-032, p. 79, lines 11-24 (Conf). Para 281, fn. 993.

¹⁴⁵ **P-1086**: T-122, p. 11, line 22 – p. 12, line 8 (Conf).

¹⁴⁶ [REDACTED]

¹⁴⁷ [REDACTED]

¹⁴⁸ [REDACTED]

¹⁴⁹ **P-0582**: [MLI-OTP-0062-3788-R-01](#) at 3802, line 475; **P-0605**: T-192, pp. 10, lines 4-17; p. 84, lines 8-15 (Conf); [MLI-OTP-0062-3736-R01](#) at 3753; [MLI-OTP-0012-2028](#); [MLI-D28-0005-7056](#); [MLI-D28-0006-3144](#).

¹⁵⁰ **D-0605**: T-192, p. 38, lines 2-6; p. 36, lines 3-10, 21-24 (Conf); **P-0150**: T-089, p. 28, lines 16-18; p. 29, lines 3-10 (Conf); **D-0093**: [MLI-D28-0006-4212-R01](#) at 4217-4218; D-0315: T-185, p. 53, line 12 – p. 54, line 11 (Conf).

¹⁵¹ **P-0150**: T-105, p. 25, line 25 – p. 29, line 15; p. 31, line 1 – p. 38, line 21 (Conf).

¹⁵² **P-0150**: T-105, p. 38, lines 1-21 (Conf).

AQIM, which was manifested by specific cultural rules governing the role of women and the modalities for marriages and divorces.¹⁵³ Before 2012, women had to be submissive to their husbands¹⁵⁴ and risked lawsuit if they were disobedient,¹⁵⁵ and Malian law required women to live with their husbands, who were the “head” of the family.¹⁵⁶ Before 2012, Malian society in Timbuktu tolerated marital violence, as the majority of people and Muslims in Timbuktu believed it was acceptable to beat their wives.¹⁵⁷ Marital rape was not penalised under Malian law nor were complaints investigated by the Malian authorities.¹⁵⁸ Since Ansar Dine and AQIM did not introduce these laws and cultural norms, they are not responsible for their continued practice before, during, and after 2012.

58. Neither Ansar Dine nor AQIM used force to maintain their presence in Timbuktu or enforce a specific ideological perspective against the wishes of the local population. The local population welcomed their arrival.¹⁵⁹ The groups also consulted with the local population about specific approaches adopted by the different organs. It was possible for locals to complain and obtain a remedy in case of disagreement with the conduct of individuals or the approach of particular organs.¹⁶⁰ For example, some of the local population marched through the streets of Timbuktu in sign of protest against the actions of Mohamed Moussa. The result of this protest was his removal as the head of *Hesbah*.¹⁶¹ Furthermore, the Crisis Committee had regular lengthy meetings with group leaders, including Abou Zeid, and could raise any concerns they may have had for the local population.¹⁶²

3.5 The Prosecution failed to prove that charged incidents were committed by persons acting pursuant to the common purpose

59. The absence of specific information about the identity of many of the alleged perpetrators makes it impossible to establish beyond reasonable doubt that they shared a common criminal

¹⁵³ **P-0605**: T-192, p. 12, lines 12-16; p. 25, lines 17-25 (Conf); **P-0152**: T-032, p. 40, lines 3-6 (Conf); **P-0150**: T-105, p. 56, lines 18-23 (Conf).

¹⁵⁴ **P-0150**: T-105, p. 61, lines 4-6 (Conf); [MLI-OTP-0064-1217-R02](#) at 1228, lines 380-381.

¹⁵⁵ **P-0150**: T-105, p. 56, lines 21-25 (Conf); See also [MLI-D28-0005-2680](#), p. 2682.

¹⁵⁶ [MLI-D28-0005-2225](#) at 2284; [MLI-D28-0005-2721](#) at 2730.

¹⁵⁷ **P-0150**: T-105, p. 62, lines 20-22 (Conf).

¹⁵⁸ **P-0150**: T-105, p. 63, lines 9-12 (Conf).

¹⁵⁹ **D-0605**: T-192, p. 46, lines 2-4 (Conf); T-194, p. 27, lines 23-25; p. 28, line 1, lines 7-8 (Conf); **P-0065**: T-045, p. 15, line 18 – p. 16, line 1 (Conf); **D-0093**: [MLI-D28-0006-4212-R01](#), paras 19-22; **D-0512**: [MLI-D28-0006-2611-R02](#) at 2614, para. 13; **D-0554**: [MLI-D28-0006-2623-R01](#) at 2625-2626, paras 12-15; **D-0315**: T-185, p. 36, line 22 – p. 37, line 12 (Conf); p. 39, line 21 – p. 40, line 1 (Conf); **P-0608**: T-154, p. 93, line 24 – p. 94, line 7 (Conf).

¹⁶⁰ [REDACTED]

¹⁶¹ **D-0551**: T-200, p. 82, line 5 – p. 84, line 2.

¹⁶² [REDACTED]

purpose or were acting pursuant to a common criminal purpose.¹⁶³ Moreover, according to the bulk of reliable evidence adduced at trial, criminal acts were committed by MNLA and Arab militia members before the arrival of Ansar Dine and AQIM.¹⁶⁴ Members of the MNLA and the Arab militia later joined the ranks of Ansar Dine or AQIM.¹⁶⁵ Witnesses gave evidence about actions by undisciplined individuals who were former MLNA.¹⁶⁶ In such cases, perpetrators were not acting in furtherance of a common purpose but were acting in accordance with extrinsic purposes that ran counter to the goals of Ansar Dine or AQIM.

4 MR AL HASSAN DID NOT KNOWINGLY CONTRIBUTE TO, AND DID NOT INTEND HIS ACTIONS TO CONTRIBUTE TO, EITHER A COMMON PURPOSE OR THE COMMISSION OF ANY CRIMES

4.1 There is Insufficient Detail Concerning the Timing and Nature of Mr Al Hassan's Contributions and Linkage to Either the Common Purpose or the Commission of Charged Crimes

60. The Prosecution has failed to establish that Mr Al Hassan contributed, much less significantly, to the common purpose. It has neither pleaded, nor established as a matter of evidence, that Mr Al Hassan (i) was aware the common purpose would result in the commission of the specific crimes charged in this case, and that he (ii) participated in the common plan with the awareness that his participation would contribute to the commission of these crimes. At most, the evidence establishes Mr Al Hassan was aware Ansar Dine intended to act in accordance with *Shari'a* in Timbuktu; that, on its own, is not a crime.¹⁶⁷

61. By focussing on Mr Al Hassan's association with Ansar Dine rather than his contribution to specific crimes, the Prosecution's case against Mr Al Hassan has impermissibly blurred the distinction between collective liability and individual criminal responsibility. Articles 25(3)(c) and (d) of the Statute do not criminalise membership of groups, even ones suspected of terrorism or criminal activity. In its discussion of aider and abettor or co-perpetrator liability, the *Kvočka* Trial Judgment found that "[t]he level of participation attributed to the accused and whether that participation is deemed significant will depend on a variety of factors, including

¹⁶³ [Katanga TJ](#), paras 1627-1628.

¹⁶⁴ **P-0099**: T-147, p. 8, line 11 – p. 9, line 5; p. 10, lines 16-25 (Conf); **D-0551**: T-200, p. 62, lines 14-20; p. 78, line 25 – p. 79, line 4 (Conf); **P-0150**: T-202, p. 47, lines 10-17 (Conf); **D-0512**: [MLI-D28-0006-2611-R02](#) at 2613-2614, paras 12-13; [\[REDACTED\]](#) [MLI-D28-0006-2603](#) at 2604 – 2606; **P-0608**: T-154, p. 93, line 4 – p. 94, line 13 (Conf).

¹⁶⁵ **D-0511**, [MLI-D28-0006-2629-R01](#) at 2637, para. 47 (Original: [MLI-D28-0005-9310-R01](#)); **D-0211**: T-190, p. 38, line 17- p. 39, line 2; p. 40, lines 10-18 (Conf); **P-1086**: T-122, p. 24, lines 4-17 (Conf).

¹⁶⁶ **D-0211**: T-190, p. 40, lines 10-18 (Conf); **P-1086**: T-122, p. 24, lines 4-17 (Conf).

¹⁶⁷ **P-0065** testified that even prior to 2012, *Shari'a* courts existed in Timbuktu and the population were able to avail themselves of this recourse in case of dispute. *Sharia* courts were therefore not a new mechanism introduced by Ansar Dine or AQIM. See **P-0065**: T-37, p. 18, lines 17-24 (Conf).

[...] the functions performed, the position of the accused, [and] the amount of time spent participating after acquiring knowledge of the criminality of the system”.¹⁶⁸ Importantly, it indicated that “efforts made to prevent criminal activity or to impede the efficient functioning of the system” would affect the significance of the participation,¹⁶⁹ and that the most important factor would be specific role played by the accused vis-à-vis the seriousness and scope of the crimes committed. The *Mbarushimana* Pre-Trial Chamber embraced the *Kvočka* Trial Chamber’s reasoning in its Decision on the Confirmation of Charges,¹⁷⁰ focusing on: (i) the sustained nature of the participation after acquiring knowledge of the criminality of the group’s common purpose; (ii) efforts made to prevent criminal activity or to impede the efficient functioning of the group’s crimes; (iii) whether the accused creates or merely executes the criminal purpose; (iv) the position of the suspect in or relative to the group; and (v) the role played by the suspect in respect of the seriousness and scope of the crimes committed. The Chamber also expressly found against group liability, holding that it would be inappropriate – and Article 25(3)(d) overextended – were liability to be incurred for any contribution to a group crime.¹⁷¹

62. It follows from these criteria that merely executing pre-determined tasks in a fungible manner will not attract responsibility under Article 23(3)(c) or (d). Similarly, contributions that are not intentionally directed to specific crime or purpose entailing the commission of a specific crime, will also not attract responsibility. Put together, the Prosecution must demonstrate that the defendant -in this case Mr Al Hassan – knew and intended for his actions to play a key role in bringing about the charged acts concerning sexual violence and forced marriage, unfair sentences, torture and cruel treatment, and destruction of religious monuments. After reviewing the evidence in its totality, the Trial Chamber must acquit Mr Al Hassan because the Prosecution has not proved that Mr Al Hassan knew and intended to contribute to the charged crimes or that his conduct did in fact do so.

4.2 Mr Al Hassan Did Not Play Any Role in Creating or Shaping the Implementation of the Alleged Common Purpose

63. The Prosecution has not established that Mr Al Hassan was a member of the alleged “common purpose”, or that he played any role in shaping its adoption or the way it was implemented during the charged period. Mr Al Hassan played no role in conceiving or setting

¹⁶⁸ [Kvočka TJ](#), para. 311 (emphasis added).

¹⁶⁹ [Kvočka TJ](#), para. 311.

¹⁷⁰ [Mbarushimana Confirmation Decision](#), paras 280, 284, fns. 662, 668, 670, 673.

¹⁷¹ [Mbarushimana Confirmation Decision](#), paras 276-277.

up Ansar Dine¹⁷² and joined the group when it was already a *fait accompli*;¹⁷³ had no involvement in the organisational policy of the group or in formulating its policies and missions; was not part of the hierarchical structure as outlined by the Prosecution;¹⁷⁴ and, despite the Prosecution's contention that religious and military training were important aspects of the formulation and promulgation of the alleged common purpose,¹⁷⁵ he did not participate in any type of military training or activities. Indeed, Mr Al Hassan's civilian status is reinforced by the fact that he stayed in Timbuktu when other members of Ansar Dine went to Diabali and Konna,¹⁷⁶ and never played a role in recruiting or training others. The stark reality is that if Mr Hassan had not been present in Timbuktu during the charged period, the alleged incidents would still have occurred. His presence and involvement in the Islamic Police neither increased the possibility of their occurrence nor increased the severity of the means through which alleged incidents were committed.

64. The Prosecution has also failed to prove that Mr Al Hassan possessed the necessary *mens rea*: that he knew and intended his actions to contribute to the commission of the charged crimes. *Mens rea* must be proven beyond reasonable doubt to have existed at the moment of the alleged actus reus, not later.¹⁷⁷ Although it might be possible in some cases to infer the latter from the very specific manner in which a crime is committed, the Prosecution has failed, in this case, to adequately explain and elaborate how such knowledge and intent can reasonably be inferred from the facts and circumstances in question. Knowledge of a criminal purpose obtained just one day after the event has been deemed an insufficient basis on which to infer the existence of *mens rea* on the prior day.¹⁷⁸ The Prosecution's case fails to satisfy these requirements. As will be developed in further detail in Sections 7-11, the Prosecution has not proven that Mr Al Hassan was even aware that the alleged criminal incidents took place or at a minimum, that he possessed such knowledge at the time he is alleged to have made culpable contributions. No evidence had been led to attempt to demonstrate that Mr Al Hassan was aware of the alleged charged incidents of rape nor that he knew that the charged marriages were

¹⁷² **P-0150**: T-088, p. 16, line 11 – p. 17, line 2; p. 52, line 21 – p. 53, line 4 (Conf); T-089, p. 17, lines 1-12 (Conf); **D-0211**: T-190, p. 83, lines 2-19, p. 94, line 19 – p. 95, line 2 (Conf).

¹⁷³ The Prosecution asserts that the common purpose was adopted on or before April 2012 (*see Al Hassan DCC*, paras 1021, 1029), but concedes that Mr Al Hassan was only in Timbuktu from May 2012 onwards (*Al Hassan DCC*, para. 23), which means that he took no part in creating the common purpose or in its early implementation.

¹⁷⁴ *Al Hassan DCC*, paras 243-250.

¹⁷⁵ *Al Hassan DCC*, para. 227.

¹⁷⁶ **P-0582**: [MLI-OTP-0062-3820-R01](#) at 3833, lines 440-447.

¹⁷⁷ *Naletilić & Martinović AJ*, para. 114 (“[t]he principle of individual guilt requires that an accused can only be convicted for a crime if his *mens rea* comprises the *actus reus* of the crime”).

¹⁷⁸ *Blagojević AJ*, para. 298.

concluded and carried out through force. No evidence had been led to demonstrate that Mr Al Hassan was aware that Mohamed Moussa detained women before mid-December 2012: there is no evidence that he contributed or assisted Mohamed Moussa after this point. No evidence has been led to demonstrate that Mr Al Hassan could predict or influence the judgments or punishments issued by the Islamic Tribunal. Apart from his utter lack of involvement, the only evidence that Mr Al Hassan knew of the fate of the mausolea is based on a “chat” that occurred after Ansar Dine, ██████████ and Mr Al Hassan left Timbuktu.

65. Mr Al Hassan’s presence and participation in the Islamic Police from May 2012 to very early 2013, and in Ansar Dine more generally, does not reflect any knowledge and intent to commit the charged crimes. Nor can intent and knowledge be imputed from the routine tasks ascribed to him within the Islamic Police or from his interactions in the community more generally. The Prosecution has not proved that Mr Al Hassan intended to further or contribute to the charged common purpose of installing *Shari’a* in Timbuktu. Mr Al Hassan was not an extremist¹⁷⁹ and harboured no such ideologies.¹⁸⁰ ██████████ even noted that Mr Al Hassan’s “religious understanding was very limited”¹⁸¹ and that he “did not have deep knowledge of the Islamic rules”.¹⁸² This belies a lack of intent on Mr Al Hassan’s part to facilitate or contribute to the implementation of any extremist ideologies or purpose.

66. Like much of the population in 2012, Mr Al Hassan faced the unhappy choice of either abandoning his home or of staying in Timbuktu but finding a way to protect and provide for his family, particularly in light of the health difficulties faced by ██████████
█████████¹⁸³ Witnesses have testified that Mr Al Hassan, like many other young men in the tribes, was pushed by his tribe to be a non-extremist stakeholder,¹⁸⁴ and to “join the non-Qaeda section of Ansar Dine to protected [himself], to protect the community and to develop a control of the organisation from the inside.”¹⁸⁵

67. Mr Al Hassan’s motives – which were directed towards helping his family and the local Azawadi population¹⁸⁶ – are reflected by his actions – which were also directed towards helping

¹⁷⁹ **D-0514:** T-209, p.17, lines 11-22 (Conf); *See also* [MLI-D28-0006-9053-R01](#) at 9058, paras 40, 41 and 42; **D-0272:** T-182, p. 13, lines 14-19 (Conf).

¹⁸⁰ **P-0065:** T-050, p. 19, lines 2-5 (Conf).

¹⁸¹ ██████████

¹⁸² ██████████

¹⁸³ Defence Trial Brief, paras 37-39; Original: [MLI-D28-0006-4209](#); Translation (ENG): [MLI-D28-0006-4210](#); [MLI-D28-0006-4262](#); Original: [MLI-D28-0006-4263-R01](#); Translation (ENG): [MLI-D28-0006-4266](#).

¹⁸⁴ **P-0065:** T-050, p. 18, line 22 (Conf); **P-0654:** T-133, p. 84, line 25 – p. 85, line 16.

¹⁸⁵ **P-0065:** T-050, p. 18, lines 17-20 (Conf); **P-1086:** T-122, p. 59, lines 19-20; **D-511:** [MLI-D28-0005-9310](#) at 9314-9315 (English translation [MLI-D28-0006-2629-R01](#) at 2637); **D-0534:** [MLI-D28-0006-4188-R01](#) at 4190, lines 14-16; **D-0211:** T-190, p. 59, line 13 – p. 66, line 4.

¹⁸⁶ **P-0065:** T-046, p. 64, lines 1-15 (Conf); **D-0534:** [MLI-D28-0006-4188-R02](#), p. 4198, lines 1-10.

the local population. Even if members of Ansar Dine or AQIM shared a common purpose involving the commission of crime (which is disputed), the Prosecution has also not proven that Mr Al Hassan's daily activities were directed towards advancing the commission of such crimes or that he knew and intended his activities to do so. As set out above, in order to fill the vacuum created by a State that had long been absent from the North, Ansar Dine and the Islamic Police assisted the local population and protected them from crimes, using forms of traditional justice long utilised in the region.¹⁸⁷ The "common purpose" of Ansar Dine and the Islamic Police included providing assistance and care for the people of Timbuktu; water, electricity, fuel, medicine, and medical treatment were provided to the people for free.¹⁸⁸ Both Prosecution and Defence witnesses described the extent to which Mr Al Hassan's role in the Islamic Police assisted with these objectives: he brought sick persons to the hospital, helped the hospital function securely and effectively, and facilitated the provision of essential services.¹⁸⁹ This is a lawful objective and Mr Al Hassan's actions, contributing to this objective, cannot give rise to a conviction for war crimes and crimes against humanity. The Islamic Police also acted as a dispute resolution mechanism for locals - allowing them to resolve issues or property disputes without resort to violence. Both Prosecution and Defence Witnesses described instances where Mr Al Hassan used his limited role in the Islamic Police to help them, protect them, or advise them in a manner that demonstrated his commitment to ensuring the well-being and security of all ethnic groups in the local population.¹⁹⁰

68. During Mr Al Hassan's affiliation with it, Ansar Dine was treated as a legitimate group and was involved in the peace negotiations in Burkina Faso;¹⁹¹ in fact, it was not designated a terrorist organisation until well after Mr Al Hassan had ended his involvement with it.¹⁹² In short, he had no reason to question the legitimacy of the structure from May 2012 to January 2013.

¹⁸⁷ See **D-0246**: [MLI-D28-0006-9124-R01](#) at 9126, paras 10 to 13; **P-0004**: T-166, pp. 19-27 (Conf); **P-0150**: T-097, pp. 37-39 (Conf); **P-0643**: T-083, pp. 52-53, 57-68 (Conf); **P-0654**: T-133, pp. 51-53 (Conf); **P-0160**: T-067, p. 33, line 21 – p. 43, line 4 (Conf).

¹⁸⁸ [MLI-D28-0006-9124-R01](#) at 9129, para. 28. See also **P-0605**: T-044, p. 67, lines 23-24 (Conf); p. 71, lines 5-7; T-050, p. 56, lines 5-19 (Conf); **D-0315**: T-185, p. 30, lines 4-24; **P-0608**: T-154, p. 16, lines 8-16 (Conf).

¹⁸⁹ **P-1086**: T-122, p. 44, line 25 – p. 45, line 25 (Conf); **P-0608**: T-154, p. 56, line 5 – p. 57, line 16 (Conf); **D-0093**: [MLI-D28-0006-4212-R01](#) at 4214, para. 14.

¹⁹⁰ **D-0006**: T-207, p. 39, line 24 – p. 42, line 20 (Conf); **D-0544**: T-196, p. 6, lines 2-8, p. 18, lines 6-13, p. 30, lines 18-22, p. 39, line 18 - p. 40, line 11 (Conf); **D-0272**: [MLI-D28-0006-4181-R01](#) at 4184, para. 22; **P-0608**: T-154, p. 56, line 5 – p. 57, line 16, p. 59, lines 4-23 (Conf); [MLI-D28-0005-7606](#).

¹⁹¹ **P-0065**: T-048, p. 32, line 20 – p. 33, line 17 (Conf); [MLI-D28-0006-4002](#); [MLI-D28-0005-2561](#) (Translation: [MLI-D28-0005-2563](#); [MLI-D28-0005-2565](#) (Translation: [MLI-D28-0005-2567](#)); [MLI-D28-0005-2569](#); [MLI-D28-0005-2611](#);

¹⁹² **P-0065**: T-048, p. 33, lines 9-11 (Conf).

4.3 Mr Al Hassan's Alleged General Contributions to the Common Purpose

69. The Prosecution has failed to present a clear nexus between Mr Al Hassan's work with the Islamic Police – i.e. his alleged contributions – and the commission of crimes. It has also obfuscated the central issue of *mens rea*, instead stating throughout its pleadings that Mr Al Hassan's "persecutory intent" can be presumed from the mere fact that crimes took place.¹⁹³

70. Mr Al Hassan's functions during his time with the Islamic Police were entirely consistent with standard tasks and assignments of law enforcement and is not probative of the *mens rea* to commit the charged war crimes and crimes against humanity.

71. In the first place, Mr Al Hassan's role within Ansar Dine was limited. The Islamic Police itself had a subordinate role within Ansar Dine and Mr Al Hassan himself did not influence its mandate or play a substantive role in the manner in which it executed its tasks. He did not occupy positions of power or influence within the organisation and did not possess the capacity to question or undermine the authority or decisions of his seniors, much less the group's leaders.¹⁹⁴ Mr Al Hassan did not participate in any high councils¹⁹⁵ or decision-making structures.¹⁹⁶

72. No weight can be placed on [REDACTED] evidence concerning a January 2013 meeting allegedly involving Mr Al Hassan. This evidence must be read in connection with [REDACTED]. The evidence, as a whole, does not support any reliable inference that Mr Al Hassan exercised any form of authority at this period. On oath, [REDACTED] testified that at this January meeting, Mr Al Hassan repeated in French what others said in Arabic as the meeting was attended by Arab traders.¹⁹⁷ He also gave evidence that it was the locals themselves that decided that shop-keepers could respond to

¹⁹³ [OTP Trial Brief](#), para. 280.

¹⁹⁴ [REDACTED]

¹⁹⁵ See e.g. [REDACTED]

¹⁹⁶ See also **P-0065**: T-046, p. 64, lines 22-24 (Conf); [REDACTED] (discussing membership of the high councils and committees, from which Mr Al Hassan was markedly absent).

¹⁹⁷ [REDACTED]

threats directly, but then afterwards there was an appeal for calm.¹⁹⁸ [REDACTED] testified that all the participants in the meeting were in agreement concerning the message that was sent out,¹⁹⁹ and [REDACTED] clarified that there were two key meetings during this era – one which concerned the protection of Arab shop-keepers (where Mr Al Hassan was present) and the other, where the local population were warned not to insult members of the groups (where Mr Al Hassan was not present).²⁰⁰ For the first meeting, Mr Al Hassan also did not speak – “he was just present”.²⁰¹ At most, Mr Al Hassan was a mere interpreter and, [REDACTED] a passive bystander.

73. Mr Al Hassan was neither a member of *Hesbah* nor of the Islamic Tribunal; on the contrary, he was a non-leadership figure within the Islamic Police, which, incidentally, ranked lowest in the organisational hierarchy of the group.²⁰²

for minor [offences] it was usually the police, as I said, if there were minor clashes or problems between people. But if the offence was more serious it would go up to the level of the morality brigade. And if it was even more serious, it would go up to the justice system.

[REDACTED] confirmed that the “the police were not on equal footing as the judges”²⁰³ and were obliged to execute the latter’s decisions.²⁰⁴

74. Even within the Islamic Police itself, Mr Al Hassan exercised no real power. Contrary to the Prosecution’s assertions that he was a “key and important leader within the Islamic police”, his role was administrative.²⁰⁵ Known primarily for his computer skills²⁰⁶ and translation abilities,²⁰⁷ D-0202 testified that Mr Al Hassan was typically found at his desk, and “always at the police HQ or at his office”,²⁰⁸ while D-0605 confirmed Mr Al Hassan’s overall lack of authority.²⁰⁹ The charged allegation that Mr Al Hassan drafted and signed reports is a red herring: in the absence of proof that Mr Al Hassan could control what was inserted into reports, or could choose whether to file a report, such tasks do not rise above the threshold of routine

198 [REDACTED]

199 [REDACTED]

200 [REDACTED]

201 [REDACTED]

202 **P-0654**: T-134, p. 21, lines 17-20 (Conf).

203 [REDACTED]

204 [REDACTED]

205 **P-0065**: T-046, p. 59, lines 13-19 (Conf). *See also* **D-0202**: T-203, p. 40, lines 18-24 (Conf).

206 **D-0605**: T-193, p. 20, line 24 – p. 21, line 1, p. 26, lines 14-17 (Conf).

207 **D-0202**: T-204, p. 9, line 13 (Conf).

208 **D-0605**: T-195, p. 21, lines 13-15 (Conf).

209 **D-0605**: T-192, p. 84, lines 3-8 (Conf).

administration. The fact that emails to the ICC Registrar are acknowledged and responded to by his administrative assistant do not make the assistant his right-hand deputy.

75. The clerical and subordinate nature of Mr Al Hassan's position is demonstrated by what he did not or could not do. He did not carry a weapon in his day-to-day functions.²¹⁰ He did not participate in military or religious trainings conducted by Ansar Dine. He did not participate in daily police patrols. He could not represent the Islamic Police at meetings with the local population.²¹¹ He transcribed what was said to him, but could not independently conduct investigations of his own accord.²¹² Indeed, of all the reports collected by the Prosecution, only one report refers to him as an investigator, namely a minor case, conducted in [REDACTED] presence, against a fellow security officer, which resulted in the possibility of a full pardon.²¹³ The fact that no subsequent report refers to Mr Al Hassan as an investigator demonstrates that his ability to conduct investigations was curtailed after this point.

76. Mr Al Hassan also did not have authority over other members of the police.²¹⁴ That Mr Al Hassan did not possess any effective power as concerns the conduct of individual police officers is bolstered by [REDACTED] claim that there was no discipline amongst members of the Police²¹⁵ and that individual members would go around and do whatever they wanted to do without any consequences.²¹⁶ P-0065 further confirmed that Mr Al Hassan exercised no authority or influence over AQIM members in the police, which included Abu Dhar.²¹⁷ P-0582 also explained that Khaled was responsible for taking decisions to punish members of the police, with Mr Al Hassan merely translating his orders.²¹⁸

77. Indeed, despite Prosecution allegations that Mr Al Hassan was the "commissioner of police",²¹⁹ the "driving force within the Islamic Police",²²⁰ or that he held a "vital role" in the police,²²¹ numerous witnesses have testified that he was neither chief in name nor action;²²²

²¹⁰ **P-0638**: T-058, p. 58, lines 23-24 (Conf); **P-0654**: T-133, p. 89, line 9 – p. 90, line 15 (Conf); **P-0004**: T-165, p. 73, lines 17-19 (Conf).

²¹¹ **D-0551**: T-200, p. 88, lines 13-18 (Conf).

²¹² **D-0605**: T-192, p. 93, lines 11-13 (Conf).

²¹³ See *infra* para. 395.

²¹⁴ **D-0605**: T-192, p. 84, lines 1-8; p. 93, lines 7-8 (Conf). See also T-193, p. 13, lines 22-25 (Conf).

²¹⁵ [REDACTED]

²¹⁶ [REDACTED]

²¹⁷ **P-0065**: T-046, p. 63, lines 5-23 (Conf).

²¹⁸ **P-0582**: [MLI-OTP-0062-3788-R02](#) at 3807, lines 642-658.

²¹⁹ OTP Opening Statements: T-017, p. 57, line 7 (Conf).

²²⁰ OTP Opening Statements: T-017, p. 57, line 13 (Conf).

²²¹ OTP Opening Statements: T-017, p. 57, line 15 (Conf).

²²² **P-0605**: T-192, p. 79, lines 6-14 (Conf); **P-0540**: T-184, p. 12, lines 9-11 (Conf); **P-0006**: T-205, p. 31, lines 1-10 (Conf); **D-0202**: T-203, p. 36, lines 10-15 (Conf). See also **P-0605**: T-195, p. 19, lines 11-13 (Conf).

that was first Adam,²²³ and then Khaled, to whom Mr Al Hassan reported and deferred.²²⁴ Indeed, P-0582 recalled having been frustrated at the fact that, each time he or anyone else asked Mr Al Hassan about even minor issues concerning the police, Mr Al Hassan would be unable to act without first checking with his superiors.²²⁵ Tellingly, when Mr Al Hassan is informed by locals from Ber that they have caught thieves and were seeking the assistance of the police, Mr Al Hassan's reaction was to call Khaled to ask him to come immediately to deal with the matter.²²⁶ P-0654 also testified that Mr Al Hassan could not make decisions, but needed to first verify any issue with his chief.²²⁷

78. Witnesses, who were present in Timbuktu in January 2013, confirmed that Mr Al Hassan never occupied a leadership role in the Police. P-0065 testified unequivocally that the former was not the head of Police.²²⁸ Similarly, D-0202, who was present in Timbuktu until the departure of Ansar Dine, confirmed that Khaled was the Emir of the Police until the very end.²²⁹ In 2013, when [REDACTED] and Koutaiba (an honest and accurate man)²³⁰ co-wrote the "complete story" of Ansar Dine for the period "until the French intervention",²³¹ they did not list Mr Al Hassan as an Emir of the Islamic Police.²³² While the Prosecution has attempted to rely on an translation error to suggest that D-0605 testified that Mr Al Hassan was the *emir* at the end,²³³ this conclusion is not coherent with D-0605 repeated explanation that the Islamic Police was directed first by Adama (with Abu Dhar and then Mr Al Hassan as subordinates), and then Khaled (with Abu Dhar and then Mr Al Hassan as subordinates),²³⁴ and also that Mr Al Hassan was always under both the Emir and Abu Dhar.²³⁵

²²³ P-0654: T-128, p. 19, lines 10-18 (Conf). See also T-131, p. 34, lines 17-18 (Conf) ("[...] in 2012 [...] I know that the person in charge of the Islamic Police was Adama.").

²²⁴ P-0065: T-046, p. 49, lines 7-8 (Conf); [MLI-OTP-0068-3201](#) at 3229, para. 142. See also P-0654: T-128, p. 19, lines 22-25 (Conf); D-0202: T-204, p. 9, lines 10-16 (Conf).

²²⁵ P-0582: [MLI-OTP-0062-3820-R01](#) at 3830-3831. See also P-0065: T-040, p. 55, lines 20-22 (Conf).

²²⁶ Video: [REDACTED]; Transcript: [REDACTED]; Translation (ENG): [REDACTED] at 4635, lines 1-16.

²²⁷ P-0654: T-128, p. 36, lines 7-13 (Conf).

²²⁸ P-0065: T-040, p. 55, lines 11-16 (Conf).

²²⁹ D-0202: T-203, p. 36, lines 12-22 (Conf); See specifically lines 20-22 ("[a]nd for how long was [Khaled] the chief of the police? A. [...] until the mujahideen left Timbuktu in 2013.").

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²³³ [OTP Final Trial Brief](#) para. 124. It would appear that the phrase "followed by", which can mean "in time" or "in hierarchy", was translated as "chronologically" in English.

²³⁴ D-0605: T-192, p. 83, line 25 – p. 84, line 7 (Conf).

²³⁵ D-0605: T-193, p. 18, lines 1-19 (Conf) ("[h]e was after Abou Zhar always, and Abou Zhar was the second, he had the second rank. So we can say that Al Hassan's rank was the third one at the police.").

79. Mr Al Hassan was obliged, under threat of punishment,²³⁶ to follow any orders issued by his superiors.²³⁷ He did not rank high enough within the hierarchy to independently make any important decisions and did not possess sufficient authority or autonomy to disregard decisions or decrees issued by the leaders.²³⁸ Like all members, he was expected to comply.

80. Given his limited sphere of influence within the Islamic Police, Mr Al Hassan did not have the capacity to frustrate the group or groups' objectives or any alleged crimes emanating therefrom. Even if he had refused to fulfil his duties as a police-officer and accepted the severe corporal consequences of such a decision, it would not have stopped someone else from doing the work that he was supposed to and would not have altered the functioning of the Islamic Police or of Ansar Dine in any way; someone else would have replaced him. It would have been the people of Timbuktu who suffered as a result, as they would have lost a key ally. Mr Al Hassan leaving the Islamic Police or refusing to obey his orders would have made no difference to the overall functioning of the Police, the group, or to the alleged common purpose, but it would have resulted in very real consequences to Mr Al Hassan, his family,²³⁹ and the people of Timbuktu.²⁴⁰

4.3.1 That a Number Attributed to Mr Al Hassan Appeared For a Short Time on the Police Signboard Does Not Establish the Existence of Any Authority on His Part

81. The allegation that the Police signboard exhibited a number attributed to Mr Al Hassan does not prove that Mr Al Hassan knowingly and intentionally contributed to the commission of the charged crimes. **First**, the Prosecution has not proved that this number was used exclusively by Mr Al Hassan, during the period it was exhibited. **Second**, the sign displayed two numbers: 79262392 and 77035418,²⁴¹ one of which has been attributed to Adam. The inclusion of an additional number would be consistent with Mr Al Hassan's role as a linguistic

²³⁶ **P-0065**: T-049, p. 18, lines 15-21 (Conf) (testifying about a video in which a member of Ansar Dine was publicly sanctioned for the primary purposes of demonstrating to other members the consequences of disobedience and to intimidate them into compliance).

²³⁷ **P-0065**: T-046, p. 64, lines 22-24 (Conf).

²³⁸ **P-0065**: T-046, p. 63, lines 19-23 (Conf).

²³⁹ Local members of the Islamic Police were not paid salaries, but were given rice, grain, millet, clothing, and other assistance essential to their and their families' survival. See **P-0582**: [MLI-OTP-0062-3788-R01](#) at 3798.

²⁴⁰ **P-0065**: T-050, p. 18, line 4 – p. 19, line (Conf); **P-0150**: T-108, p. 33, lines 22-25 (Conf); **P-1086**: T-122, p. 46, lines 11-22; p. 48, lines 2-20 (Conf); **P-0654**: T-133, p. 56, lines 8-12 (Conf); **P-0608**: T-154, p. 56, line 5 – p. 57, line 16; p. 59, lines 4-23 (Conf); **D-0315**: T-185, p. 54, line 7 – p. 55, line 12 (Conf); T-186, p. 18, lines 1-9; p. 21, line 23 – p. 22, line 4 (Conf); **D-0605**: T-195, p. 20, line 22 – p. 21, line 1 (Conf); **D-0006**: T-205, p. 36, lines 1-14 (Conf); **D-0514**: T-209, p. 17, lines 17-22 (Conf); **D-0544**: [MLI-D28-0006-3342-R01](#) at 3344, paras 13-14; at 3345, paras 20-21; **D-0534**: [MLI-D28-0006-4188-R01](#) at 4198, lines 26-28; **D-0093**: [MLI-D28-0006-4212-R01](#) at 4214, para. 14; at 4214-4215, paras 24-25; **D-0312**: [MLI-D28-0006-5584-R01](#) at 5591-5592, lines 33-35; **D-0246**: [MLI-D28-0006-9124-R01](#) at 9127-9131, paras 17, 19-28; at 9132, para. 37.

²⁴¹ **P-0150**: T-092, p. 49, line 18 – p. 50, line 4; p. 53, lines 8-14 (Conf).

interface for Adam and other members of the police who could not speak local languages. Indeed, it is common practice to include specific contact numbers and general secretarial numbers in external correspondence. **Third**, when the police station moved from the BMS to the *Gouvernorat*²⁴² towards the end of August or the beginning of September 2012,²⁴³ Mr Al Hassan's number was not included on the new sign.²⁴⁴ ██████ testified that the two numbers appearing on the sign at the second headquarters would necessarily have been that of the police chief and his deputy; however, neither of the two numbers appearing at the *Gouvernorat* are attributable to Mr Al Hassan. Nor has the Prosecution presented evidence of such attribution. In short, despite the Prosecution's assertion that Mr Al Hassan's number being on the board was indicative of his influential role at the "heart of a repressive system", Mr Al Hassan's number appeared on a board at the first police station for only three months, from May to August 2012, and was not included after the move to the second Police headquarters.

4.3.2 *Mr Al Hassan's Limited Administrative or Linguistic Role Concerning Islamic Police Patrols Did Not Contribute to the Charged Criminal Incidents*

82. The Prosecution has not proved that Mr Al Hassan played a substantive role in the organisation and execution of police patrols or that he undertook any such tasks with the knowledge and intent to further the commission of the charged criminal incidents. Mr Al Hassan's superiors made all substantive decisions related to the patrols,²⁴⁵ such that Mr Al Hassan neither had nor was able to exercise any authority over those participating in them. P-0582 confirmed that such planning only took place in accordance with Khaled's instructions and orders.²⁴⁶ The corrigendum to the Prosecution's closing brief also acknowledges a misplaced reliance on translation errors from Mr Al Hassan's interviews,²⁴⁷ which are themselves a fundamentally unreliable source of evidence.²⁴⁸

83. The police patrols themselves were directed towards standard, lawful police functions, such as maintaining order and stability.²⁴⁹ Their services were welcomed and utilised by the locals.²⁵⁰ P-0654 testified that he observed the police patrols on a regular basis, noting that they

²⁴² **P-0654**: T-131, p. 34, lines 4-5 (Conf); T-128, p. 48, lines 8-9 (Conf).

²⁴³ OTP Opening Statements: T-018, p. 19, lines 10-11 (Conf).

²⁴⁴ **P-0150**: T-113, p. 69, line 12 – p. 70, line 5 (Conf).

²⁴⁵ **P-0582**: [MLI-OTP-0062-3820-R01](#) at 3836, lines 547-559.

²⁴⁶ **P-0582**: [MLI-OTP-0062-3820-R01](#) at 3836, lines 547-559.

²⁴⁷ [Explanatory Note to OTP Corrigendum](#).

²⁴⁸ [Explanatory Note to OTP Corrigendum](#).

²⁴⁹ **P-0065**: T-038, p. 48, line 14 (Conf).

²⁵⁰ **P-0065**: T-038, p. 48, lines 8-10 (Conf).

“were in charge of regulating traffic, controlling traffic”²⁵¹ and worked to “restore order”.²⁵² P-0065 testified that the Islamic Police acted as a “regular police force”²⁵³ and that women were able to go to the market and shopkeepers were able to sell their goods as a direct consequence of the security established by them.²⁵⁴ [REDACTED] similarly confirmed that the Islamic Police in Timbuktu did not function in the way prescribed by Islamic texts and instead functioned more as a general police force as found in other civil systems.²⁵⁵

4.3.3 *Limited Participation in Media Interviews at the Behest of Group Leaders Does Not Establish the Existence of Any Real or De Facto Authority or Contributions*

84. Participation in media interviews is of no relevance to the execution of the charged criminal incidents. **First**, the Prosecution has not demonstrated that the interviews were ever disseminated to the public. [REDACTED] testified that Mr Al Hassan, as a local Tuareg, was chosen to replace [REDACTED] after [REDACTED], for footage for a proposed scripted documentary.²⁵⁶ [REDACTED] testified that the project was never completed or broadcast.²⁵⁷ In the absence of such public transmission, the interviews had no impact on the course of events in Timbuktu. **Second**, Mr Al Hassan’s alleged participation was not reflective of an elevated role – quite the contrary: because anyone appearing in these interviews would be recognised by security and intelligence forces and would not be able to carry out missions afterwards.²⁵⁸ The group leaders selected locals who were inconsequential to such missions.²⁵⁹ Abu Dhar, a fellow Malian national, also participated in such interviews.²⁶⁰ **Third**, the interviews were not spontaneous: they were scripted by third persons and as such, do not evidence Mr Al Hassan’s personal views and convictions. The contents are no more reliable than a staged, directed, and acted film. [REDACTED] confirmed in his testimony that he was “acting” when he participated in [REDACTED] [REDACTED].²⁶¹ [REDACTED] also “acted” as a member of *Hesbah*, even though [REDACTED] [REDACTED].²⁶²

²⁵¹ P-0654: T-132, p. 65, lines 12-13 (Conf).

²⁵² P-0654: T-132, p. 65, line 16 (Conf).

²⁵³ P-0065: T-046, p. 53, lines 23-24 (Conf).

²⁵⁴ P-0065: T-046, p. 53, lines 9-16 (Conf).

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²⁶⁰ Video: [REDACTED]; Transcript (ARB): [REDACTED]

Translation (ENG): [REDACTED]

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4.3.4 *Interactions With the Local Population Do Not Establish the Existence of Any Real or De Facto Authority*

88. Prosecution and Defence witnesses alike have testified to knowing and recognising Mr Al Hassan because he, like them, was a local from Timbuktu.²⁷⁵ He spoke their local languages and had frequented many of the same places as had they.²⁷⁶ Long before 2012, he had earned a reputation for being kind and friendly and for trying to help the local population,²⁷⁷ something which he continued to do from his position within the Islamic Police.²⁷⁸ The evidence thoroughly refutes the Prosecution's claim that Mr Al Hassan was well-known in Timbuktu only as a result of his role within the Islamic Police, that the population feared him, and that the locals "had no choice but to engage with him".²⁷⁹ This is a misstatement of the evidence. P-0065, P-0654, D-0246 confirmed that Mr Al Hassan helped them, to help protect the local population through their reporting endeavours.²⁸⁰ P-0654 and D-0553 attested to the positive effects stemming from the presence of locals, such as Mr Al Hassan within Ansar Dine.²⁸¹

89. D-0605 testified that Mr Al Hassan felt close to the population and tried to help when he could because he knew the region, its customs, and traditions. He was able to communicate and interact with most of the local population because of his linguistic skills.²⁸² P-0582 similarly stated that Mr Al Hassan felt it was his duty, as a native of Timbuktu who knew the people, to get involved in police work in order to help the locals,²⁸³ and had advised him to

²⁷⁵ **P-1086**: T-121, p. 49, lines 2 – 16 (Conf); T-122, p. 48, lines 7-13 (Conf); **P-0638**: T-058, p. 13, line 7 - p. 17, line 9 (Conf); **D-272**: T-182, p. 7, lines 8-17 (Conf); **D-0211**: T-190, p. 19, line 17 – p. 20, line 9 (Conf); **D-0605**: T-193, p. 19, line 19 – p. 20, line 14 (Conf). *See also* **P-0654**: T-133, p. 43, line 23-25 (Conf).

²⁷⁶ **D-0605**: T-193, p. 17, lines 4-9 (Conf); T-195, p. 91, line 21 – p. 92, line 8 (Conf); **P-0150**: T-107, p. 86, lines 7 – 17 (Conf); **P-1086**: T-122, p. 48, lines 2-20 (Conf); **D-0272**: T-182, p. 45, lines 1-22 (Conf); **D-0211**: T-190, p. 27, lines 3-11 (Conf); **D-0243**: [MLI-D28-0006-9053-R01](#) at 9058, para. 40-42.

²⁷⁷ **P-0150**: T-108, p. 33, lines 22-25 (Conf); **P-1086**: T-122, p. 46, lines 11-22 (Conf); **D-0605**: T-195, p. 20, line 22 – p. 21, line 1 (Conf); **D-0093**: [MLI-D28-0006-4212-R01](#) at 4214, para. 14; **D-0246**: [MLI-D28-0006-9124-R01](#) at 9127, paras 17; **D-0544**: [MLI-D28-0006-3342-R01](#) at 3344, paras 13-14. *See also* **P-0654**: T-133, p. 56, lines 8-12 (Conf); **D-272**: [MLI-D28-0006-4181-R01](#) at 4183, paras 15-16.

²⁷⁸ **D-0605**: T-195, p. 20, lines 22-25 (Conf); **P-0065**: T-050, p. 18, line 4 – p. 19, line 5 (Conf); [MLI-D28-0006-9124-R01](#) at 9127-9131, paras 17, 19-28; at 9132, para. 37; **P-0654**: T-133, p. 56, lines 8-12 (Conf); **P-0608**: T-154, p. 56, line 5 – p. 57, line 16, p. 59, lines 4-23 (Conf), [MLI-D28-0005-7606](#); **D-0315**: T-185, p. 54, line 7 – p. 55, line 12 (Conf); T-186, p. 18, lines 1-9; p. 21, line 23 – p. 22, line 4 (Conf); **D-0514**: T-209, p. 17, line 21 – p. 18, line 2 (Conf); **D-0006**: T-205, p. 36, lines 1-14 (Conf); **P-1086**: T-122, p. 48, lines 2-20 (Conf); **D-0312**: [MLI-D28-0006-5584-R01](#) at 5591-5592, lines 33-5. *See also* **D-0534**: [MLI-D28-0006-4188-R01](#) at 4198, lines 26-28.

²⁷⁹ OTP Opening Statements: T-017, p. 70, lines 7-8 (Conf); **D-272**: [MLI-D28-0006-4181-R01](#) at 4185, para. 24.

²⁸⁰ **P-0065**: T-039, p. 25, line 22 – p. 26, line 7 (Conf); T-048, p. 22, line 23 – p. 23, line 23, p. 24, lines 2-11 (Conf); **P-0654**: T-128, p. 23, line 5 – p. 24, line 14, p. 44, lines 2-10 (Conf); **D-0246**: [MLI-D28-0006-9124-R01](#) at 9127-9129, paras 17, 23, 19-22, 24-28.

²⁸¹ **D-0553**: [MLI-D28-0005-9325-R01](#) at 9332, para. 39; **P-0654**: T-133, p. 43, line 16 – p. 44, line 17 (Conf).

²⁸² **D-0605**: T-193, p. 26, lines 1-6 (Conf); **D-0006**: T-207, p. 39, line 24 – p. 42, line 20 (Conf).

²⁸³ [MLI-OTP-0062-3820-R01](#) at 3830-3831.

interpret in favour of the locals as opposed to the foreigners.²⁸⁴ His goal – and one that he seemingly accomplished, given witness testimony underscoring the locals’ appreciation for Mr Al Hassan²⁸⁵ – was to maintain peace and stability within the community.²⁸⁶

90. In the same manner that the press or outreach office of the ICC do not influence the content of ICC judgments, Mr Al Hassan’s interactions with the local population were not reflective of any substantive role within the decision making processes within the Islamic Police. P-0582 clarified in this respect that while locals preferred to interact with Al Hassan when they went to the Police, as opposed to with Khaled, who did not speak their language, Mr Al Hassan always involved and deferred to Khaled, as his superior.²⁸⁷ This account is corroborated by both P-0654 and D-0246.²⁸⁸

91. The Prosecution has failed to explain the nexus between Mr Al Hassan’s alleged role in interpreting, translating, and communicating the daily work of the Islamic Police to the local population and the intentional commission of the charged crimes. His role as interpreter and interface for the locals was directed towards lawful ends and objectives – improving the situation for the local population in Timbuktu. As found in the *Mbarushimana* case, a defendant’s role in speaking publicly for a particular organisation does not constitute evidence of authority over the commission of crimes by the organisation in question.²⁸⁹

92. Nor can such a nexus be discerned from the charges or the evidence. Mr Al Hassan’s linguistic skills did not influence the content of the orders issued by Adama or Khaled. They also did not have any impact whatsoever on the execution of the specific crimes charged in this case. P-0582 stated that Mr Al Hassan only received complaints when Khaled was not present, and even then, he did so solely to organise the complaints for Khaled.²⁹⁰ Individual criminal responsibility for serious crimes cannot be predicated on conduct of completely ordinary and administrative functions, such as Mr Al Hassan’s alleged role in receiving the locals’ complaints: Adama and Khaled would have issued the same orders, irrespective as to whether Mr Al Hassan was a member of the Islamic police or not. There were also other interpreters ready and available to perform the same role.²⁹¹ The people of Timbuktu would have lost

²⁸⁴ [MLI-OTP-0062-3820-R01](#) at 3830-3831.

²⁸⁵ **P-0065**: T-050, p. 18, lines 23-25 (Conf).

²⁸⁶ **P-0065**: T-046, p. 64, lines 1-15 (Conf).

²⁸⁷ **P-0582**: [MLI-OTP-0062-3773-R01](#) at 3784-3785.

²⁸⁸ **D-0246** : [MLI-D28-0006-9124-R01](#), at 9128, para. 23; See also *supra*, fn. 280.

²⁸⁹ [Mbarushimana Confirmation Decision](#), para. 297.

²⁹⁰ [MLI-OTP-0070-0749](#) at 0791, lines 62-63.

²⁹¹ **D-0605**, T-192, p. 40, lines 16-23 (Conf).

friendly face and helping hand, but his absence would not have impacted or changed the events that gave rise to these charges.

4.4 Positive Defences: Mistake of Fact/Law, Superior Orders and Duress

93. The burden of proof is on the Prosecution.²⁹² The raising of positive defences did not shift or dilute this burden.²⁹³ Since the Defence has met its evidentiary burden of demonstrating that the defences of mistake of fact/law, superior orders and duress are applicable to the confirmed charges, Mr Al Hassan must be acquitted of all charges due to the Prosecution's failure to demonstrate the necessary degree of knowledge, intent, and culpable participation, in light of such defences. In addition to the factual and legal arguments set out in the Defence Trial Brief,²⁹⁴ the Defence has raised incident-specific arguments in the sections below.

5 THE PROSECUTION HAS FAILED TO PROVE THE CHARGED INCIDENTS

5.1 The Prosecution has failed to prove the existence of a "protracted armed conflict"

94. The Prosecution failed to adduce sufficient probative evidence to establish, beyond reasonable doubt, the intensity and protracted nature of the hostilities or the organisation of the involved armed groups. The standard for triggering a non-international armed conflict (NIAC) is higher than the "one shot" trigger for international armed conflicts between state actors.²⁹⁵ NIACs must be distinguished from "less serious" forms of internal violence "such as internal disturbances and tensions, riots or acts of banditry," which may be genuinely harmful but do not qualify as armed conflict.²⁹⁶ The existence of different thresholds for non-international and international armed conflict is a consequence of the fact that States may have a greater tendency to guard against regulation of their domestic affairs by international law than against regulation of their external relations with other sovereign States.²⁹⁷

95. International jurisprudence²⁹⁸ confirms that demonstrating the existence of a "protracted armed conflict" requires intensive fact analysis,²⁹⁹ yet the Prosecution has brought no evidence to satisfy the standard of determination, which are the parties' organisation and the intensity or

²⁹² [Ntaganda AJ](#), para. 12.

²⁹³ [Ongwen AJ](#), paras 3-4.

²⁹⁴ See Defence Trial Brief, paras 51-98.

²⁹⁵ M. Sassòli et al., *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, (3rd ed., 2011), p. 22 (Part I, Chapt II); L. Blank and B. Farley, *Identifying the Start of Conflict: Conflict Recognition, Operational Realities, and Accountability in the Post-9/11 World*, 36 Mich. J. Int'l L. 467 (2015), p. 486.

²⁹⁶ [Rome Statute](#), Articles 8(2)(d) and 8(2)(f); [Additional Protocol II](#), Pt. 1, Art. 1, para. 2; see [Tadić TJ](#), para. 562 (emphasis added).

²⁹⁷ [ICRC Commentary on Third Geneva Convention](#), para. 450.

²⁹⁸ See [Haradinaj TJ](#), para. 40; [Tadić TJ](#), paras 143, 145, 565-566.

²⁹⁹ [Akayesu TJ](#), paras 603-605.

“protracted nature” of fighting. The Prosecution did not attempt to prove the requisite level of organisation of AQIM or the MNLA in 2012 because little supporting evidence exists. The five factors necessary to determine organisation include a command structure, unified military strategy, recruitment of new members and facilitation of military trainings, implementation of obligations of Common Article 3, and the ability to speak with one voice.³⁰⁰

5.1.1 *AQIM did not have the requisite level of organisation*

96. From January 2012 to January 2013, AQIM was composed of disparate brigades without unified leadership, with many of the individual brigades remaining uninvolved in the conflict.³⁰¹ There was no uniform or means of identifying individuals as members of AQIM. AQIM had no unified strategy nor was there a clear command structure.³⁰² Prior to their entry into Timbuktu, there is no probative evidence that AQIM brigades exercised territorial control over specific areas in Northern Mali. Moreover, although AQIM was present in Timbuktu, there is no evidence that they controlled the region through military means. At the first sign of potential confrontation, they left.³⁰³ The Prosecution provided no evidence concerning which brigades or commanders were allegedly involved in different confrontations. The existence of an alleged plan to wage jihad or install Islamic values does not transform groups that are loosely aligned by religion into a coherent and organised party to an armed conflict.³⁰⁴ It would flout decades of carefully constructed humanitarian law, and contravene the burden of proof for the Chamber to assume the existence of a unified strategy or command chain between different groups or brigades.

5.1.2 *MNLA did not have the requisite level of organisation*

97. The same degree of ambiguity and discombobulation holds true of the MNLA. Prosecution witnesses confirmed that the MNLA had no discipline or organisation, which led to the commission of crimes such as rape and looting that led AQIM and Ansar Dine to block the presence of the MNLA in Timbuktu to restore order.³⁰⁵ The MNLA became diminished throughout the year because of desertions³⁰⁶ and they disintegrated into “different community

³⁰⁰ [Bošković TJ](#), paras 199–203; [Haradinaj TJ](#), para. 60; [Lubanga TJ](#), para. 537; [Katanga TJ](#), para. 1186.

³⁰¹ **P-0099**: T-145, p. 17, lines 5-13 (Conf); **P-0152**: T-032, p. 27, lines 10-21 (Conf).

³⁰² **P-0004**: T-164, p. 17, lines 7-17 (Conf).

³⁰³ **P-0150**: T-090, p. 64, line 15 – p. 65, line 5 (Conf).

³⁰⁴ [Belgium, *FB et al. Judgment*](#), para. 11.

³⁰⁵ **P-0099**: T-145, p. 19, lines 21-24 (Conf); T-147, p. 5, line 4 – p. 6, line 7 (Conf); p. 7, line 6 – p. 9, line 5; p. 11, line 8 – p. 12, line 7 (Conf); **P-1086**: T-121, p. 28, line 17 – p. 29, line 2 (Conf).

³⁰⁶ **P-1086**: T-121, p. 34, lines 4, 13-14 (Conf).

style groups”.³⁰⁷ Such disintegrated groups do not fulfil the degree of organisation required to attract the application of IHL.³⁰⁸

5.1.3 *Ansar Dine did not have the requisite level of organisation*

98. The Prosecution failed to demonstrate the military command structure of Ansar Dine or its organisation for military purposes. The Prosecution primarily relies mainly on incidents that occurred before Ansar Dine arrived in Timbuktu to establish the existence of an armed conflict. No evidence illustrated whether Ansar Dine promulgated military regulations during this period or had any system to discipline its members. According to P-0150, Ansar Dine lacked sufficient strength to face a conventional army,³⁰⁹ which the Trial Chamber in *Boškoski* found significant to its lengthy analysis of whether the Albanian National Liberation Army possessed the requisite organisation.³¹⁰ Based on a single unreliable witness, the Prosecution states that Ansar Dine received “continuous support” from AQIM (which has no bearing on organisation) and alludes briefly to a “considerable vehicle park [in Timbuktu] and diverse weaponry.”³¹¹ The Prosecution then states that Iyad ag Ghaly organised Ansar Dine’s structure “around a system of allegiance based on the principle of “listen and obey’.”³¹²

99. The idea that organisation for determination of an armed conflict can be proven through such thinly-sourced, facile statements beggars belief. Nowhere does the Prosecution explain what the structure of Ansar Dine actually was, the composition of the hierarchy they cite, or provide any further details about the “considerable vehicle park and diverse weaponry,” including how they were allocated.³¹³ In violent contrast, the *Boškoski* court cited public communiqués issued by the NLA detailing (among other topics), “the goals of the group”, “the NLA’s structure and hierarchy”, “the weaponry and manpower of the NLA”, proclamations of political representatives, and explanation of “NLA withdrawal from Aračinovo.”³¹⁴ The Prosecution is incapable of upholding the burden of proof regarding the level of organisation

³⁰⁷ **P-1086**: T-121, p. 69, lines 18-25 (Conf).

³⁰⁸ [Haradinaj TJ](#), paras 68-89.

³⁰⁹ **P-1050**: T-184, p. 25, line 23 – p. 26, line 11 (Conf).

³¹⁰ [Boškoski TJ](#), paras 250-291. The Chamber’s analysis expanded 41 paragraphs of fact analysis relating to the NLA’s level of organisation. The entirety of the Prosecution’s argument in their Final Brief spans five conclusory paragraphs.

³¹¹ [OTP Final Trial Brief](#), para. 192. *See also* **P-0065**: T-050, p. 37, line 23 – p. 38, line 3 (Conf) (describing the differences between AQIM as a “global project... targeting western interests” (p. 37, lines 23-24) and Ansar Dine as a national project focused on gaining rights.).

³¹² [OTP Final Trial Brief](#), para. 192.

³¹³ [OTP Final Trial Brief](#), para. 192.

³¹⁴ [Boškoski TJ](#), para. 269.

befitting a party to a non-international armed conflict because even during the occupation of Timbuktu, Ansar Dine simply did not possess such organisation.

5.1.4 *MUJAO did not have the requisite level of organisation*

100. The Prosecution fails to illustrate any formal organisational structure of MUJAO, relying on vague descriptors.³¹⁵ No formal chain of command was established,³¹⁶ with certain senior leaders affiliated with MUJAO having also been active in “all of [the] movements”.³¹⁷

5.1.5 *FAMa did not have the requisite level of organisation*

101. Evidence concerning the FAMa also indicates that it was internally “very disorganised”³¹⁸ and incapable of maintaining a chain of command or coherent structure during the charged time period.³¹⁹ It imploded due to desertions and lack of morale,³²⁰ ultimately abandoning its own soldiers.³²¹ P-1086 testified that when he was with the MNLA, he fought against FAMa and pro-government ethnic militia rather than organised army brigades.³²² He was not present when the MNLA entered Timbuktu and was unable to give reliable evidence about how it took place.³²³

102. Even if the Prosecution were to prove organisation of the myriad parties, there is no agreement in IHL regarding the measurement of intensity when multiple non-state actors are involved, as with Mali in 2012. Intensity level is normally “assessed for each bilateral situation on its own, meaning that” violence “between an organized armed actor and its adversary would need to satisfy the criterion of intensity, regardless and separately from the actions of other organized armed actors that might be fighting the same adversary.”³²⁴ Taken separately under this traditional framework, the Prosecution have not proven hostilities between any armed actor and the Malian army or between themselves.

5.1.6 *Improper aggregation of armed acts*

103. In an attempt to cure this defect caused by disparate groups lacking sufficient organisation to be parties to an armed conflict, the Prosecution improperly aggregated all armed acts against

³¹⁵ [OTP Final Trial Brief](#), para. 541.

³¹⁶ **P-0654**: T-130, p. 81, line 6 – p. 82, line 7 (Conf).

³¹⁷ **P-0654**: T-128, p. 10, line 2-4; T-135, p. 22, lines 1-24. (Conf).

³¹⁸ **P-0646**: T-076, p. 6, lines 11-18 (Conf).

³¹⁹ **P-0646**: T-076, p. 6, lines 11-18 (Conf).

³²⁰ **P-0081**: T-061, p. 68, lines 19-21 (Conf); p. 69, lines 6-9 (Conf); **P-1086**: T-122, p. 17, line 19 – p. 18, line 7 (Conf).

³²¹ **D-0243**: [MLI-D28-0006-9053-R01](#) at 9056, para. 25.

³²² **P-1086**: T-121, p. 16, lines 19-20; p. 18, line 24 – p. 20, line 2 (Conf).

³²³ **P-1086**: T-121, p. 24, lines 14-16 (Conf).

³²⁴ J. Nikolic et al., “[Aggregated intensity: classifying coalitions of non-State armed groups](#)”, *ICRC Humanitarian Law & Policy Blog*, 7 October 2020.

the FAMA. The ICRC notes that intensity may be aggregated for the evaluation of armed action as constituting an armed conflict when “several organized armed groups display a form of coordination and cooperation”³²⁵ that include elements such as:³²⁶

establishment of centralized joint command, allocation of areas of responsibilities, sharing of operational tasks (detention, procurement, equipment, transport of troops and other logistics), declarations/agreements describing the tasks assigned to coalition members, existence of common Standard Operating Procedures (SOPs) and/or Rules of Engagement (RoEs), exchanges of tactical/strategic information, existence of an umbrella platform dealing with political issues and communication in the name of the members of the “coalition”, facilitating military operations of one of the actors in the areas under control of another actor, coordinating simultaneous attacks against the common enemy, conducting joint operations, etc.

104. The Prosecution failed to adduce any evidence that myriad actors in Mali were operating as an “alliance or coalition” under these criteria, instead eliciting evidence regarding the individual acts of AQIM, Ansar Dine, MUJAO or MNLA. In fact, as the witness evidence shows, to attempt an argument that the groups were acting in concert would have contravened all facts about the distinct aims, methodology, and philosophies of the groups.³²⁷ Multiple witnesses testified regarding, for example, the opposition of AQIM and Ansar Dine to the rapes and pillaging conducted by the MNLA.³²⁸ While Ansar Dine and the MNLA had an agreement of non-hostilities that was respected from January 2012 and January 2013,³²⁹ such an agreement does not rise to the level of a shared ideology. Were it to do so, a “shared ideology, similarities of political views, or the mere existence of a common enemy” does not constitute a coalition for the purpose of aggregating violence to evaluate the intensity factor.³³⁰ In other words, an agreement on the *absence of violence* between two armed groups cannot be used as evidence of alliance to satisfy an *intensity of violence inquiry* under Art. 8(2)(f).³³¹

³²⁵ ICRC, “[International Humanitarian Law and the Challenges of Contemporary Armed Conflicts](#)” (2019), para. 202.

³²⁶ J. Nikolic et al., “[Aggregated intensity: classifying coalitions of non-State armed groups](#)”, *ICRC Humanitarian Law & Policy Blog*, 7 October 2020.

³²⁷ **D-0511**: Original: MLI-D28-005-9310-R01, Translation (ENG): [MLI-D28-0006-2629-R01](#) at 2633-2637, paras 21-46; **P-0065**: T-037, p. 38, line 20 – p. 40, line 17 (Conf); **P-0150**: T-088, p. 33, lines 7-16 (Conf); T-089, p. 19, line 5 – p. 20, line 9 (Conf); T-099, p. 35, lines 12-14, p. 36 (Conf). See also **D-0553**: [MLI-D28-0005-9325-R01](#) at 9329-9330, paras 25-31.

³²⁸ **P-0150**: T-104, p. 38, line 10 – p. 39, line 1 (Conf). See also *supra*, fn. 305.

³²⁹ [REDACTED]; [MLI-D28-0004-3468](#) (demonstrating the agreement continued to apply throughout 2012).

³³⁰ J. Nikolic et al., “[Aggregated intensity: classifying coalitions of non-State armed groups](#)”, *ICRC Humanitarian Law & Policy Blog*, 7 October 2020.

³³¹ The only armed acts between the armed groups for which the Prosecution has adduced any evidence were for brief skirmishes between MUJAO and the MNLA in Gao. See **P-0646**: T-077, p. 34, lines 11-14 (Conf); **P-1086**: T-121, p. 38, lines 14-15 (Conf).

5.1.7 Impermissible division of alleged armed conflict

105. Even after impermissibly aggregating the armed acts, the Prosecution was unable to establish the duration of hostilities and introduced a second novel argument: splitting the “armed conflict” into two phases: January to April 2012, and April 2012 to January 2013.³³² The Prosecution’s argument defies the purpose of a hostilities analysis, which is to avoid fluctuation in the applicable law.³³³ Legal scholarship notes that as of 2018, the minimum period found to satisfy the protracted element was five months.³³⁴

106. This standard would eliminate the first “phase” of “armed conflict” alleged by the Prosecution. Without that “first phase,” the Trial Chamber is left to solely rely on the Prosecution’s initial citation of uncorroborated pro-government media reports of violence in Ménaka, located over 900 kilometres away from Timbuktu.³³⁵ The Prosecution also refers to an attack on Aguelhok (over 1,000 kilometres away from Timbuktu) occurring the next day,³³⁶ and the fall of military bases, such as Amachach in Tessalit (over 1,150 kilometres from Timbuktu) in March 2012.³³⁷ P-0646 described these engagements as amounting to “terrorism” rather than hostilities.³³⁸ In a video interview, Oumar Ould Hamahah claimed that Tesalit was taken without a single bullet fired.³³⁹ P-0150 stated that he heard that no active fighting was involved in the takeover of Anefis,³⁴⁰ and confirmed that he was told by ██████████ that the fighting in Amachach lasted one day with no casualties on the side of the *mujahideen*.³⁴¹ Regardless, P-0150 cannot be relied upon to establish the existence of hostilities: his information was gleaned from internet searches³⁴² and impacted by inappropriate steers from the Prosecution.³⁴³ Witnesses and legal observers agree that events portrayed in the media were “exaggerated a great deal” for propaganda purposes.³⁴⁴

³³² [Al Hassan DCC](#), para. 39.

³³³ [Gotovina TJ](#), para. 1694 (referring to a “revolving door” of IHL applicability that leads to a “considerable degree of legal uncertainty and confusion”).

³³⁴ D. A. Lewis, “[The Notion of ‘Protracted Armed Conflict’ in the Rome Statute and the Termination of Armed Conflicts Under International Law](#)” (2019) 101 *International Review of the Red Cross* 1091 at 1103, citing [Bemba Confirmation Decision](#), para. 235.

³³⁵ [Al Hassan DCC](#), paras 39, 75, 78.

³³⁶ [Al Hassan DCC](#), para. 79.

³³⁷ [Al Hassan DCC](#), para. 79.

³³⁸ **P-0646**: T-076, p. 7, line 13 (Conf).

³³⁹ Video: [MLI-OTP-0001-0052](#) (see 00: 26: 05: 00 to 00: 28: 10: 00); Transcript (FRN): [MLI-OTP-0033-5296](#) at 5308, lines 361-400.

³⁴⁰ **P-0150**: T-106, p. 41, lines 12-15 (Conf).

³⁴¹ **P-0150**: T-106, p. 66, lines 9-25 (Conf).

³⁴² **P-0150**: T-106, p. 45, lines 9-14 (Conf); p. 49, lines 12-14 (Conf).

³⁴³ **P-0150**: T-106, p. 50, lines 1-19 (Conf).

³⁴⁴ **P-1086**: T-122, p. 20, line 16 – p. 21, line 17 (Conf); **P-0646**: T-078, p. 59, lines 12 to 16 (Conf).

107. Regarding the “second phase”, there is no evidence adduced by the Prosecution. Per Article 8(2)(f), there was no “protracted fighting” between the Malian government and the other groups. The FAMA collapsed due to defections and an internal military *coup d’état* in Bamako.³⁴⁵ In fact, the Prosecution conceded that FAMA decided to leave Timbuktu before other groups entered.³⁴⁶ There was no fighting in or around Timbuktu during the next ten months.³⁴⁷ The MNLA withdrew from Gao to avoid clashes in civilian areas.³⁴⁸ Although there were issues of banditry that required a security response, these issues “always existed, well before the crisis”.³⁴⁹

108. The Prosecution’s “two phases” argument contradicts this Court’s emphasis on the duration of violence in its evaluation of the existence of armed conflict.³⁵⁰ No international tribunal or court has ever found the existence of an armed conflict based solely on the handful of unsupported assertions made by the Prosecution. This Chamber should decline to do so here.

5.1.8 Any armed conflict ceased to exist before the charged offenses took place

109. Regardless of whether the Trial Chamber finds that a NIAC existed at some point between the armed groups and FAMA, the conflict ended before the alleged offenses took place.

110. There is no IHL provision that requires a peace agreement to end hostilities. There are four distinct bases that could constitute the end of a NIAC: (i) the intensity or organisation factors cease to exist;³⁵¹ (ii) the “general close of military operations”; (iii) the determination that there is no reasonable risk of a resumption of hostilities; and (iv) the existence of a peaceful settlement between or among the parties.³⁵² By any of these analyses, a purported “armed conflict” ceased by April 2012.

111. Under the first theory, FAMA was sufficiently disorganised and disengaged to sever the intensity of any hostilities by April 2012, and the myriad of non-state actors could not maintain the requisite organisation or intensity of conflict following the withdrawal of FAMA from Timbuktu because there was no measurable armed conflict. Therefore, the application of IHL

³⁴⁵ [MLI-OTP-0001-2113](#) at 2114, para. 5; [MLI-OTP-0001-5687](#) at 5711-5715.

³⁴⁶ [Al Hassan DCC](#), paras 107-108. See also [MLI-D28-0005-8228](#); **P-0150**: T-089, p. 21, lines 3-6; **P-1086**: T-121, p. 8, line 24 – p. 9, line 1 (Conf).

³⁴⁷ **P-0150**: T-106, p. 6, lines 5-11; p. 72, lines 11-23 (Conf).

³⁴⁸ **P-1086**: T-122, p. 21, lines 9-17 (Conf).

³⁴⁹ **P-1086**: T-122, p. 9, line 21 (Conf).

³⁵⁰ [Bemba TJ](#), para. 139; [Katanga TJ](#), para. 1187; [Haradinaj TJ](#), para. 41; [Delalić TJ](#), paras 129-130, 133, 134, 138-139.

³⁵¹ M. Milanovic, “[The End of Application of International Humanitarian Law](#)” (2014) 96 Int’l Rev. Red Cross 163, 180.

³⁵² D. Lewis et al., “[Four Theories on the End of Non-International Armed Conflict](#)”, *Indefinite War: Unsettled International Law on the End of Armed Conflict*, HLS PILAC, February 2017, p. 103.

ceased “once the conditions that triggered its application” no longer existed.³⁵³ Similarly, FAMA’s collapse and lack of conflict among other groups constituted a “general close of military operations” under the second theory, therefore terminating any existing armed conflict. 112. According to the ICRC, a “lasting cessation of armed confrontations without real risk of resumption” constitutes the end of a NIAC, the third theory.³⁵⁴ Importantly, a NIAC can conclude despite “minor isolated or sporadic acts of violence,” which characterize the events in Mali after April 2012. For example, while the Diakonia International Humanitarian Law Centre in Mali determined that “from 2012 to 2015, Mali’s regular army was engaged in a NIAC against the MNLA” (notably, not AQIM or Ansar Dine, excluding the alleged offenses), the Centre also notes that “the description of these groups by third parties sometimes reflects more their interest in portraying these groups as organized entities, rather than a real degree of organization.”³⁵⁵ When asked if he could provide evidence as to which armed group was doing what in 2012, P-0152 gave sworn expert evidence that “Events and what happened there is still open for both scholarly and political debate. And if anybody said that “I can tell you with certainty what groups there where”, either that person is lying or not understanding how complex the situation is”.³⁵⁶

113. Finally, a peaceful settlement existed among the formerly warring parties by the end of the “first phase” of the Prosecution’s purported armed conflict. This criterion is unrelated to the evaluation of intensity or organisation under the fourth theory. Essentially, even if intensity or organisation fail to trigger a NIAC, the armed conflict may continue to exist until a peaceful settlement is achieved. A peaceful settlement was in place, as reflected by the lack of violence surrounding the administration of Timbuktu during the charged temporal scope. Under this theory, “what counts is the pacification of the situation, not the disappearance of the criteria” – a “peaceful settlement is to be understood in its material sense and not in the formal sense of a peace treaty or another agreement of the same kind”.³⁵⁷

³⁵³ M. Milanovic, “[The End of Application of International Humanitarian Law](#)” (2014) 96 Int’l Rev. Red Cross Cross 163, 170.

³⁵⁴ [ICRC Commentary on First Geneva Convention](#), paras 489-492.

³⁵⁵ Diakonia International Humanitarian Law Centre, “[Legal Classification of the Situation in Mali and Applicable International Law](#)” (October 2019), fn. 23. *See also* P-0646: T-078, p. 59, lines 1-21 (Conf) (lines 15-16: “[a]nd that is why the strengths or manpower numbers provided by these groups is – the numbers are always inflated”).

³⁵⁶ **P-0152**: T-032, p. 86, lines 1-4 (Conf).

³⁵⁷ J. Grignon, “[The ‘General Close of Military Operations’ as the Benchmark for the Declassification of Armed Conflicts and the End of the Applicability of International Humanitarian Law](#)” (2021) 59 Canadian Yearbook Int’l L. 80, 97-98.

5.2 The Prosecution has established no nexus between an armed conflict and the charged war crimes

114. Even if the Chamber were to find that a NIAC existed during the charged period, the charged war crimes must be discussed due to the Prosecution's failure to establish a nexus between the NIAC and the charged incidents. The charges lack any coherent arguments concerning the essential link between the alleged hostilities and the application of daily civilian regulations.

115. The nexus element "delineates war crimes from ordinary crimes."³⁵⁸ This element should be defined in a "rigorous" manner³⁵⁹ as an overly broad definition of this element would have profound consequences for the Court's jurisdiction, risking its intrusion into the proper territory of domestic courts.³⁶⁰ A broad approach to the nexus requirement might capture a wider range of conduct, but it would also dilute the specificity of IHL.³⁶¹ Since command responsibility is predicated on the ability of military leaders to know and apply IHL, this result would undermine the effective application of IHL.

116. If customary international law prescribes additional elements for such crimes or further limitations on how the nexus element should be defined, "the Court cannot be precluded from applying it to ensure consistency of the provision with international humanitarian law", or to otherwise ensure the principle of legality.³⁶²

117. It is necessary for the charged incidents to have a link to the armed conflict situation: "the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed."³⁶³ Mere temporal or geographic proximity to an armed conflict do not satisfy the threshold nor does the fact that the perpetrator was a member of an armed group.³⁶⁴ Further, the perpetrator's membership to an armed group does not satisfy the requirement, as "[p]articular care is needed when the accused is a non-combatant."³⁶⁵ Sexual violence committed by a member of an armed group does not bring the conduct within the framework of IHL if there is no direct link to the armed conflict.³⁶⁶

³⁵⁸ [Ntaganda Appellate Decision on Jurisdiction](#), para. 2.

³⁵⁹ [Ntaganda Appellate Decision on Jurisdiction](#), para. 68.

³⁶⁰ [Ntaganda Appellate Decision on Jurisdiction](#), para. 68.

³⁶¹ G. Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford: OUP 2006), p. 45.

³⁶² [Ntaganda Appellate Decision on Jurisdiction](#), para. 1.

³⁶³ [Kunarac AJ](#), para. 58.

³⁶⁴ [Ntaganda Appellate Decision on Jurisdiction](#), fn. 151; see G. Gaggioli, "[Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law](#)" (2014) 96 (894) *Int'l Rev. Red Cross* 503, 515.

³⁶⁵ [Ntaganda AJ](#), para. 570.

³⁶⁶ G. Gaggioli, "[Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law](#)" (2014) 96 (894) *Int'l Rev. Red Cross* 503, 515.

118. According to the established framework of international law, a:³⁶⁷

wide range of activities occurring in situations of armed conflict are governed exclusively by the law enforcement paradigm, such as the exercise of administrative, disciplinary, and judicial authority over occupied territory, the civilian population, and persons deprived of their liberty.

119. In terms of the latter, acts committed within a detention framework also do not fulfil the nexus requirement if the victim was not detained for reasons associated with the armed conflict.³⁶⁸

120. During the charged period, Ansar Dine and AQIM were not engaged in hostilities. The Prosecution has not pleaded or established that the physical perpetrators were combatants. The Prosecution has also not established that the physical perpetrators were aware of the “the existence of fighting of a certain level of intensity between at least two organised entities.”³⁶⁹ The alleged victims were not military opponents or associated with military opponents. They were not arrested, detained, or punished for reasons associated with an armed conflict. Opportunistic crimes do not satisfy the nexus requirement.³⁷⁰ Members of the groups, including AQIM, married members of the local population before the outbreak of any hostilities. The Prosecution did not lead any evidence to suggest that AQIM changed its modus operandi concerning the negotiation or execution of any marriages. The commission of rape was also directly contrary to the goals of the groups present in Timbuktu and therefore cannot be linked to a military objective.

121. Malian authorities abandoned Timbuktu before Ansar Dine and AQIM arrived. Ansar Dine and AQIM took steps to fill the governance gap at the request and with the assistance of the local population.³⁷¹ The establishment and administration of governance apparatus with the assistance of an NSA are not sufficient to trigger the nexus threshold. Otherwise, IHL would capture actions of the Islamic Police and of locals who worked at the EDM, the hospital and the Crisis Committee. A broad nexus definition would also result in the inclusion of such persons as participants in hostilities. This outcome is inconsistent with the established

³⁶⁷ N N. Melzer & G. Gaggioli, “[Conceptual Distinction and Overlaps Between Law Enforcement and the Conduct of Hostilities](#)”, in T. Gill and D. Fleck (eds.), *The Handbook of the International Law of Military Operations* (Oxford, 2nd ed. 2015), p. 10.

³⁶⁸ G. Gaggioli, “[Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law](#)” (2014) 96 (894) *Int’l Rev. Red Cross* 503, 515.

³⁶⁹ [Ntaganda TJ](#), para. 733.

³⁷⁰ [Rutaganda AJ](#), para. 570.

³⁷¹ **P-0065**: T-039, p. 26, lines 1-6 (Conf); T-046, p. 50, lines 8-12 (Conf); **P-0004**: T-164, p. 29, line 19 – p. 31, line 22; p. 37, lines 4-6 (Conf); T-166, p. 56, lines 16-18 (Conf).

framework of IHL, which expressly specifies that policing activities during an occupation are “neutral” and are not linked to the armed conflict.³⁷²

122. There are important policy and humanitarian considerations for excluding civilian policing and governance activities by NSAs from the scope of IHL. If civilian policing by an NSA equates to a military activity, the principles of IHL would allow for more flexibility concerning the permissible use of force to pursue military objectives. This would result in reduced civilian protection. Watkins concludes that “[w]here insecurity is caused by civilians not involved in the hostilities but engaged in ‘riots, isolated and sporadic acts of violence and acts of a similar nature’, then human-rights-based law enforcement norms govern the activities of the security forces.”³⁷³

123. The “neutral” status of police was given special consideration during the drafting and adoption of the Geneva Conventions. The ICRC Commentary to Article 54 of GC IV notes the existence of a “draft Declaration applying to Police Officers”, which specifies that:³⁷⁴

“[d]uring or after occupation, Police officers may in no case be subjected to penalty or compulsion by reason of the execution by them of an order of any authority which could in good faith be regarded as competent especially if the execution of this order was a normal part of their duty’.

124. The ICRC Commentary to Article 54 underscores that in the context of an occupation, police officers “fulfil an essential role in the life of the public” and that “it is therefore generally agreed that it is their moral duty to remain at their posts in the interests of their fellow citizens”.³⁷⁵

125. The above principles speak to the importance of regulating “policing” activities through human rights norms rather than IHL or ICL. When individuals step up to the plate to protect and assist their fellow citizens, it is the State that bears responsibility for its failure for having done so.

126. Each specific crime may entail additional or more specific nexus elements.³⁷⁶ The Defence will address the Prosecution’s failure to satisfy these crime specific requirements in further detail in Sections 7-11.

³⁷² K. Watkins, “[Use of force during occupation: law enforcement and conduct of hostilities](#)” (2012) 94 (885) Int’l Rev. Red Cross 267, 310-311.

³⁷³ K. Watkins, “[Use of force during occupation: law enforcement and conduct of hostilities](#)” (2012) 94 (885) Int’l Rev. Red Cross 267, 310.

³⁷⁴ [ICRC Commentary on Article 54 of GC IV](#), Notes (6).

³⁷⁵ [ICRC Commentary on Article 54 of GC IV](#), p. 306.

³⁷⁶ [Al Hassan Confirmation Decision](#), para. 226: *See also Ntaganda Appellate Decision on Jurisdiction*, para. 68.

5.3 The Chapeau Elements for Crimes Against Humanity Are Not Established

5.3.1 No attack was committed as part of an organisational policy

127. Although one incident can constitute a crime against humanity, this does not hold true for the definition of an “attack”, which requires the Prosecution to demonstrate “a course of conduct involving the multiple commission of acts referred to in paragraph 1”.³⁷⁷ This requires the Prosecution to demonstrate a connection between the attack and the incidents in question, or the charged organisational policy to commit such an attack and the incidents.³⁷⁸ Isolated or sporadic acts are thus excluded.³⁷⁹

5.3.2 There was no organisational policy to “attack” the civilian population

128. Ansar Dine did not have an organisational policy to attack the civilian population, as their main objectives were to offer protection and restore justice.

129. The local population welcomed the arrival of Ansar Dine.³⁸⁰ When Iyad Ag Ghaly arrived in Timbuktu in April 2012, he informed the local population that Ansar Dine arrived to offer help, protection and justice.³⁸¹ This is confirmed by Abu Zeid, who also addressed the local population and explained that one of Ansar Dine’s objectives was to protect the civilians.³⁸² In addition to protecting the population, Ansar Dine took steps to defend local infrastructure and to ensure the functioning of the hospital, energy and water supplies.³⁸³ A “green number” was distributed to the local population, which they could call for help or protection.³⁸⁴ Multiple witnesses testified that the local population was treated well during the first six months— there were no problems with Ansar Dine. The positive effect of Ansar Dine’s presence and role can be seen in two ways: i) contrasting the absence of civilian casualties in 2012 to past rebellions which had a substantial number of deaths,³⁸⁵ and ii) contrasting the relatively stable and secure situation in Timbuktu in 2012, to Bamako, where the local population committed a series of

³⁷⁷ [Rome Statute](#), Art. 7(2)(a).

³⁷⁸ [Gbagbo, Appellate Judgment on Confirmation Adjudgment](#), para. 46; [Kordić AJ](#), para. 94.

³⁷⁹ [Kordić AJ](#), para. 94.

³⁸⁰ [MLI-OTP-0011-0263](#) (00: 01: 12: 00 to 00: 01: 29: 00); [MLI-OTP-0061-1188](#) at 1190-1991, lines 38-49; **P-0150**: T-089, p. 29, lines 13-17; p. 32, lines 22-23 (Conf); **P-0065**: T-045, p. 8, lines 12-16 (Conf); **P-0638**: T-059, p. 15, lines 3-6 (Conf).

³⁸¹ [REDACTED] **D-0551**: T-200, p. 61, line 21 – p. 62, line 1 (Conf). See also [MLI-D28-0005-9325-R01](#) at 9330, paras 30-31.

³⁸² [REDACTED]

³⁸³ **D-0315**: T-185, p. 30, lines 16-23 (Conf); **D-0605**: T-192, p. 37, lines 17-23 (Conf); **D-0551**: T-200, p. 52, lines 14-24; p. 60, lines 12-21 (Conf). See also [MLI-D28-0004-8039](#) at 8088.

³⁸⁴ **P-0641**: T-139, p. 56, lines 22-24 (Conf); [MLI-D28-0006-4212-R02](#) at 4217; **D-0093**: [MLI-D28-0006-4212-R01](#) at 4217; [MLI-D28-0006-3325](#) at 3330 (Original: MLI-D28-00006-3321); **D-0554**: [MLI-D28-0006-2623-R01](#) at 2625, para. 12.

³⁸⁵ **D-0540**: T-183, p. 35, line 15 – p. 36, line 1 (Conf); **D-0006**: T-205, p. 43, line 22 – p. 44, line 3 (Conf); **P-1086**: T-122, p. 5, line 8 – p. 6, line 25 (Conf).

violent exactions against minority groups.³⁸⁶ The presence of Ansar Dine in Timbuktu also operated as a bulwark against more extreme elements from other countries. This is demonstrated by the minimal number of *Hudud* punishments in areas where Ansar Dine was present, as compared to Gao, where MUJAO was not constrained by a local group.³⁸⁷

130. The implementation of *Shari'a* was an additional means of protection by calming the population³⁸⁸ and deterring acts of criminality, violence, and retribution.³⁸⁹ The Islamic Tribunal and religious authorities collaborated with Ansar Dine to fill the vacuum caused by the departure of State authorities, taking steps to ensure the local population's survival.³⁹⁰ It succeeded in providing security, as the situation for the local population was better in 2012 than it is today.³⁹¹ Ansar Dine also actively consulted and collaborated with groups that represented the civilian population, such as the notables, imams,³⁹² and the Crisis Committee.³⁹³ The leaders were responsive to requests and complaints submitted by the local population.³⁹⁴ The organisation policy governing *Hesbah* also directed members not to oppress the population or use violence.³⁹⁵

5.3.3 *The acts do not satisfy Article 7(1) or are not linked to an organisational policy*

131. The DCC refers to “crimes” without specifying which criminal incidents comprise the “attack”.³⁹⁶ The existence of judgments from the Islamic Tribunal does not satisfy this element. Acts falling under Article 8(2)(c)(iv) cannot be used to satisfy the definition of “attack”, unless the judgment concerned conduct that would amount to torture or cruel treatment. Many judgments focused on non-criminal matters, did not entail a corporal punishment, or did not impose a punishment that would satisfy the gravity threshold for Article 7(1). *Hudud* judgments also cannot be considered an attack against the civilian population given that they were initiated through complaints filed by the civilian population.³⁹⁷ Individual judgments issued by the Tribunal also cannot be imputed to an Ansar Dine/AQIM organisational policy: tribunal members, who were not all members of AQIM or Ansar Dine, made independent

³⁸⁶ [MLI-OTP-0078-3678](#); **P-0152**: T-032, p. 50, lines 12-24 (Conf).

³⁸⁷ [MLI-D28-0004-1032](#) at 1083; **P-0152**: T-032, p. 74, line 17 – p. 75, line 6.

³⁸⁸ **P-0654**: T-127, p. 55, lines 7-11 (Conf).

³⁸⁹ **D-0551**: T-200, p. 52, lines 14-24; p. 60, lines 12-21; p. 61, line 21 – p. 62, line 1 (Conf).

³⁹⁰ **P-0643**: T-083, p. 53, line 11 – p. 54, line 25 (Conf); [MLI-D28-0004-8148](#) at 8173.

³⁹¹ **P-0641**: T-139, p. 55, line 7 – p. 57, line 6 (Conf).

³⁹² **P-0150**: T-089, p. 28, lines 16-18; p. 29, lines 3-10 (Conf).

³⁹³ **D-0093**: [MLI-D28-0006-4212-R01](#) at 4217-4218.

³⁹⁴ **P-0065**: T-038, p. 47, lines 9-12; p. 48, lines 9-10 (Conf); **P-0150**: T-106, p. 37, lines 16-18 (Conf).

³⁹⁵ Audio: [MLI-OTP-0043-0273](#); Transcript: [MLI-D28-0006-5733](#); Translation (ENG): [MLI-D28-0006-5741](#) at 5746, lines 22-31, 5747, lines 29-33.

³⁹⁶ [Al Hassan DCC](#), paras 195-197.

³⁹⁷ [REDACTED]

determinations concerning the specific approach to apply in individual cases.³⁹⁸ Ansar Dine and AQIM leaders, such as Droukdel, disapproved of imposing severe punishments during the charged period.³⁹⁹ Their position was similar to that of local notables, [REDACTED].⁴⁰⁰

132. Tazir punishments also do not satisfy the Article 7(1) threshold, particularly in the absence of testimonial evidence on the manner in which the punishments were imposed. These individual punishments must also be assessed against the overall positive consequences for the local population in terms of deterring acts of criminality and violence, and ensuring security and stability. [REDACTED] also testified that there was no organisational policy or rules concerning several aspects, such as listening to music.⁴⁰¹ He could not remember any punishments being inflicted, and if they were imposed, the punishments were not systematic or pursuant to an organisational rule or policy. They “rarely” occurred.⁴⁰²

133. Although the DCC refers to acts of arrest and detention,⁴⁰³ the Prosecution presented a distorted image of 2012, as witnesses recycled a handful of hearsay incidents. The same stories were repeated by different witnesses, demonstrating the Prosecution’s failure to exercise appropriate investigative diligence to ascertain actual victim identities to create a constructive ambiguity as to the actual number of incidents or victims. Given the extent to which crime base witnesses were related (socially or by family), the burden falls on the Prosecution to demonstrate that various hearsay incidents reported by witnesses were actually separate incidents and not the same event repeated ad nauseum. The Prosecution’s failure to do so violates the Defence’s right to adequate notice and detail concerning the charges and deprived the Chamber of sufficiently probative evidence to base evidential findings that would satisfy the high standard of proof required in a criminal trial.

134. The Prosecution failed to establish at trial that the actions of Mohamed Moussa (or his subordinate) were committed pursuant to an organisational policy (involving Ansar Dine or AQIM) or that the threshold for Article 7(1) was met by such actions. Mohamed Moussa was part of the MNLA for the first part of the year. He did not join AQIM.⁴⁰⁴ He pursued objectives related to his tribe and not Ansar Dine or AQIM.⁴⁰⁵ As concerns allegations of the arrest and

³⁹⁸ **D-0605:** T-192, p. 56, lines 4-6, 11-13; p. 60, line 25 – p. 61, line 2; p. 62, line 22 – p. 63, line 1; p. 72, lines 18-25 (Conf).

³⁹⁹ **P-0152:** T-032, p. 26, lines 8-18 (Conf); **P-0150:** T-089, p. 65, lines 2-25 (Conf); T-101, p. 50, lines 21-23 (Conf); **P-0654:** T-132, p. 25, line 18 – p. 26, line 3 (Conf).

⁴⁰⁰ **P-0654:** T-132, p. 25, line 18 – p. 26, line 3 (Conf).

⁴⁰¹ [REDACTED]

⁴⁰² [REDACTED]

⁴⁰³ *Al Hassan DCC*, para. 161.

⁴⁰⁴ **D-0512:** [MLI-D28-0006-2611-R04](#) at 2614, para. 19.

⁴⁰⁵ [REDACTED]

detention of women, as explained by the ICC Prosecution, detention of a brief duration would not satisfy the threshold for Article 7(1),⁴⁰⁶ even if coupled with unsanitary conditions and physical aggressions.⁴⁰⁷ The Islamic police did not detain women at the BMS or the *Gouvernorat*.⁴⁰⁸ [REDACTED]⁴⁰⁹ When Mohamed Moussa joined *Hesbah*, there was a 24-hour rule:⁴¹⁰ women were only kept at the Headquarters until their guardian arrived.⁴¹¹ Detainees were treated well.⁴¹² The organisation did not condone or ratify the actions of Mohamed Moussa or of undisciplined *Hesbah* members. When informed, the leaders would take steps to free women⁴¹³ and discipline members who used excessive or arbitrary force or harmed locals.⁴¹⁴ Mohamed Moussa was duly replaced in this role, after which, the situation improved.⁴¹⁵

135. The same holds true for the alleged actions of individual members (i.e. alleged flogging or mistreatment occurring in the “streets”). Abu Zeid gave express instructions prohibiting such conduct and established procedural safeguards concerning the implementation of tazirs to limit their applications to situations that were necessary, proportionate and consistent with Islamic law.⁴¹⁶ Members who disregarded these instructions were disciplined or banished.⁴¹⁷ Abu Zeid and other leaders apologised and provided compensation to locals who had been harmed through the random actions of individual members.⁴¹⁸

136. As set out in Section 7.5, alleged incidents of rape or forced marriage did not occur pursuant to an organisational policy. To fall within the ambit of an organisational policy, the organisation must take active steps to promote or ratify the acts in question.⁴¹⁹ Rape was considered “*Haram*” for members of Ansar Dine.⁴²⁰ Such actions, if they occurred (which is disputed) were carried out by rogue elements and therefore cannot be included in the

⁴⁰⁶ [OTP’s Art. 5 Report on Gabon](#), para. 137; See K. Ambos and S. Wirth, “[The Current Law of Crimes Against Humanity](#),” 13 Criminal Law Forum 1-90 (2002), p. 65.

⁴⁰⁷ [OTP’s Art. 5 Report on Gabon](#), para. 139.

⁴⁰⁸ [REDACTED]

⁴⁰⁹ [REDACTED]

⁴¹⁰ [REDACTED]

⁴¹¹ [REDACTED]

⁴¹² **P-0150**: T-094, p. 74, lines 2-4 (Conf); **D-0202**: T-203, p. 43, line 4 – p. 44, line 4 (Conf).

⁴¹³ See *infra*, para. 284.

⁴¹⁴ **D-0605**: T-194, p. 22, line 23 – p. 23, line 4 (Conf); T-193, p. 51, lines 7-12 (Conf); [MLI-D28-0006-3048](#) at 3049, para. 9; **D-0514**: T-208, p. 54, lines 1-7 (Conf).

⁴¹⁵ **D-0551**: T-200, p. 82, lines 5-10; p. 83, lines 9-15 (Conf); [MLI-D28-0006-4212-R01](#) at 4216, paras 24-25.

⁴¹⁶ Original: [MLI-OTP-0002-0017](#) at 0018 (Article 8); Translation (ENG): [MLI-OTP-0077-2186](#); **D-0202**: T-203, p. 96, lines 8-11.

⁴¹⁷ **D-0529**: T-189, p. 16, line 9 – p. 17, line 21 (Conf); [MLI-D28-0006-3048](#) at 3049, para. 9.

⁴¹⁸ **P-0150**: T-104, p. 42, line 8 – p. 43, line 2 (Conf).

⁴¹⁹ [Rome Statute](#), Article 7(1) (“[i]t is understood that ‘policy to commit such attack’ requires that the State or organisation actively promote or encourage such an attack against a civilian population.”)

⁴²⁰ **D-0202**: T-203, p. 11, lines 9-11 (Conf).

assessment of whether the threshold of crimes against humanity is met.⁴²¹ Ansar Dine investigated rape complaints and punished perpetrators.⁴²² When it was reported that a member of the police raped a local woman, the case was effectively and fully investigated, leading to the punishment and banishment of the perpetrator⁴²³ and the victim was given compensation.⁴²⁴ Members were informed that *Zina* (including rape) was prohibited.⁴²⁵ Members were also given sermons concerning Islamic requirements of obtaining consent for marriage.⁴²⁶ The objective of applying Islamic law is not consistent with either rape or forced marriage.⁴²⁷ The Islamic Tribunal would grant divorces if there was no evidence that the woman or family consented.⁴²⁸ The Tribunal followed the same approach to consent and divorce that was applied within the local community before 2012.⁴²⁹ The Tribunal's approach for divorce was more lenient than the situation under Malian law.⁴³⁰

5.3.4 *Not widespread or systematic*

137. Even if the cumulative effect of such punishments or incidents constitutes an “attack”, the Prosecution has not demonstrated that the “attack” was widespread or systematic during the charged period or that such an attack was directed against the civilian population as opposed to a “limited and randomly selected number of individuals.”⁴³¹ In the context of preliminary examinations, the Prosecution has concluded that discrete use of excessive force in policing operations does not constitute an “attack” for the purposes of Article 7.⁴³²

138. The Pre-Trial Chamber confirmed that the notion of “widespread” entails “une attaque massive, fréquente, menée à grande échelle, collectivement, d’une gravité considérable et dirigée contre un grand nombre de victims”.⁴³³ The attack must also encompass the entire charged time period and area. Given this scope,⁴³⁴

to establish the existence of a pattern covering a prolonged period and a large area, what matters is not so much the total number of victims as the number of incidents. For example, when during a singular attack on a

⁴²¹ [Limaj TJ](#), para. 216.

⁴²² **D-0202**: T-203, p. 11, lines 12-15 (Conf).

⁴²³ **D-0605**: T-194, p. 22, line 23 – p. 23, line 4 (Conf).

⁴²⁴ **D-0605**: T-193, p. 37, lines 8-16 (Conf).

⁴²⁵ **D-0529**: T-189, p. 7, lines 7-9, 16-23; p. 7, line 25 – p. 8, line 9 (Conf).

⁴²⁶ **D-0540**: T-184, p. 17, lines 11-14 (Conf).

⁴²⁷ **D-0605**: T-193, p. 50, line 25 – p. 51, line 4 (Conf); **D-0529**: T-189, p. 7, lines 3-9; p. 9, lines 4-11 (Conf).

⁴²⁸ **D-0202**: T-20, p. 47, line 12 – p. 49, line 15 (Conf).

⁴²⁹ **D-0202**: T-203, p. 18, line 24 – p. 19, line 5 (Conf).

⁴³⁰ [REDACTED]

⁴³¹ [Kumarac AJ](#), para. 90.

⁴³² [OTP's Art. 5 Report on Gabon](#), paras 102, 160.

⁴³³ [Al Hassan Confirmation Decision](#), para. 161.

⁴³⁴ [Gbagbo, Judge Henderson's Reasons](#), para. 1891.

particular location three people are killed and seven injured, however tragic this is, this would only count as one instance for the purposes of the existence of a pattern of physical violence. If, on the other hand, there are ten different incidents where a single individual is killed or injured, this counts as ten instances of a potential pattern.

139. The first application of a *Shari'a* (*Hadd*) punishment was the flogging of ██████████ on 20 June 2012.⁴³⁵ Any earlier incidents were sporadic and isolated.⁴³⁶ They were not tied to an organisational policy. The Tribunal generally searched for excuses to avoid applying the *Hadd*,⁴³⁷ as the imposition of such punishments constituted the exception. The Prosecution brought no evidence concerning the formal execution of subsequent punishments until the amputation of Dédéou Maiga in October 2012. According to the Pre-Trial Chamber, the population of Timbuktu was composed of approximately 780,000 inhabitants in 2012.⁴³⁸ One amputation and a handful of *Hudud* punishments over the course of nine months do not satisfy the threshold of establishing a widespread or systematic attack against a population of that size.⁴³⁹ The Prosecution recognised as much in its 2013 Article 53(1) Report.⁴⁴⁰ The threshold also cannot be established retrospectively.

5.3.5 The Prosecution has not established that the perpetrators or the accused were aware that the acts were committed as part of an attack

140. The Prosecution has not demonstrated that the perpetrators or Mr Al Hassan were aware of the acts' existence, which allegedly comprise the "attack" against the civilian population, or the organisational policy pursuant to which the attack was committed.⁴⁴¹ The notion of "awareness" must be construed in a manner consistent with Article 30, encompassing *dolus directus* and *indirectus* but not *dolus eventualis*.

141. Key leaders, such as Sanda Ould Boumana, publicly denied that women were detained before October 2012.⁴⁴² ██████████ testified that apart from allegations of early April (which he understood to concern the MNLA) and the complaint concerning Abou Bakrin, he did not hear of any rape allegations in 2012.⁴⁴³

⁴³⁵ ██████████ See also P-0004: T-166, p. 88, lines 23-25 (Conf) (only verbal warnings for first months).

⁴³⁶ [Limaj TJ](#), para. 189.

⁴³⁷ See *infra*, paras 371 and 374.

⁴³⁸ [Al Hassan Confirmation Decision](#), para. 189.

⁴³⁹ [Limaj TJ](#), para. 210.

⁴⁴⁰ [OTP's Article 53\(1\) Report on Mali](#), para. 149.

⁴⁴¹ See K. Ambos, S. Wirth, "[The Current Law of Crimes Against Humanity](#)," 13 Criminal Law Forum 1-90 (2002), p. 65, concerning fact that since organisational policy is a material element, knowledge must encompass this element.

⁴⁴² [MLI-OTP-0048-0461](#) at 0462; [MLI-D28-0005-7249](#).

⁴⁴³ ██████████ where ██████████ describes sexual harassment as "making a pass" at someone.

142. Contemporaneous media reporting cannot be deemed to have put the perpetrators “on notice”. ██████ did not publish any allegations of rape or forced marriage in 2012.⁴⁴⁴ Apart from the well-known “Bocar” case, NGO reports attributed such allegations to MNLA, not AQIM or Ansar Dine.⁴⁴⁵ In January 2013, the Prosecution concluded that “the information available does not provide a reasonable basis to believe that crimes against humanity under Article 7 have been committed in the Situation in Mali.”⁴⁴⁶

143. When the Defence raises the issue of defects at trial, the burden falls on the Prosecution to demonstrate that the Defence was not prejudiced.⁴⁴⁷

144. The Defence raised the above objections in a timely manner and cannot be deemed to have waived the right to seek further relief. The Chamber’s prior Rule 122 decision does not eliminate the Chamber’s ongoing duty to assess and ensure the fairness of the proceedings, considering any issues that have arisen during the trial itself.⁴⁴⁸

6 THE EVIDENTIAL FOUNDATION IS BASED ON CONTAMINATED AND UNRELIABLE EVIDENCE

6.1 International Media Credibility and NGO Contamination

145. The memory of Prosecution witnesses was tainted through faulty investigative practices, such as group interviews leading to cross-pollination, inexperienced investigators, and the use of photos and videos to identify perpetrators. As a result of direct and indirect forms of influence, testimony was moulded to first fit the case profile identified by journalists, NGO funders, and now, the charges in this case. Due to the Prosecution’s heavy reliance on NGOs and intermediaries, earlier forms of contamination continue to taint the evidence presented before the ICC.

6.2 Improper influence by journalists/media propaganda

146. Foreign media pushed a Manichaeian portrait of the events, where Ansar Dine members were depicted as barbaric extremists and occupiers. Any journalist who attempted to accurately describe Ansar Dine risked being labelled as a terrorist sympathiser.⁴⁴⁹ Due to the jockeying for power and influence, the Malian State and certain groups like the MNLA used the media to

⁴⁴⁴ ██████

⁴⁴⁵ [MLI-OTP-0001-2393](#) at 2399; [MLI-D28-0004-4661](#) at 4674-4676; **P-0150**: T-122, p. 17, line 14 – p. 78, line 25 (Conf); *see also* **P-0099**: T-147, p. 10, lines 9-15 (Conf).

⁴⁴⁶ [OTP’s Article 53\(1\) Report on Mali](#), para. 128.

⁴⁴⁷ [Renzaho AJ](#), para. 125.

⁴⁴⁸ [Rules of Evidence and Procedure](#), Rule 134(3).

⁴⁴⁹ ██████

push a false narrative that favoured their pro-intervention objectives.⁴⁵⁰ French media outlets such as France 2 and RFI were influential in furthering this false narrative.

6.2.1 France 2

147. After the departure of Ansar Dine, France 2 played a leading role in shaping the narrative, including through its documentary “Sous le règne des Islamistes”. France 2 was embedded with the French military and entered areas before other journalists,⁴⁵¹ thus interacting with potential witnesses and victims before other, more unbiased outlets.

148. Regarding the film “Sous le règne des Islamistes”, the producers did not verify the film’s accuracy as a whole or the commentary [REDACTED], resulting in “several mistakes”.⁴⁵² This included the highly misleading description that Abu Tourab [REDACTED], wearing a *Hesbah* vest, was head of the Islamic Police, when he was the head of *Hesbah*.⁴⁵³ France was running “a campaign to intervene and to kick out the Islamists in Northern Mali; so it used its media and used international media to mobilise as much international support at the time.”⁴⁵⁴ This film therefore reflected France 2’s pro-intervention approach and distorted the actions of “jihadists”.⁴⁵⁵

149. France 2 also bought footage [REDACTED] but the supplied content was influenced by the interests of a Western media outlet.⁴⁵⁶ To convince France 2 to purchase the footage, [REDACTED] provided “material that portray[ed] Al-Qaeda as a terrorist organization. [...] The Western media would never buy reports that are Al-Qaeda propaganda.”⁴⁵⁷

6.2.2 RFI

150. During the events, witnesses relied heavily on RFI for news.⁴⁵⁸ However, RFI depended on locals for access to information without vetting for biases or unreliability. P-0623, [REDACTED] [REDACTED] engaged a local source who described Tuaregs in contemporaneous posts as “dogs” and the descendants of Judas.⁴⁵⁹

450 [REDACTED]
 451 **P-0007:** T-019, p. 51, line 24 – p. 52, line 12 (Conf); [REDACTED]
 452 [REDACTED]
 453 [REDACTED] See also [MLI-OTP-0009-1749](#); [MLI-OTP-0028-0839](#) at 0846, lines 220-221.

454 [REDACTED]
 455 [REDACTED]
 456 [REDACTED]
 457 [REDACTED]
 458 **P-0654:** T-135, p. 100, lines 15-18 (Conf); **P-0099:** T-148, p. 38, lines 3-11 (Conf); **P-0608:** T-153, p. 51, lines 4-10; p. 58, lines 6-13 (Conf).
 459 [MLI-D28-0004-0800](#); **P-0623:** T-030, p. 52, line 1 – p. 53, line 25 (Conf).

151. Given the reliance on fixers by international journalists associated with RFI and other news outlets, many sources remain anonymous and are not subject to vetting procedures. Rather than relying on proper investigations, international journalists relied on “fixers”⁴⁶⁰ to connect them with alleged victims and locals. Journalists were flown in and escorted through an idealised Timbuktu where fixers presented victims for journalists to interview. For example, P-0010, a journalist found to be involved in embellishment by a UK court,⁴⁶¹ arrived in Timbuktu, visited the Sidi-Yahya Mosque, and interviewed [REDACTED] and [REDACTED] in “quick succession”.⁴⁶² P-0010 read articles concerning their accounts before speaking to them,⁴⁶³ seemingly made no attempt to verify claims,⁴⁶⁴ and repeated claims that were intrinsically incoherent.⁴⁶⁵ The article was sent for publication the same evening.⁴⁶⁶ The narrative was also heavily influenced by the conspicuous absence of Tuaregs-Arabs in Timbuktu when reporters and NGOs arrived.⁴⁶⁷ Some fixers were also simultaneously sources for various news outlets, such as [REDACTED]⁴⁶⁸. Therefore, different outlets reporting the same information does not constitute independent corroboration.

152. Prosecution expert P-0152 agreed it was necessary to be “extremely careful” with media articles concerning the North of Mali, including those published by AFP and RFI, due to the difficulties verifying biased sources or speaking to both sides.⁴⁶⁹ P-0608 also testified that it was necessary to consider RFI accounts with a “pinch of salt” due to false reports concerning Islamists.⁴⁷⁰

6.2.3 Other Media Outlets and the Dissemination of Propaganda

153. Misreporting from foreign journalists propagated the false conflation between *Hesbah* and the Islamic police, and the BMS with the Islamic Police.⁴⁷¹ Locals told journalists that the BMS was the headquarters of the Islamic Police, which demonstrates how the local population also wrongly conflated the two.⁴⁷²

⁴⁶⁰ P-0007: T-019, p. 10, lines 17-21; p. 48, lines 4-7 (Conf).

⁴⁶¹ [MLI-D28-0004-0224](#), p. 0250; P-0010: T-021, p. 27, lines 8-19 (Conf).

⁴⁶² P-0010: T-021, p. 31, lines 8-9 (Conf).

⁴⁶³ P-0010: T-021, p. 21, lines 14-19 (Conf).

⁴⁶⁴ P-0010: T-021, p. 22, lines 11-14 (Conf).

⁴⁶⁵ P-0010: T-021, p. 22, line 15 – p. 23, line 5 (Conf); P-0010: [MLI-OTP-0059-0391-R01](#) at 0392.

⁴⁶⁶ P-0010: T-021, p. 35, lines 19-22 (Conf).

⁴⁶⁷ P-0007: T-019, p. 55, lines 12-25 (Conf).

⁴⁶⁸ [REDACTED]

⁴⁶⁹ P-0152: T-032, p. 91, line 17 – p. 94, line 1 (Conf); [MLI-D28-0004-1145](#).

⁴⁷⁰ P-0608: T-154, p. 80, lines 11-15 (Conf).

⁴⁷¹ P-0007: T-019, p. 9, lines 8-13; p. 10, lines 10-12; p. 57, lines 1-4 (Conf).

⁴⁷² P-0007: T-019, p. 11, lines 3-14 (Conf).

154. Videos and reports of incidents were widely circulated on mobile phones, blurring the line between true memory recall and memories based on media exposure. Prosecution witnesses learned about Ansar Dine members through the media,⁴⁷³ and discussed incident details and identity of individuals with other locals,⁴⁷⁴ removing the distinction between actual memory recall and remote hearsay and rumours. Malian State newspapers also published demonstrably false accounts, using pictures of lapidations and floggings from Somalia.⁴⁷⁵ ██████ used images of extremists and lashings from other countries and conflicts ██████ ██████ to raise awareness in France about the events of 2012 in Timbuktu.⁴⁷⁶ P-0608 also confirmed that the Malian media published false accounts of jihadists raping women at the “Islamic police”.⁴⁷⁷

155. In contrast to the Prosecution’s claim that women would not speak about rape due to cultural stigma, after the French intervention, women gave very public interviews claiming they had been raped, particularly upon meeting the NGOs tasked with collecting the account of potential rape victims.⁴⁷⁸

156. Before arriving in Timbuktu, P-0007 ██████ had clear preconceptions that “jihadists” had taken control of Timbuktu. The goal of their mission was to report on “jihadists”⁴⁷⁹ and make parallels with the Taliban in Afghanistan.⁴⁸⁰ P-0007 acknowledged he was not a Mali specialist, as it was his first time reporting on the country.⁴⁸¹ Many journalists relied on ██████ ██████ for tips and news even though he was based in Bamako.⁴⁸² This led to dissemination of false and exaggerated stories, such as the complete destruction of manuscripts.⁴⁸³ ██████ also assisted journalists to identify “contacts” in Timbuktu.⁴⁸⁴ Given that ██████ was affiliated with the MNLA⁴⁸⁵ and the MNLA were then supporting French intervention,⁴⁸⁶ he had a clear motive to push the anti-Ansar Dine narrative.

⁴⁷³ P-0641: T-140, p. 32, lines 12-16 (Conf).

⁴⁷⁴ P-0641: T-140, p. 32, line 17 – p. 34, line 7 (Conf). *See also* P-0557: T-057, p. 32, line 17 – p. 33, line 8 (Conf).

⁴⁷⁵ [MLI-D28-0004-3153](#); P-0065: T-049, p. 23, line 3 – p. 24, line 4.

⁴⁷⁶ ██████

⁴⁷⁷ P-0608: T-154, p. 80, lines 19-21 (Conf).

⁴⁷⁸ P-0010: T-021, p. 23, lines 5-11 (Conf); [MLI-D28-0004-6988](#).

⁴⁷⁹ P-0007: T-019, p. 7, lines 21-25 (Conf).

⁴⁸⁰ P-0007: T-019, p. 52, line 25 – p. 53, line 6 (Conf).

⁴⁸¹ P-0007: T-019, p. 10, lines 10-12 (Conf).

⁴⁸² P-0010: T-021, p. 7, line 11 – p. 8, line 5 (Conf); P-0007: T-019, p. 47, lines 9-11 (Conf).

⁴⁸³ P-0010: T-019, p. 48, line 8 – p. 49, line 1 (Conf).

⁴⁸⁴ P-0010: T-019, p. 48, line 8-19 (Conf).

⁴⁸⁵ P-0114: T-060, p. 55, line 14 – p. 56, line 11 (Conf).

⁴⁸⁶ P-0114: T-060, p. 54, lines 6-9 (Conf); [MLI-D28-0004-4802](#).

6.3 Improper influence by NGOs

157. This negative influence on the population is clearly demonstrated by distorted evidence concerning the identity of the perpetrators and the description of alleged harm. Generally, NGOs and locals reported that the MNLA committed rapes in Timbuktu throughout 2012,⁴⁸⁷ yet the local population conflated the MNLA and Ansar Dine, and even MUJAO.⁴⁸⁸ To specifically demonstrate NGO influence, this section will discuss the following NGOs:

██████████ FIDH, and ██████████

6.3.1 ██████████

158. ██████████ was financed by ██████████ to conduct two sequential monitoring and documentation projects in Timbuktu and surrounding areas.⁴⁸⁹ ██████████'s funding to ██████████ was contingent on the goal of identifying at least 400 cases as part of the monitoring project in Timbuktu and Gao.⁴⁹⁰ ██████████ these goals gave rise to bad practices by NGOs towards SGBV survivors, as they incentivised NGOs to accept declarations that were incorrect or to use old cases to meet these targets.⁴⁹¹ In light of how case registration would entitle victims to certain forms of assistance and aid, NGOs erred in favour of encouraging individuals to declare that they were rape victims. The principle was that it was better to assist a false case than lose time trying to prove if it was real.⁴⁹²

159. ██████████ arranged for forced marriage victims to receive assistance and financial aid for child education on the grounds that they were products of forced marriage or rape in 2012,⁴⁹³ even if a child's age meant that this was impossible.⁴⁹⁴ During the documentation process, ██████████ reported "encountering false victims" who "seemed to be more concerned about receiving financial assistance" and gave "'influenced responses or named witnesses that could not confirm their experiences."⁴⁹⁵ For example, when ██████████ encountered ██████████ at a meeting for SGBV victims in Timbuktu, she told him she joined an association to receive funds to continue activities.⁴⁹⁶

⁴⁸⁷ P-0114: T-060, p. 57, lines 6-16 (Conf).

⁴⁸⁸ P-0114: T-060, p. 53, lines 15-21 (Conf).

⁴⁸⁹ ██████████

⁴⁹⁰ [MLI-D28-0004-7042](#) at 7069, line 1.8 A.

⁴⁹¹ ██████████

⁴⁹² ██████████

⁴⁹³ ██████████

██████████

⁴⁹⁴ ██████████

⁴⁹⁵ ██████████ [MLI-D28-0004-7042](#) at 7055.

⁴⁹⁶ ██████████

6.3.2 P-0160's Problematic Documentation Process

160. P-0160 [REDACTED]

[REDACTED]⁴⁹⁷ He observed that victims would often put “Islamic police” in their accounts even if they did not know if the perpetrator was from MNLA, MUJAO, or Ansar Dine.⁴⁹⁸ P-0160's explanation of methodology is contradictory,⁴⁹⁹ and he clearly accepted accounts that were factually impossible (i.e. a woman he met in February 2013⁵⁰⁰ who claimed to have given birth caused by rape in December 2012).⁵⁰¹

161. P-0160 met with victims in a group setting and encouraged them to speak about what happened to them in front of other victims.⁵⁰² When conducting interviews, rather than conducting open inquiries, he worked from the premise that something had happened to women at the BMS (i.e. that they had been raped), and kept meeting them until they would agree that they had been raped.⁵⁰³ The recorded dates of witness accounts are also arbitrary and highly inaccurate.⁵⁰⁴ He acknowledged the possibility that details in the files were not accurate⁵⁰⁵ and also noted that this type of work should have been carried out by “specialised and qualified individuals who, unfortunately, were not present.”⁵⁰⁶

162. P-0160 further conceded that when discussing the events of 2012, people would often generalise and employ negative stereotypes based on skin colour. Tuaregs would be automatically associated with Ansar Dine or MNLA, and Arabs with MUJAO or AQIM.⁵⁰⁷ P-0160 further confirmed that individuals found it difficult to distinguish between responsibility of individuals, blamed groups as a whole, and if they knew the identity of the perpetrator, they would blame the group associated with that ethnicity.⁵⁰⁸ P-0160 referred to “Islamists” in his work but was unable to ascertain whether MNLA fell within this label.⁵⁰⁹ Although reference was made to a child's skin colour to claim that the child must have been a product of rape, P-

⁴⁹⁷ [REDACTED]

⁴⁹⁸ P-0160: T-066, p. 24, lines 19-25 (Conf).

⁴⁹⁹ P-0160: T-066, p. 40, lines 2-11 (Conf).

⁵⁰⁰ P-0160: T-066, p. 20, lines 19-20 (Conf).

⁵⁰¹ [REDACTED]

⁵⁰² P-0610: T-158, p. 79, lines 1-11 (Conf).

⁵⁰³ P-0160: T-066, p. 52, lines 3-17 (Conf).

⁵⁰⁴ P-0160: T-067, p. 42, lines 4-15 (Conf).

⁵⁰⁵ [REDACTED]

⁵⁰⁶ P-0160: T-066, p. 40, lines 21-22 (Conf).

⁵⁰⁷ P-0160: T-067, p. 25, lines 1-8 (Conf).

⁵⁰⁸ P-0160: T-067, p. 26, lines 4-11 (Conf).

⁵⁰⁹ P-0160: T-067, p. 69, line 20 – p. 70, line 3 (Conf).

0160 also accepted that there were single mothers in Timbuktu who had children of mixed ethnicity for reasons unconnected to the groups' presence.⁵¹⁰

163. Significantly, when P-0160 first interviewed seven women who married Islamists in 2012, he concluded that four consented and two were considered "forced" because the woman was younger than 18 (and it was the position of [REDACTED] that written consent was required in such cases).⁵¹¹ P-0160 does not provide information about the seventh woman. In the cases he reported, women stayed in their houses during the marriage.⁵¹²

164. P-0160 [REDACTED]
[REDACTED]⁵¹³ and [REDACTED].⁵¹⁴ [REDACTED]
and [REDACTED] relied on local fixers with no legal training to identify alleged victims.⁵¹⁵ According to V-0002, [REDACTED] was in Bamako during the events⁵¹⁶ and visited the houses of people she heard were victims and provide information to FIDH.⁵¹⁷

6.3.3 [REDACTED] Projects

165. There was a general documentation project (Project A) and a more specific project (Project B), which was contingent on victims identifying the group responsible. P-0160 [REDACTED]
[REDACTED]⁵¹⁸ Project B appears to have been part of [REDACTED]
[REDACTED] to identify specific "emblematic" cases. In Timbuktu, it was decided to bring two cases, the first on allegations of war crimes and rape committed by the "Islamic Police" and the second against FAMA.⁵¹⁹ Notably, none of the cases concerned the "MNLA", notwithstanding allegations that members committed rape.

166. At Project B's completion, [REDACTED] documented one victim of rape in prison.⁵²⁰ In terms of the gap between this figure and the number of alleged rape victims who went to Bamako, P-0160 told the Prosecution he had obtained a list with the names of seven alleged rape victims from a woman who claimed they were detained at the same time as her.⁵²¹ The woman who

⁵¹⁰ [REDACTED]

⁵¹¹ P-0160: T-068, p. 31, lines 6 -14; p. 38, lines 2-3 (Conf).

⁵¹² P-0160: T-068, p. 41, lines 12-16 (Conf).

⁵¹³ [REDACTED] P-0547: T-153, p. 28, lines 1-12 (Conf); P-0639: T-136, p. 31, lines 23 – p. 32, line 4 (Conf).

⁵¹⁴ [REDACTED]

⁵¹⁵ [REDACTED] [MLI-D28-0004-6993](#) at 7001-7002, 7007, 7010, 7016. See also [Annex D to Defence BTM on Witnesses and NGO influence](#), p. 3.

⁵¹⁶ V-0002: T-170, p. 4, lines 11-16 (Conf).

⁵¹⁷ P-0538: T-162, p. 55, line 17 – p. 57, line 15 (Conf).

⁵¹⁸ [REDACTED]

⁵¹⁹ [MLI-D28-0004-7042](#) at 7063.

⁵²⁰ [MLI-D28-0004-7042](#) at 7063.

⁵²¹ [REDACTED]

gave him this list did not initially say she was raped. P-0160 updated her file to say she was raped while imprisoned, although no one was present when she told him this information.⁵²²

167. ██████████ “Project C” involved starting proceedings in Bamako and preparing victims for these court proceedings,⁵²³ so ██████████ arranged psycho-social sessions with victims from Timbuktu which allowed them to “speak openly about their experiences and learn from others with similar traumas.”⁵²⁴ In December 2015, as part of Project C, ██████████ arranged a training session with 50 female victims in Timbuktu during which they explained human rights concepts and focused on “building cohesion amongst victims”.⁵²⁵ The victims and their parents were also told that Mayor Halle Ousmane endorsed their efforts.⁵²⁶ ██████████ testified that the meetings she attended were initially in Songhai.⁵²⁷ The ██████████ victims were introduced to FIDH (see below).

6.3.4 FIDH

168. ██████████
██████████⁵²⁸ ██████████
██████████
██████████⁵²⁹ ██████████ confirmed that before commencing interviews, FIDH worked directly with ██████████ and ██████████ and met with ██████████ They were briefed by ██████████ concerning the chronology of evidence concerning the “dihadistes”⁵³⁰ and ██████████
██████████
██████████⁵³¹

169. ██████████ and ██████████ spoke to the victims before the FIDH interviews⁵³² and participated in the interviews as interpreters.⁵³³ ██████████ also acted as an interpreter along with

⁵²² P-0160: T-068, p. 26, line 21 – p. 27, line 1 (Conf).

⁵²³ P-0160: T-068, p. 21, lines 5-14 (Conf).

⁵²⁴ P-0160: T-068, p. 20, lines 9-25 (Conf); [MLI-D28-0004-7042](#) at 7056.

⁵²⁵ P-0160: T-068, p. 22, lines 3-15; p. 23, lines 3-7 (Conf).

⁵²⁶ P-0160: T-068, p. 22, line 21 – p. 23, line 2 (Conf).

⁵²⁷ V-0001: T-169, p. 37, lines 2-24 (Conf).

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⁵³² ██████████. The involvement of ██████████ in these interviews was redacted from ██████████ statement until the end of the Prosecution case.

⁵³³

██⁵³⁴ ██████████ told the Prosecution that an interpreter, who could have been ██████████ embellished details provided by victims.⁵³⁵

170. Prosecution witnesses understood from interactions with FIDH that they would receive aid because of their claims.⁵³⁶ Notably, the account provided by ██████████ to ██████████ and ██████████ varied significantly from what he and his wife later claimed to FIDH.⁵³⁷ Similarly, after speaking to ██████████ and FIDH, ██████████ changed and aggravated key aspects of their accounts.⁵³⁸

171. The manner in which several crime-based victims were identified and questioned is exemplified by the video prepared by FIDH.⁵³⁹ Before they were interviewed by lawyers, a ██████████ and showed clips from “Sous le règne des Islamistes”, ██████████⁵⁴⁰ ██████████ ██████████⁵⁴¹ According to the video, FIDH met seven rape victims simultaneously, along with ██████████ the interpreter.⁵⁴² FIDH representatives showed photos of key leaders and alleged perpetrators to the victims, and the photos appeared to have written commentary.⁵⁴³ Although ██████████ told the Prosecution he was able to provide the original “rushes”, or rough versions of footage, he claimed they had been destroyed when asked by the Defence.⁵⁴⁴ D-0502, who watched this video, explained how the process of showing images or articles that relate to person’s experience can generate false memories, especially in relation to traumatic events.⁵⁴⁵ The likelihood for tainted evidence is greater if videos and photos are shown before open-ended questions,⁵⁴⁶ which was the case with victims who met with ██████████ before their FIDH interviews.⁵⁴⁷ The lack of sufficient procedural safeguards is highlighted by the confusion and conflation of the accounts of ██████████

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⁵³⁸ See *infra*, paras 436-443.

⁵³⁹ [MLI-OTP-0039-0574](#), 00: 00: 14: 00 to 00: 01: 05: 00.

⁵⁴⁰ ██████████; [MLI-OTP-0039-0574](#) at 00: 00: 31: 00.

⁵⁴¹ ██████████

⁵⁴² [MLI-OTP-0039-0574](#) at 00: 07: 00: 00 -00: 07: 05: 00; [MLI-OTP-0069-0494](#) at 0501, lines 192-196; see ██████████

⁵⁴³ [MLI-OTP-0039-0574](#) at 00: 15: 09: 00-00: 15: 13: 00; [MLI-OTP-0069-0494](#) at 0506, lines 410-412; [MLI-OTP-0039-0574](#) at 00: 19: 16: 00; [MLI-OTP-0069-0494](#) at 0510, lines 531-532.

⁵⁴⁴ [Annex D to Defence Request to Appeal Third Regulation 55 Decision](#), p.1.

⁵⁴⁵ D-0502: T-179, p. 37, line 7 – p. 38, line 9 (Conf).

⁵⁴⁶ D-0502: T-179, p. 62, line 9 – p. 63, line 1 (Conf).

⁵⁴⁷ ██████████

monthly”.⁵⁶⁰ She was aware of other people coming there to tell their story.⁵⁶¹ [REDACTED] was also [REDACTED] and was aware she was a Prosecution witness. [REDACTED] contacted the Prosecution to ask if they had assisted her following [REDACTED].⁵⁶² [REDACTED] also signed certificates allowing members to claim compensation (for example [REDACTED] [REDACTED]).⁵⁶³ The Defence was unable to fully explore the impact of [REDACTED] influence on Prosecution witnesses since the Prosecution announced its inability to call him as a viva voce witness at the end of its case.

176. [REDACTED], [REDACTED] appears to have informed FIDH of the identities of “victims” to be interviewed. [REDACTED] explained that [REDACTED] was the one who spoke to the foreigners, and afterwards she had two white men come to her house.⁵⁶⁴

6.3.6 [REDACTED]

177. [REDACTED] was another local NGO that interacted with Prosecution witnesses. [REDACTED] interviewed [REDACTED] about the events of 2012, even though [REDACTED]

[REDACTED]⁵⁶⁵

6.4 Evidential contamination through the Bamako proceedings

178. Evidential contamination took shape in several forms during the Bamako proceedings. Aside from the already flawed proceedings, such as leading questions and exposure to images of alleged perpetrators without following proper protocols, tainting memory and recall of vulnerable witnesses, other indirect forms of contamination took place. Witness interactions during travel, the motivation of obtaining reparations, the heavy presence of NGOs, and the Prosecution’s involvement in already flawed judicial proceedings are several factors that contribute to such evidential contamination⁵⁶⁶.

6.4.1 Group Travel

179. Both direct and indirect testimonial contamination results when witnesses who testify on similar events travel together and are exposed evidential accounts in the absence of strict

⁵⁶⁰ [REDACTED]

⁵⁶¹ [REDACTED]

⁵⁶² [MLI-OTP-0080-3494-R01](#).

⁵⁶³ [REDACTED]

⁵⁶⁴ [REDACTED]

⁵⁶⁵ [REDACTED]

⁵⁶⁶ [D-0512: MLI-D28-0006-2611-R02](#) at 2616-2617, paras 34-36.

safeguards.⁵⁶⁷ Contamination does not require deliberate intent to lie but can be caused by unconscious evidential influence.⁵⁶⁸

180. Victims travelled to and from Bamako in groups, accompanied by individuals ([REDACTED], [REDACTED]) acting as Prosecution intermediaries and interpreters for the Bamako proceedings.⁵⁶⁹ For example, some victims travelled with [REDACTED],⁵⁷⁰ who was an interpreter for victims during the hearings.⁵⁷¹ Victims also met with and spoke with each other.⁵⁷²

181. Victims who had not yet travelled to Bamako were aware that others had travelled there to give evidence.⁵⁷³ For example, “[REDACTED] spoke with the victim’s husband so that she would get authorization to travel to Bamako.”⁵⁷⁴ This was not disclosed to the Defence until the end of the Prosecution case even though the Prosecution called several husbands to testify. It appears that [REDACTED] may have used [REDACTED], [REDACTED], to contact victims who participated in the 2015 complaint and connect them with the Prosecution.⁵⁷⁵ This information was not disclosed to the Defence when [REDACTED] testified. Several victims claimed they had no form of identification⁵⁷⁶ and it is unclear what steps, if any, were taken to establish victim identities. [REDACTED] was responsible for identifying which victims would travel to Bamako.⁵⁷⁷

6.5 Married Witnesses

182. The *Ngudjolo* Trial Chamber found, in connection with a husband and wife that testified, that “on account of the ties binding the two witnesses, it cannot discount the possibility that they may have conferred before their in-court testimony, thereby precluding any corroboration.”⁵⁷⁸ This finding was upheld on appeal.⁵⁷⁹ Therefore, caution should be given to the accounts of [REDACTED] and [REDACTED], who were married and both testified, as well as for [REDACTED], married to [REDACTED].⁵⁸⁰ [REDACTED] and [REDACTED] were also married when they testified in the case.⁵⁸¹ Although the Prosecution withdrew [REDACTED], [REDACTED] provides evidence on the alleged incident

⁵⁶⁷ See [ICC-01/04-01/06-T-78-Eng](#), p. 9, line 25 – p. 11, line 4; [Ngudjolo TJ](#), para. 155.

⁵⁶⁸ **P-0636**: T-072, p. 23, lines 2-10 (Conf).

⁵⁶⁹ [MLI-OTP-0080-4648-R01](#) at 4650.

⁵⁷⁰ **P-0595**: T-070, p. 53, lines 3-7 (Conf).

⁵⁷¹ **P-0595**: T-070, p. 61, lines 12-17 (Conf); P-0538: T-0162, p. 65, lines 13-15 (Conf).

⁵⁷² **V-0001**: T-169, p. 49, line 18 – p. 50, line 9 (Conf).

⁵⁷³ [MLI-OTP-0080-4648-R01](#) at 4649

⁵⁷⁴ [MLI-OTP-0080-4648-R01](#) at 4650.

⁵⁷⁵ [MLI-OTP-0080-4648-R01](#) at 4649; **P-0114**: T-060, p. 65, lines 1-4; p. 75, lines 20-25 (Conf).

⁵⁷⁶ [MLI-OTP-0080-4648-R01](#) at 4650.

⁵⁷⁷ [REDACTED]

⁵⁷⁸ [Ngudjolo TJ](#), para. 441.

⁵⁷⁹ [Ngudjolo AJ](#), para. 207.

⁵⁸⁰ [REDACTED]

⁵⁸¹ [REDACTED]

185. OTP witnesses (i.e. ██████████) worked with ██████████⁵⁹⁸ and interacted with ██████████⁵⁹⁹ at trainings. ██████████ was a member of the association run by ██████████ and ██████████ was part of ██████████ (██████████).⁶⁰⁰ ██████████ further confirmed that ██████████ attended meetings she organised through ██████████⁶⁰¹

186. ██████████ who worked with ██████████ registered victims' accounts, accompanied them on their travels, and interpreted during the Bamako hearings.⁶⁰² D-0240 attended ██████████ workshops with ██████████ and described her as someone who manipulated statistics, including the number of persons encompassed by the investigations.⁶⁰³ P-0610 attended monthly group ██████████ meetings at ██████████ house with other victims, including ██████████.⁶⁰⁴ ██████████ advised members what they should focus on during their interviews with the OTP.⁶⁰⁵ P-0610 told OTP investigators that she knew "Hamed Moussa", even though she was not familiar with him or the name.⁶⁰⁶

187. Witnesses were provided the list of perpetrators and images collated by FIDH attached to the complaint and asked to indicate who they knew.⁶⁰⁷ Consequently, witnesses recycled the same names throughout the Bamako proceedings.

6.8 OTP Involvement in Domestic Process

188. The ICC Prosecution was not a passive or neutral bystander of the Bamako proceedings. Prosecution representatives met with ██████████ and Malian judges seized of the complaints to discuss how to produce more concrete and "useful" evidence for the Bamako proceedings.⁶⁰⁸ The Prosecution briefed ██████████ on the Al Mahdi case (which did not include sexual and gender-based crimes, "SGBC") and advised them on their intention to interview victims of SGBC.⁶⁰⁹ ██████████ attended the Al Mahdi hearings.⁶¹⁰ The Prosecution also discussed the possibility of victim relocation with ██████████.⁶¹¹ ██████████ proposed that she and ██████████ "could assist in explaining the concept to the victims, as well as in preparing

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602 **V-0001**: T-169, p. 43, lines 1-2, 6-11 (Conf).

603 [MLI-D28-0006-4222-R01](#) at 4237, lines 2-8.

604 **P-0610**: T-158, p. 73, lines 2-14 (Conf).

605 **P-0610**: T-159, p. 14, lines 4-7 (Conf).

606 **P-0610**: T-159, p. 21, lines 2-8 (Conf).

607 [MLI-OTP-0037-1571-R03](#) at 1573.

608 [MLI-OTP-0037-1249-R01](#) at 1250.

609 [MLI-OTP-0080-4648-R01](#) at 4649.

610 [MLI-OTP-0080-4648-R01](#) at 4651.

611 [MLI-OTP-0080-4648-R01](#) at 4651.

them for their meeting with the OTP.”⁶¹² When the Prosecution started to interview victims of SGBC, representatives contacted ██████ and alerted her before each interview.⁶¹³ ██████ directly contacted some witnesses (i.e. ██████) even when instructed to delegate this task.⁶¹⁴ Victims were not informed in advance that they were meeting the Prosecution, but thought they were meeting a judge in Bamako.⁶¹⁵ ██████ acted as an intermediary, and this impacted the reliability of the evidence she collected or was in contact with.⁶¹⁶

189. ██████ filed a victim application in this case, seeking reparations on behalf of an organisation that includes Prosecution witnesses who were also part of the ██████ project. This organisation claimed to have suffered damage because of the events of 2012, even though the organisation was established in 2016.⁶¹⁷

190. Some Bamako hearings coincided with the highly publicised confirmation hearings against Mr Al Hassan.⁶¹⁸ For example, V-0001 heard about the case on the radio when she was scheduled to appear before the judge.⁶¹⁹ Victims (including V-0001 and P-0538) who appeared on the same dates with the same interpreters employed identical language to describe what happened to them.⁶²⁰

6.8.1 The OTP failed to respect Article 54(1) when conducting proceedings

191. The Prosecution did not respect Article 54(1) by failing to take appropriate measures throughout their investigations. These failures include underestimating the issue of memory and recall when interviewing witnesses nearly a decade after the events, addressing issues of media influence on witnesses who were exposed to information on Mr Al Hassan’s arrest, practicing flawed interview procedure with suggestive photos and questions, and relying heavily on husband-and-wife witnesses.

6.8.2 Memory and Recall

192. Witnesses testified almost nine years after the events. This had an appreciable impact on the accuracy and reliability of their memories concerning the identities, dates, and details.⁶²¹

⁶¹² [MLI-OTP-0080-4648-R01](#) at 4651.

⁶¹³ [MLI-OTP-0080-4698](#); [MLI-OTP-0080-4699](#); [MLI-OTP-0080-4701](#). These notes were not disclosed during the testimony of P-0520, P-0609, and P-0547.

⁶¹⁴ [MLI-OTP-0080-4703](#). This note was not disclosed when P-0538 testified.

⁶¹⁵ [MLI-OTP-0080-4648](#) at 4650.

⁶¹⁶ [Lubanga TJ](#), para. 450.

⁶¹⁷ V-0001: T-170, p. 31, line 11 – p. 32, line 9 (Conf).

⁶¹⁸ V-0001: T-169, p. 44, lines 12-14; p. 45, lines 2-7 (Conf).

⁶¹⁹ V-0001: T-169, p. 45, lines 2-7 (Conf).

⁶²⁰ V-0001: T-169, p. 47, line 20 – p. 48, line 17 (Conf); *see also* [MLI-OTP-0081-0216-R03](#) at 0259, 0262.

⁶²¹ P-0114: T-060, p. 33, lines 13-24 (Conf); P-0636: T-072, p. 5, lines 2-5 (Conf).

Although the impact of time on memory was a clear issue, the Prosecution held off on taking statements from certain witnesses to avoid triggering “disclosure obligations.”⁶²²

193. As explained by Defence expert Professor Charles Morgan III, “[n]ormal memory recall does not “improve” over time. It remains as it was initially or it decays,”⁶²³ and that “while our memory is being stored (not actively recalled), it is modified by our experiences [...] our memories are reconstructed each time we recall them to mind.”⁶²⁴ Given the fact that Prosecution witness testimonies were given nine years after the events, the Chamber should treat this evidence with extreme caution. Not only has the passage of time reduced the accuracy of their recall, but intervening events and interactions with witnesses,⁶²⁵ as well as the highly biased publicity of the events in 2012,⁶²⁶ were also highly capable of suggestively influencing the witness’ recollections resulting in the creation of false memory.⁶²⁷

194. Such interventions place the Chamber in an impossible position to accurately gauge the extent to which witness recollections have been contaminated, in circumstances where the original memory is the only memory that has “any forensic or evidentiary value”.⁶²⁸ Further expert material explains that contemporary forensic research has established that perception is vulnerable to a host of confirmation biases.⁶²⁹ In other words, “people tend to perceive, interpret, and create new evidence in ways that verify their pre-existing beliefs.”⁶³⁰ This is a “pervasive psychological phenomenon” which can occur without conscious awareness and impact their visual and auditory perception.⁶³¹ Once these beliefs take “root”, they are resistant to change.⁶³²

195. Witnesses were exposed to the biases of external parties through their use of suggestive identification procedures following the events of 2012, such as showing photographs and videos and asking leading questions.⁶³³ This irretrievably altered and distorted the original memory of the witnesses. Such alteration can be attributable to these methods’ powerful capacity to create false memories so that the original memory is corrupted by the exposure of later suggestive material, with the original memory ultimately being difficult to retrieve and

⁶²² [MLI-OTP-0037-1249-R01](#).

⁶²³ [MLI-D28-0005-9967-R01](#) at 9981.

⁶²⁴ [MLI-D28-0005-9967-R01](#) at 9983.

⁶²⁵ See *supra* paras [158-177](#), 184-187.

⁶²⁶ See *supra*, paras [146-156](#).

⁶²⁷ **D-0502**: T-179, p. 18, lines 2-7; p. 41, lines 11-16 (Conf).

⁶²⁸ *USA, Oregon v Lawson*, pp. 689, 690.

⁶²⁹ [MLI-D28-0005-9409](#) at 9410, [MLI-D28-0005-9460](#) at 9461; [MLI-OTP-0005-9496](#).

⁶³⁰ [MLI-D28-0005-9496](#) at 9498.

⁶³¹ [MLI-D28-0005-9496](#) at 9498.

⁶³² [MLI-D28-0005-9496](#) at 9498.

⁶³³ See *supra*, para 171, *infra*, paras 201, 203.

resistant to traditional methods of reliability testing, such as cross-examination.⁶³⁴ The ability for suggestive procedures to severely undermine the reliability of a witness' identification evidence is uncontroversial and consistently accepted by courts.⁶³⁵ Identification evidence has thus previously been treated with "extreme caution" to avoid the very serious risk of a miscarriage of justice.⁶³⁶

196. Such an approach is consistent with ICC jurisprudence, as the Trial Chamber previously considered that caution must be administered when assessing identification evidence due to "the vagaries human perception and recollection".⁶³⁷ The Chamber outlined supplementary factors concerning the identification evidence which were required to be assessed, indicating that identification evidence cannot be divorced from the circumstances surrounding its provision in a Chamber's determination of whether such evidence can satisfy the threshold of beyond reasonable doubt.⁶³⁸

197. Accordingly, the Chamber must consider the likelihood of memory contamination in its treatment of identification evidence, particularly when relied upon to establish the link between the perpetrator and Ansar Dine or the common purpose.

6.8.3 *Dissemination of Information on Mr Al Hassan*

198. Several Prosecution witnesses interviewed in close temporal proximity to the events only provided incriminating information concerning Al Hassan or identified him after his arrest and the public dissemination of allegations and images concerning him.⁶³⁹ Media influence is a form of testimonial contamination error.⁶⁴⁰

199. The forms P-0160 compiled for ██████ as Project A did not identify Islamists or the Islamic police as perpetrators, yet he testified that "on the forms and in the reports ██████ ██████ the expression "Islamic police" is used properly".⁶⁴¹ P-0642, who told OTP investigators that she did not know Al Hassan, claimed that he was responsible for everything, after listening to the radio and speaking to her husband.⁶⁴²

⁶³⁴ [USA, Oregon v Lawson](#), pp. 689, 695.

⁶³⁵ [USA, United States v. Wade](#), p. 228, 229; [USA, Oregon v Lawson](#), pp. 685-689; [USA, People v Marshall](#) (N.Y. 2015); [USA, Simmons v. United States](#), pp. 383-384; [USA, People v Riley](#), pp. 530-531; [Australia, Alexander v The Queen](#), p. 426; [UK, R v. Turnbull](#).

⁶³⁶ [Kupreškić AJ](#), para. 34.

⁶³⁷ [Ntaganda TJ](#), para. 71.

⁶³⁸ [Ntaganda TJ](#), paras 72, 74.

⁶³⁹ P-0114: T-060, p. 72, line 20 – p. 73, line 5 (Conf); **P-0642**: T-157, p. 8, lines 22-24 (Conf).

⁶⁴⁰ [MLI-D28-0005-9967-R01](#) at 9980. See also G. Chlevickaitė et al., "Judicial Witness Assessments at the ICTY, ICTR and ICC: Is There 'Standard Practice' in International Criminal Justice?"(2020) 18 J. Int'l Crim. J 185, 205.

⁶⁴¹ ██████

⁶⁴² **P-0642**: T-156, p. 11, lines 18-23 *contra* T-157, p. 15, lines 7-11 (Conf).

6.8.4 *Flawed Interview Procedure*

200. Prosecution investigators began witness interviews with a description of allegations against Mr Al Hassan, including that they were linked to his role in the police.⁶⁴³ Prosecution witnesses interviewed by ██████████ a former ICTR prosecutor, explained their motivation to testify by making parallels between Timbuktu and Rwanda.⁶⁴⁴

201. Vulnerable victims and witnesses were shown documents, photos, and videos of perpetrators and the BMS in a suggestive manner during interviews and preparation sessions. Many of these interviews occurred after Mr Al Hassan's arrest and confirmation hearing, by which time a large volume of images had been broadcast publicly.⁶⁴⁵

202. For example, after focusing questions purely on Al Hassan, P-0638 was shown a video and asked to identify the only person in the video with a clear face.⁶⁴⁶ After ██████████ stated he did not know Al Hassan's signature, the Prosecution showed him a document with the words "Al Hassan" written next to a signature, and asked him to confirm if a similar signature on subsequent documents was that of Mr Al Hassan. They performed the same exercise with ██████████ and thus contaminated his testimony through suggestibility.⁶⁴⁷

203. Similarly, P-0636 stated in the Prosecution preparation session that she did not know the BMS or where she was taken, and only learned about it afterwards.⁶⁴⁸ When shown a photograph of the BMS, she stated that she did not remember the building.⁶⁴⁹ During the preparation session, she was shown photos and videos of the BMS,⁶⁵⁰ including photos of the ATM room with glass doors and a "BMS" sign (P-0636 is literate).⁶⁵¹ She was clearly in an agitated state at this point, as she contacted the OTP investigator claiming she was scared.⁶⁵² Despite never mentioning a glass door in her witness statement, the Prosecution elicited details that replicated the photograph through a series of highly leading questions.⁶⁵³ She further remembered people wearing turbans with weapons, which replicated a video shown during the preparation session.⁶⁵⁴

⁶⁴³ **P-0642**: T-157, p. 12, lines 8-10; p. 14, lines 7-10 (Conf); **P-0641**: T-140 p. 73, line 25 – p. 74, line 8 (Conf); [MLI-OTP-0070-1598-R02](#) at 1599, para. 4.

⁶⁴⁴ **P-0641**: T-140, p. 73, lines 6-11; p. 74, lines 20-24 (Conf); **P-0638**: T-058, p. 84, lines 13-20 (Conf).

⁶⁴⁵ See [Haradinaj TJ](#), para. 29.

⁶⁴⁶ Defence email to the Trial Chamber, 14 December 2020, 19: 59.

⁶⁴⁷ See [MLI-D28-0005-9967-R01](#) at 9980-9981.

⁶⁴⁸ **P-0636**: T-072, p. 30, lines 1-7 (Conf).

⁶⁴⁹ **P-0636**: T-072, p. 56, line 10 – p. 57, line 12 (Conf).

⁶⁵⁰ Defence email to the Trial Chamber, 14 March 2021, 21:44.

⁶⁵¹ [MLI-OTP-0006-1468](#).

⁶⁵² **P-0636**: T-072, p. 57, line 13 – p. 59, line 6 (Conf).

⁶⁵³ **P-0636**: T-072, p. 29, lines 5-7 (Conf).

⁶⁵⁴ Defence email to the Trial Chamber, 14 March 2021, 21:44 (referring to [MLI-OTP-0041-0612](#)).

7 The charges of rape, sexual violence or forced marriage have not been proven

7.1 Incidents for which no viva voce evidence has been brought

7.1.1 P-0542, P-0574, P-0553, and P-0553's sister

204. The Prosecution failed to introduce any evidence relating to P-0542, P-0574, P-0553, and P-0553's sister. These accusations should not be used in relation to any charge. The Defence notes that the Prosecution withdrew incidents concerning P-0542, P-0574, P-0580's mother and P-1728.⁶⁵⁵ The Defence therefore relies on the Prosecution's withdrawal.

7.1.2 P-0609 and P-0957

205. The allegations concerning P-0609 and P-0957 must be dismissed due to the Prosecution's failure to adduce any supporting viva voce evidence. The procès verbaux from the Bamako proceedings constitute testimonial evidence, which should have been submitted through Rule 68.⁶⁵⁶ P-0533, [REDACTED] was responsible for both interview interpretations.⁶⁵⁷ Given that both witnesses used identical phrases in their responses, it would appear that P-0533 substituted the witnesses' words with his own.⁶⁵⁸ This impacts the overall reliability, since the extent of the contamination cannot be verified due to lack of a cross-examination.

206. Further, the records are unauthenticated. The contents are not adjudicated facts because the statement was not under oath and the domestic proceedings have not resulted in a final judgment. Given the extent to which Prosecution witnesses diverged from the contents of their Bamako statements, no reliance can be placed on these records. The contents lack intrinsic coherence, as demonstrated by P-0609, who states that it is "probable" that Ansar Dine were responsible, but she was unable to distinguish between groups.⁶⁵⁹ Both witnesses use the black and white flag to identify the group but fail to provide the context in which they saw the flag and the flag's link to the alleged perpetrator. Given that P-0609 claims to have been kept at a house in [REDACTED] which was under control of the MNLA,⁶⁶⁰ it cannot be assumed that she was married to an individual from Ansar Dine or AQIM. Their memory was contaminated by image exposure and inappropriate questioning techniques.⁶⁶¹

⁶⁵⁵ [OTP Final Trial Brief](#), para. 211.

⁶⁵⁶ [Decision on Submission of Open Source Evidence](#), para. 17.

⁶⁵⁷ [MLI-OTP-0037-1571-R03](#); [MLI-OTP-0035-0146-R03](#).

⁶⁵⁸ [MLI-OTP-0035-0146-R03](#) at 0148; [MLI-OTP-0037-1571-R03](#) at 1573.

⁶⁵⁹ [MLI-OTP-0037-1571-R01](#) at 1572.

⁶⁶⁰ **P-0622**: T-160, p. 34, line 22 – p. 44, line 24 (Conf).

⁶⁶¹ See *supra*, paras 193-197.

207. The Rule 68 statement of P-0524 does not constitute independent corroboration as she merely recounts what she heard [REDACTED].⁶⁶² [REDACTED]

[REDACTED]⁶⁶³ [REDACTED]
[REDACTED] The sole basis for her recollection appears to be P-0524's [REDACTED]⁶⁶⁴ [REDACTED]

[REDACTED] does not constitute independent corroboration of [REDACTED]. The attributable weight to this declaration of P-0524 should be assessed in light of the impossibility for the Defence to cross-examine the witness of critical and core evidence.⁶⁶⁵

208. When the Prosecution tendered this statement, it did not express any intention to rely on the sections concerning P-0609 and P-0957.⁶⁶⁶ When admitting this statement, the Chamber also affirmed that⁶⁶⁷

having had regard to specific factual allegations which do not appear to be corroborated or cumulative of other evidence on the record [...] a prior recorded testimony must not form the sole or decisive basis for the conviction for a particular crime as such.

209. The Defence was therefore entitled to assume that these allegations do not form part of the factual matrix of the charges.

7.1.3 P-1134

210. The evidence of P-1134's alleged rape is based on contradictory media interviews from P-1134. In one interview, she claimed to have been arrested for [REDACTED] [REDACTED] whereas in another interview, she claimed it was because she was not properly covered. In some accounts, she says she was raped on the second night; in others, on the fourth night. In her most recent account, she claims she was flogged but does not mention any rape,⁶⁶⁸ and earlier accounts do not mention flogging. To [REDACTED] she says her [REDACTED] was shot for saying [REDACTED] whereas her [REDACTED] testified under oath that it was when he was [REDACTED]

These major discrepancies demonstrate the unreliable methods used by journalists to collect information.

⁶⁶² [Haraqija Contempt TJ](#), para. 64; [Gbagbo, Judge Henderson's Reasons](#), para. 46.

⁶⁶³ [MLI-OTP-0071-0246-R11](#) at 0262, para. 102; [MLI-OTP-0071-0246-R11](#) at 0261, para. 90.

⁶⁶⁴ [MLI-OTP-0071-0246-R11](#) at 0262, para. 96; [MLI-OTP-0071-0246-R11](#) at 0261, para. 90.

⁶⁶⁵ [Gbagbo, Judge Henderson's Reasons](#), para. 40.

⁶⁶⁶ [OTP R.68\(2\)\(b\) Application for P-0524](#), paras 33-37.

⁶⁶⁷ [R. 68\(2\)\(b\) Decision on P-0524](#), para. 10. See also [Karadžić TJ](#), paras 449, 462-475; [Popović AJ](#), paras 96, 1222; [Prlić AJ](#), para. 137; [Martić AJ](#), para. 192, fn. 486.

⁶⁶⁸ [MLI-D28-0005-8188](#).

211. There is no sworn evidence that P-1134 was raped or sexually assaulted in detention or that she was detained for the duration claimed by journalists. P-0603 testified that P-1134 was detained for one day and one night.⁶⁶⁹ P-0641 gives the same period, testifying that her mother and brother were at the BMS the entire night.⁶⁷⁰ P-0636 testified that during her detention, another girl was detained with her. P-0636 said she experienced the same treatment as the other girl. The evidence presented by P-0636 is vague. P-0636 testified that she did not discuss what happened to P-1134, as they “both had [their] problems”⁶⁷¹ and she “didn’t ask her any further questions”.⁶⁷² The Chamber should not assume that the elements of the crime of rape are met. Several witnesses testified that she was taken to the hospital because P-1134 had [REDACTED] [REDACTED]⁶⁷³ which she had suffered before 2012,⁶⁷⁴ and had [REDACTED]. According to P-0641, it occurred because P-1134 saw [REDACTED]⁶⁷⁵. A record from the hospital of Timbuktu dated December 2012 refers to the temporary admission of a woman for injuries caused by [REDACTED]⁶⁷⁶. This is the only report recording such an injury. No other injuries are recorded in the report, nor does the report refer to the woman’s return to the BMS, despite [REDACTED] routinely recording any infraction caused by the Islamists. This is consistent with D-0512’s evidence that P-1134 told D-0512 that she was released after she [REDACTED]⁶⁷⁷. From the timing of the report, it appears that P-1134 was taken to the BMS when *Hesbah* was present, immediately before Mohamed Moussa was replaced as the leader of *Hesbah*. There is no basis for the Chamber to conclude that the evidence on the record supports the existence of a common purpose to commit rape, sexual assault, or intentional forms of mistreatment.

7.1.4 P-0570

212. The Chamber should not place any weight on P-0570’s evidence, as it lacks intrinsic coherence and reliability. The descriptions of buildings and rooms do not correspond to reality, suggesting confabulation. She incorrectly describes the BMS as a chocolate brown house.⁶⁷⁸ She said she was held inside a room with mint green and white walls,⁶⁷⁹ yet the photographs

⁶⁶⁹ P-0603: T-125, p. 31, lines 1-6 (Conf).

⁶⁷⁰ P-0641: T-138, p. 88, line 12 – p. 91, line 15 (Conf).

⁶⁷¹ P-0636: T-071, p. 36, line 6 (Conf).

⁶⁷² P-0636: T-071, p. 37, line 3 (Conf).

⁶⁷³ [REDACTED] [MLI-OTP-0059-0391](#); P-0641: T-138, p.72, lines 8-12.

⁶⁷⁴ [MLI-D28-0006-2611-R03](#) at 2618, para. 47; P-0622: T-160, p. 42, lines 13-16 (Conf); P-0603: T-125, p. 31, lines 2-8 (Conf).

⁶⁷⁵ P-0641: T-138, p. 88-91; T-140, p. 12, lines 4-15 (Conf).

⁶⁷⁶ [MLI-OTP-0028-0934-R01](#) at 0935.

⁶⁷⁷ [MLI-D28-0006-2611-R03](#) at 2618, para. 47.

⁶⁷⁸ P-0570: [MLI-OTP-0049-0047-R05](#) at 0053, para. 28.

⁶⁷⁹ P-0570: [MLI-OTP-0049-0047-R05](#) at 0054, para. 29.

of the BMS interior show that there were no mint green walls.⁶⁸⁰ P-0570 makes contradictory statements about one or several members of armed groups named Adama. She recounts how a tall and strong “Bambara” named Adama arrested her friend.⁶⁸¹ P-0570 goes on to say that there were two Adamas – one was Songhaï and the other Tamasheq.⁶⁸² She describes the Songhaï Adama as a short man with light skin who was kind to locals.⁶⁸³ She says that she had only seen the Songhaï Adama once (not in the context of her friend’s arrest) and had no contact with the Tamasheq Adama.⁶⁸⁴ When confronted with her prior account about a “Bambara” Adama who arrested her friend, P-0570 declared that it was the Songhaï Adama who arrested her friend.⁶⁸⁵ P-0570 also claimed that a couple had their genitals cut by the Islamists to prevent a sexual encounter.⁶⁸⁶ The Chamber cannot properly rely on her contradictory and exaggerated accounts to make findings.

213. D-0512, [REDACTED] gave evidence that directly controverts P-0570’s account. Although D-0512 visited Bamako with her children for twenty days, four months after the arrival of the Islamists,⁶⁸⁷ this would have been before *Hesbah* moved to the BMS in September. Therefore, D-0512 was in Timbuktu for the entire period, corresponding to Mohamed Moussa’s work with *Hesbah*. According to D-0512, the only interaction that P-0570 experienced with Islamists during this period occurred when P-0570 was briefly taken to the BMS by *Hesbah* and released.⁶⁸⁸ D-0512 also spoke to P-0570 regularly, and was unaware of her going to the hospital in 2012 for a prolonged period.⁶⁸⁹ There are reasonable grounds to believe that P-0570 created a highly exaggerated account, after contacting [REDACTED]⁶⁹⁰ who travelled with and interpreted for P-0570 throughout the Bamako proceedings.⁶⁹¹ Her statement is comprised of rumours concerning other victims in Timbuktu, whom she may have met or heard of during meetings with [REDACTED]. There is no probative indication that she

⁶⁸⁰ [MLI-OTP-0039-0607](#) at 0615-0616; [MLI-OTP-0060-1920](#) at 1941, 1943, 1945, 1947, 1948, 1950, 1951, 1953. See also **P-0150**: T-99, p. 42, lines 14-24 (Conf).

⁶⁸¹ [MLI-OTP-0049-0047-R03](#) at 0059, para. 47.

⁶⁸² [MLI-OTP-0049-0047-R03](#) at 0065, para. 68.

⁶⁸³ [MLI-OTP-0049-0047-R03](#) at 0065, para. 69.

⁶⁸⁴ [MLI-OTP-0049-0047-R03](#) at 0065, paras 69-70.

⁶⁸⁵ [MLI-OTP-0049-0047-R03](#) at 0065, para. 70.

⁶⁸⁶ [MLI-OTP-0049-0047-R05](#) at 0066, para. 73.

⁶⁸⁷ [MLI-D28-0006-2611-R02](#) at 2614, para. 15.

⁶⁸⁸ [MLI-D28-0006-2611-R02](#) at 2617, para. 41.

⁶⁸⁹ [MLI-D28-0006-2611-R02](#) at 2617, para. 43.

⁶⁹⁰ [MLI-D28-0006-2611-R02](#) at 2616, para. 33.

⁶⁹¹ [MLI-OTP-0032-0325-R02](#) at 0326.

personally witnessed such incidents. In addition, P-0570 also provided exaggerated evidence, such as the fact that “Islamists” were cutting feet.⁶⁹²

214. The impossibility of cross-examining P-0570 was exacerbated by late disclosure of significant information, which the Defence did not receive until after the close of its case.⁶⁹³

215. P-0570 also gave evidence that the [REDACTED] P-1460, was forcibly married and gave birth. P-0570 provides no information on the perpetrator nor the timing of this incident. The lack of P-0570’s general credibility combined with the insufficient information regarding P-1460 (i.e. no identity was disclosed to the Defence nor information about the alleged perpetrator and affiliation to any armed groups) militates in favour of rejecting the evidence on this charged incident. Given that P-0570 could not be cross-examined on issues of credibility, reliance on P-0570’s evidence would be manifestly inconsistent with the Chamber’s duty to ensure fair and impartial proceedings.

7.2 Incidents are supported by contaminated/unreliable/contradictory evidence/ due process violations impacting on inferences which can be drawn

7.2.1 P-0636, P-0538, P-0610, and P-0520

216. The accounts of rape and forced marriage by P-0636, P-0538, P-0610, and P-0520 are unreliable. Their claims have mutated in implausible ways, suggesting memory contamination. Evidence on key disputed issues was elicited at trial through leading questions and techniques, and the Defence was prevented from challenging core credibility issues through disclosure violations and unfounded objections. Vague and circulatory answers from witnesses also prevented the Defence from challenging their accounts.⁶⁹⁴

217. P-0636’s memory and account were tainted when she was asked leading questions, such as “[a]vez-vous déjà été emmenée a la police islamique?” and “avez-vous été violée par des djihadistes pendant l’occupation?”⁶⁹⁵ This was reinforced when [REDACTED] used this interview record to prepare P-0636 before her testimony in Bamako.⁶⁹⁶ Her unreliable and implausible account results in the inability to make safe findings of fact. In some accounts she claims she was raped at a house;⁶⁹⁷ others, near a house.⁶⁹⁸ In court, she inaccurately describes the BMS

⁶⁹² [MLI-OTP-0049-0047-R03](#) at 0065, para. 58.

⁶⁹³ Defence email, 4 April 2023, 16:47; Defence email, 2 February 2023, 16:49; Defence email, 26 October 2021, 16:33; [MLI-OTP-0081-0400-R02](#) at 0405-0406, paras 29-30.

⁶⁹⁴ See **P-0636**: T-072, p. 23 (Conf); **P-0538**: T-162, p. 71, lines 9-15; p. 72, lines 17-23 (Conf); **P-0520**: T-150, p.10, line 1 – p. 11, line 12; p. 12, line 22 – p. 13, line 3; p. 14, line 16 – p. 17, line 17; p. 29, line 22 – p. 32, line 11; p. 41, lines 1-10 (Conf); **P-0547**: T-153, p. 6, line 14 – p. 7, line 7; T-153, p. 15, line 19 – p. 16, line 12 (Conf).

⁶⁹⁵ [MLI-OTP-0071-0479](#) at 0477.

⁶⁹⁶ **P-0636**: T-072, p. 9, line 13 – p. 10, line 25 (Conf).

⁶⁹⁷ [REDACTED].

⁶⁹⁸ [MLI-OTP-0071-0477-R01](#) at 0479.

as a one-storied house,⁶⁹⁹ and like a house whose inhabitants had been pushed out.⁷⁰⁰ As noted above,⁷⁰¹ P-0636 never mentioned “BMS”, described “black flags”, or men with turbans before her preparation session with the Prosecution. In both prior accounts, the rape allegation was separate from her account of attempts by Mohamed Moussa to detain her.⁷⁰² the rape occurred at the very beginning, when Timbuktu was inundated with various Arabs and Tuaregs from different groups, wearing similar clothes.

218. P-0610 also gave evidence that P-0636 was only detained for a matter of hours, before being released when her husband came to collect her.⁷⁰³ She also said this happened later in the year, and that P-0610 was warned that she would be struck if found not wearing a headscarf. This was the only thing the Islamists said to her at the BMS.⁷⁰⁴ This information, which P-0636 provided contemporaneously to P-0610, is consistent with the information P-0636 initially provided to ██████████⁷⁰⁵ Since a trauma-impacted memory does not improve with time, the Chamber cannot conclude that P-0636 was detained for any length of time at the BMS, that she was raped while detained, or that the rape can be attributed to members of Ansar Dine or AQIM.

219. P-0636 first claimed she was pregnant before she was first detained by the “Islamists”,⁷⁰⁶ then that she became pregnant due to her alleged rape,⁷⁰⁷ and then, that she gave birth in ██████████ 2015.⁷⁰⁸ Even if the Chamber were to find that P-0636 was raped, it is not possible to construct a reliable account regarding whom, how, when, and where this occurred. The details fail to satisfy Regulation 52(b) requirements of the Regulations of the Court.

220. P-0636’s reliability is further undermined by how she recounted false rumours under oath. She claimed that someone was shot in the back and killed when trying to release a girl who was detained with her.⁷⁰⁹ This incident does not correspond to any of the two reported deaths in 2012 and 2013. Her description of the girl in question does not correspond to P-1134’s ██████████, nor does her description fit the girl ██████████ (P-1134 ██████████).⁷¹⁰ If P-0636 was detained with P-1134, her detention would have been in

⁶⁹⁹ P-0636: T-071, p. 23, lines 4-6 (Conf).

⁷⁰⁰ P-0636: T-071, p. 22, lines 17-18 (Conf).

⁷⁰¹ See para. 203, fn 654, *supra*, fn 902 *infra*.

⁷⁰² [MLI-OTP-0035-0134-R02](#) at 0134-0135; [MLI-OTP-0071-0477](#) at 0479.

⁷⁰³ P-0610: T-158, p. 58, line 22 – p. 59, line 13 (Conf).

⁷⁰⁴ P-0610: T-158, p. 59, lines 8-21 (Conf).

⁷⁰⁵ [MLI-OTP-0071-0477](#) at 0479.

⁷⁰⁶ [MLI-OTP-0071-0478](#) at 0478.

⁷⁰⁷ ██████████

⁷⁰⁸ P-0636: T-072, p. 49, lines 8-11 (Conf).

⁷⁰⁹ P-0636: T-071, p. 59, lines 3-8 (Conf).

⁷¹⁰ [MLI-D28-0006-2611-R03](#) at 2618, para. 48.

December, not August. The only reasonable explanation is that P-0636 incorporated rumours of P-1134 and P-1134's family into her evidence.

221. P-0636's vague description of what allegedly happened to P-0538 also demonstrates her inability to distinguish between what she saw and heard in 2012 and what she learned afterwards through exposure to other accounts. The source of the hearsay information is too remote to warrant any evidential weight (e.g. P-0538 ██████ told P-0636 ██████).⁷¹¹ Her use of legal terms, such as "persecution",⁷¹² reflects the extent to which her account has been influenced through NGO preparation.

222. P-0636's evidence on P-1674 lacks in detail on core elements, such as information on the perpetrator, his affiliation to a group, and the timeframe of the incident. The Trial Chamber cannot rule beyond reasonable doubt on this incident.

223. There are grounds to believe that P-0636 was aware her evidence was not truthful on key aspects. Before testifying, she indicated she was afraid to testify because she believed she would be arrested and imprisoned.⁷¹³ P-0636 also claimed she was concerned her husband found out what happened to her,⁷¹⁴ even though her husband was aware of her account.⁷¹⁵ It is reasonable to infer that P-0636 was reluctant to testify since her account was not based on true memory recall.

224. P-0538 and P-0636 travelled to Bamako with and were "prepared" by ██████⁷¹⁶ The Defence had not been disclosed P-0538's name at the time of P-0636's testimony. This prevented the Defence from cross-referencing P-0636's account with ██████

225. In any event, like P-0636, her account is marked by embellishment and the effects of exposure to rumour and influence. There is agreement that P-0538 was married in 2012. However, it is not credibly established that she was married to a member of Ansar Dine or AQIM or that her marriage can be attributed to these groups.

226. The Chamber cannot conclude that the evidence reliably establishes that P-0538 married a member of Ansar Dine or AQIM or that the groups were responsible for her marriage. P-0538 lacked the capacity to reliably identify members of the different groups. She assumed that anyone who wore "chocolate" was Ansar Dine, those in grey were "Islamists", and persons in

⁷¹¹ P-0636: T-071, p. 55, lines 12-18 (Conf).

⁷¹² P-0636: T-071, p. 60, line 20 (Conf).

⁷¹³ [MLI-OTP-0080-1831](#), para. 3.

⁷¹⁴ [MLI-OTP-0080-1831](#) at 1832, para. 5.

⁷¹⁵ ██████ [MLI-OTP-0071-0477](#) at 0479.

⁷¹⁶ P-0636: T-072, p. 10, lines 8-9 (Conf).

paramilitary gear were “the MNLA”.⁷¹⁷ In her account to OTP investigators, she described the persons who had allegedly raped her as MNLA members,⁷¹⁸ and confirmed during cross-examination that they were wearing a uniform associated with the MNLA,⁷¹⁹ and that her husband was also from the MNLA.⁷²⁰ She provided different names for her husband [REDACTED],⁷²¹ none of which correspond to his actual name. To [REDACTED] she claimed that [REDACTED] who accompanied her husband (“a Tamasheq”).⁷²² To the ICC Chamber, she claimed to have married [REDACTED]. These differences cannot be attributed to interpretation errors,⁷²³ particularly as she gave the name [REDACTED] in Bamako twice, with different interpreters.⁷²⁴ It is unclear from her testimony before this Chamber that he was an “Islamist” at the time of the marriage.⁷²⁵ Unlike the Defence, which discovered the name of P-0538’s husband on the eve of her testimony,⁷²⁶ the Prosecution had access to the name on her divorce paper for the entirety of its investigations and were unable to identify any witnesses to confirm he was a member of Ansar Dine or AQIM. According to P-0538’s own account before the Chamber, the husband was a local acquaintance of her father⁷²⁷ and he took her to a house that he owned.⁷²⁸ In her victim application form, which was read back to her before she signed it,⁷²⁹ she alleged [REDACTED].⁷³⁰ Given the proximity of the Arab militia to the Malian army, the most reasonable inference is that the husband [REDACTED] which had previously worked with P-0538’s [REDACTED]. This is consistent with P-0538’s [REDACTED],⁷³¹ and how he tried to rely on his own local sheiks to help mediate the marriage.⁷³² The dowry price, evidenced by the Khula price, was also low ([REDACTED]),⁷³³ which indicates the dowry was not paid for with funds from the groups. [REDACTED] do not refer to

⁷¹⁷ P-0538: T-161, p. 10, line 16 – p. 11, line 7 (Conf).

⁷¹⁸ P-0538: T-163, p. 40, lines 4-13 (Conf).

⁷¹⁹ P-0538: T-163, p. 40, lines 4-13 (Conf).

⁷²⁰ P-0538: T-163, p. 41, lines 6-8 (Conf). The Presiding Judge ordered the Defence to move on rather than address the inconsistencies on this issue: T-163, p. 49, lines 1-19 (Conf).

⁷²¹ P-0538: T-161, p. 22, line 15 (Conf).

⁷²² P-0538: T-163, p. 17, lines 11-24 (Conf).

⁷²³ P-0538: T-162, p. 65, lines 16-18 (Conf).

⁷²⁴ P-0538: T-162, p. 80, lines 1-23 (Conf).

⁷²⁵ P-0538: T-161, p. 18, lines 4-5 (Conf).

⁷²⁶ Email from Prosecution, 26 November 2021, 14:24. P-0538 testified on 30/11 and 1-2/12.

⁷²⁷ P-0538: T-161, p. 26, line 24 – p. 27, line 24; p. 28, lines 22-24 (Conf).

⁷²⁸ P-0538: T-161, p. 33, lines 4-5 (Conf).

⁷²⁹ P-0538: T-162, p. 19, line 24 – p. 20, line 1 (Conf).

⁷³⁰ P-0538: T-162, p. 19, line 7 (Conf).

⁷³¹ P-0538: T-162, p. 72, line 8 (Conf).

⁷³² Original: [MLI-OTP-0001-7395](#), Translation: [MLI-OTP-0077-2783](#) at 2784.

⁷³³ P-0538: T-162, p. 28, line 25 (Conf).

the husband as a “brother”, which is the terms used in [REDACTED] for referring to members of AQIM.⁷³⁴

227. [REDACTED] further reflect the fact that Ansar Dine, especially [REDACTED], assisted her to end a marriage brought about through her father. According to [REDACTED] P-0538’s parents gave their consent to the marriage without speaking to P-0538 or obtaining her consent.⁷³⁵ Under cross-examination, P-0538 confirmed this.⁷³⁶ [REDACTED]

[REDACTED]⁷³⁷ [REDACTED]
[REDACTED]⁷³⁸ [REDACTED]
[REDACTED]

[REDACTED].⁷³⁹ According to [REDACTED], P-0538 told [REDACTED] that it was her parents who forced her to stay two nights with her husband. Her father claimed he was unaware that she was unwilling when he brought her to the husband on the second night.⁷⁴⁰ [REDACTED] directly controvert P-0538’s account that anyone associated with Ansar Dine or AQIM forced her to stay with him. P-0538 went to [REDACTED] to complain about her marriage and seek a divorce, therefore undermining the Prosecution’s case that Ansar Dine was responsible for creating a coercive environment that prevented the local population from exercising their rights.⁷⁴¹ It is clear from [REDACTED] that local women, such as P-0538, were able to freely inform [REDACTED] that they did not consent to marriages.

228. No reasonable Chamber could conclude that P-0538 was detained on the ground floor at [REDACTED] and raped there by her husband and other persons.⁷⁴² When interviewed closer to the events, P-0538 told [REDACTED] that during the period she [REDACTED] [REDACTED], “I was no longer at his house but in my house with my father, in a family surroundings”,⁷⁴³ an account she confirmed during cross-examination.⁷⁴⁴ [REDACTED] also recalled that P-0538 said that she was not staying with her husband throughout [REDACTED]

⁷³⁴ Cf [MLI-OTP-0001-7515](#) (trans. [MLI-OTP-0052-0019](#)).

⁷³⁵ [MLI-OTP-0001-7930](#) at 7931; [MLI-OTP-0078-6006](#) at 6007.

⁷³⁶ **P-0538**: T-163, p. 59, lines 4-6 (Conf).

⁷³⁷ [MLI-OTP-0001-7930](#) at 7931; [MLI-OTP-0078-6006](#) at 6007.

⁷³⁸ [MLI-OTP-0001-7930](#) at 7931; [MLI-OTP-0078-6006](#) at 6007. See also **P-0538**: T-163, p. 63, lines 7-9 (Conf).

⁷³⁹ [MLI-OTP-0077-2783](#) at 2784; [MLI-OTP-0001-7395](#).

⁷⁴⁰ [MLI-OTP-0077-2783](#) at 2784; [MLI-OTP-0001-7395](#).

⁷⁴¹ [MLI-OTP-0001-7930](#) at 7931; [MLI-OTP-0078-6006](#) at 6007; **P-0538**: T-163, p. 54, lines 23-25 (Conf).

⁷⁴² **P-0538**: T-161, p. 47, lines 3-17 (Conf); P-0538: T-162, p. 15, lines 17-18; p. 38, lines 23-25 (Conf).

⁷⁴³ **P-0538**: T-163, p. 23, lines 9-10 (Conf).

⁷⁴⁴ **P-0538**: T-163, p. 23, line 13 – p. 24, line 11 (Conf).

██████████⁷⁴⁵ ██████████ refers to P-0538 returning to ██████████ with her family,⁷⁴⁶ which indicates she was not detained in the interim. It is also implausible that ██████████ would fail to mention that Houka Houka had allegedly ordered P-0538 and her father to be detained for four months during ██████████. Despite acknowledging that she understood the importance of providing full and truthful evidence to the judge in Bamako, P-0538 was unable to credibly explain why these details (i.e. her detention and rape at ██████████) had been omitted from her prior statements in Bamako. After her first account, she blamed her different accounts on the interpreters and her faulty memory.⁷⁴⁷

229. Delayed disclosure of P-0538's identity⁷⁴⁸ prevented the Defence from posing questions concerning P-0538's alleged detention and rape at the ██████████

Given these impediments to the Defence's right to fairly confront P-0538 on such issues, the Chamber cannot place weight on her account of detention and abuse at the ██████████

The Chamber should note that although the Prosecution showed ██████████ concerning P-0538 to ██████████ during preparation,⁷⁴⁹ they elected not to mention it on the stand even though

██████████⁷⁵⁰ ██████████, who ██████████ ██████████, confirmed that "nobody stays overnight ██████████", and ██████████ ██████████ were not detained.⁷⁵¹ This directly controverts P-0538's account of being detained for four days during the battle of Konna.⁷⁵² ██████████

██████████ also confirmed that none of the group members stayed overnight and that only ██████████ ██████████ accessed the building.⁷⁵³

230. P-0538's account is replete with extreme exaggeration that cannot be given weight. Her willingness to withhold relevant information or embellish under oath undermines her overall credibility. Regarding procedural issues, P-0538 first claimed she met ██████████ once and the interaction involved ██████████ registering her name and leaving.⁷⁵⁴ After being confronted with the contents of the Bamako hearing, P-0538 acknowledged ██████████

⁷⁴⁵ ██████████ P-0538 did not mention her pregnancy ██████████ ██████████ to avoid having to return to her husband.

⁷⁴⁶ [MLI-OTP-0077-2783](#) at 2784; [MLI-OTP-0001-7395](#).

⁷⁴⁷ P-0538: T-163, p. 5, line 1 – p. 15, line 3 (Conf).

⁷⁴⁸ [Decision on Delayed Disclosure](#), para. 59.

⁷⁴⁹ [MLI-OTP-0068-3310](#) at 3325-3328, lines 502-582.

⁷⁵⁰ [MLI-OTP-0077-2783](#).

⁷⁵¹ ██████████

⁷⁵² P-0538: T-161, p. 49, line 23 – p. 50, line 6 (Conf).

⁷⁵³ ██████████

⁷⁵⁴ P-0538: T-162, p. 57, line 12 – p. 58, line 13 (Conf).

interpreted for her during that hearing.⁷⁵⁵ On issues of substance, P-0538 repeatedly contradicted herself about whether her father knew her husband before 2012.⁷⁵⁶ She claimed her father died after being beaten,⁷⁵⁷ although this death is not recorded in any medical records or contemporaneous accounts. Her father was present at [REDACTED] hearing at the end of January.⁷⁵⁸ P-0538 provided contradictory accounts of how she was allegedly burned.⁷⁵⁹ Her attempt to blame the interpreter in Bamako can be given no credence given that [REDACTED] testified that she had faithfully interpreted the account.⁷⁶⁰ Her account of being detained with other females who were raped also mutated significantly on the stand,⁷⁶¹ resulting in the conclusion that she was not providing evidence of something she witnessed or experienced. According to P-0520, [REDACTED] told victims [REDACTED] that “Houka Houka had been arrested and imprisoned, and that if it was him who had done these things to us, we had to say so.”⁷⁶² It is reasonable to infer that having been encouraged in this manner, P-0538’s experience [REDACTED] transformed into an untruthful account.

231. The Chamber cannot conclude that P-0610 was forcibly married to an Ansar Dine or AQIM member during the charged events or that her marriage was the consequence of the charged common purpose. P-0610’s account that her family did not consent to the marriage can be given no credence. P-0610 acknowledges she was not present when her mother spoke to her husband concerning the marriage agreement.⁷⁶³ P-0610 was not able to give evidence as to what was said, how the “Islamists” behaved or whether they were armed.⁷⁶⁴ Both [REDACTED] (D-0516) and [REDACTED] (D-0512) gave evidence that P-0610’s mother consented to the marriage,⁷⁶⁵ as did the brother.⁷⁶⁶ D-0516 gave evidence that according to their mother, P-0610 agreed to the marriage.⁷⁶⁷ The mother did not say she had been menaced or threatened.⁷⁶⁸ This

⁷⁵⁵ **P-0538**: T-162, p. 65, lines 16-18 (Conf).

⁷⁵⁶ *See* **P-0538**: T-162, p. 24, lines 19-20; p. 71, line 5 (Conf) *contra* T-161, p. 28, lines 20-24.

⁷⁵⁷ **P-0538**: T-161, p. 39, lines 22-24 (Conf).

⁷⁵⁸ **P-0538**: T-161, p. 54, line 2 (Conf).

⁷⁵⁹ **P-0538**: T-162, p. 75, lines 6-25 (Conf).

⁷⁶⁰ **V-0002**: T-170, p. 21, line 23 – p. 22, line 7 (Conf).

⁷⁶¹ **P-0538**: T-163, p. 75, line 3 – p. 76, line 8 (Conf).

⁷⁶² **P-0520**: T-150, p. 21, lines 1-4; p. 24, lines 12-17 (Conf). Before the Defence could ask P-520 to confirm her account to the Prosecution, the Presiding Judge ordered the Defence to move on. T-150, p. 23, line 22 – p. 24, line 6 (Conf).

⁷⁶³ **P-0538**: T-158, p. 18, lines 19-23; p. 22, lines 8-14; p. 27, line 17 – p. 28, line 10; p. 29, line 3; p. 30, line 2 (Conf).

⁷⁶⁴ **P-0538**: T-158, p. 20, lines 8-14; p. 23, lines 3-13 (Conf).

⁷⁶⁵ [MLI-D28-0006-2611-R03](#) at 2619, para. 56.

⁷⁶⁶ [MLI-D28-0006-2611-R03](#) at 2618, para. 51.

⁷⁶⁷ [MLI-D28-0006-2783-R01](#) at 2785, paras 16, 18.

⁷⁶⁸ [MLI-D28-0006-2783-R01](#) at 2786.

is consistent with D-0512's evidence that P-0610 informed her that P-0610 consented to the marriage.⁷⁶⁹ The conclusion that P-0610 entered a traditional marriage with her family's consent is further bolstered by P-0610's evidence that her husband spoke to her brother and gave him the dowry.⁷⁷⁰ The marriage was celebrated at her brother's house with her mother, brother and sisters in attendance, along with P-0610, P-0610's friend and her mother's friends.⁷⁷¹ █████ confirmed that a dowry was given to the brother, who gave it to their mother.⁷⁷² Similarly, P-0610 testified that following local traditions, her mother's friend came to collect her the day after the marriage⁷⁷³ and she went to her mother's home.⁷⁷⁴ She never saw or heard from her husband after this point.⁷⁷⁵ There is no indication that her husband forced her to attend the ceremony, to come or to stay at his house, or that he pursued her after she left. D-0516 and D-0512 interacted with P-0610 while she was married and did not hear any complaints or witness anything different from a traditional marriage.⁷⁷⁶

232. P-0610's credibility is further damaged due to her unreliable evidence regarding the marriage of her other sister, █████. Contrary to P-0610's belief, evidence does not support the conclusion that █████ entered a forced marriage in 2012. P-0610 was not able to give any reliable evidence on the circumstances under which her sister was married.⁷⁷⁷ The description seems to correspond to a traditional marriage, given that █████ was able to request and obtain a divorce.⁷⁷⁸ D-0516 also testified that █████ married █████ to whom she is still married.⁷⁷⁹ Since D-0516 was older than P-0610, she would have been better placed to provide reliable evidence on the details of this marriage. Although the date varies, D-0512 gave evidence that █████ married █████ to whom she is still married.⁷⁸⁰

233. There is insufficient probative evidence to conclude that P-0610's husband was a member of either Ansar Dine or an AQIM group working with Ansar Dine in Timbuktu. At the beginning of her marriage, P-0610 went with a friend to a neighbouring house.⁷⁸¹ The husband

⁷⁶⁹ **D-0512**: T-181, p. 15, line 25 – p. 16, line 3 (Conf).

⁷⁷⁰ **P-0538**: T-158, p. 35, lines 5-7; p. 36, lines 2-3; p. 36, lines 16-24 (Conf).

⁷⁷¹ **P-0538**: T-158, p. 36, lines 16-24 (Conf).

⁷⁷² [MLI-D28-0006-2783-R01](#) at 2785, para. 17. *See also* [MLI-D28-0006-2611-R03](#) at 2619, para. 56.

⁷⁷³ █████

⁷⁷⁴ **P-0538**: T-158, p. 43, lines 13-14 (Conf).

⁷⁷⁵ **P-0538**: T-158, p. 44, lines 7-14 (Conf).

⁷⁷⁶ [MLI-D28-0006-2783-R01](#) at 2785, paras 19-20; **D-0516**: T-199, p. 23, lines 1-16 (Conf); [MLI-D28-0006-2611-R03](#) at 2620, para. 59.

⁷⁷⁷ **P-0538**: T-159, p. 31, lines 11-20 (Conf).

⁷⁷⁸ **P-0538**: T-159, p. 33, lines 1-9 (Conf).

⁷⁷⁹ **D-0516**: T-199, p. 24, line 16 – p. 25, line 15 (Conf).

⁷⁸⁰ **D-0512**: T-181, p. 20, line 23 – p. 21, line 16 (Conf).

⁷⁸¹ **P-0538**: T-158, p. 38, lines 7-12 (Conf).

and his friend were unarmed.⁷⁸² P-0610 acknowledged she did not know her husband's activities in Timbuktu.⁷⁸³ D-0516, ██████████ gave evidence that P-0610's husband was an Arab who visited Timbuktu often,⁷⁸⁴ which suggests that ██████████. By P-0610's own account, before her marriage, P-0610's sister married a local Arab from Timbuktu,⁷⁸⁵ which suggests that P-0610's husband ██████████ and married P-0610 for reasons unrelated to the alleged common purpose. This is consistent with P-0610's evidence that it was customary for Arab men to marry Black women in Timbuktu, even before the groups' arrival.⁷⁸⁶

234. P-0610's reliability is also undermined by the nature of her interactions with ██████████ and other victims,⁷⁸⁷ the leading questions from the Prosecution,⁷⁸⁸ and her family's relationship ██████████.⁷⁸⁹ P-0610's ██████████ file did not attribute the marriage to a particular group.⁷⁹⁰ As explained by P-0160, if victims did not know the name of the perpetrator, they would attribute the actions to the group, which they associated with the perpetrator's ethnicity. P-0610 testified that the Islamists spoke Arabic,⁷⁹¹ which suggests that she conflated Arabs with Islamists. P-0610 also acknowledged she was unable to distinguish between MUJAO and Ansar Dine.⁷⁹²

235. Given that P-0610 never told anyone in 2012 that her husband allegedly forced her to have sexual relations, and even her neighbours and sister believed the marriage was consensual, it is impossible for Mr Al Hasan to have known of the marriage or how it was carried out. There is also no indication that the husband was acting in accordance with the charged common purpose or that Ansar Dine or AQIM played a role in assisting him to forcefully marry P-0610. The location of the husband's house, its lack of security, and P-0610 having never saw her husband armed indicate that this was a marriage entirely independently of Ansar Dine and AQIM.

⁷⁸² P-0538: T-158, p. 41, lines 2-3 (Conf).

⁷⁸³ P-0538: T-159, p. 29, lines 9-10 (Conf).

⁷⁸⁴ [MLI-D28-0006-2783-R01](#) at 2785, para. 16.

⁷⁸⁵ P-0538: T-158, p. 48, lines 13-15 (Conf).

⁷⁸⁶ P-0538: T-158, p. 51-52. See also [MLI-D28-0004-2942](#) at 2943.

⁷⁸⁷ See *supra*, para. 186.

⁷⁸⁸ P-0538: T-158, p. 67, lines 7-16 (Conf).

⁷⁸⁹ D-0516: T-199, p. 24, line 16 – p. 25, line 15 (Conf).

⁷⁹⁰ [MLI-OTP-0080-4440; Annex B to Defence BTM on Witnesses and NGO influence](#), pp. 6-9.

⁷⁹¹ P-0538: T-158, p. 15, lines 18-19 (Conf).

⁷⁹² P-0538: T-158, p. 89, lines 10-16 (Conf).

7.2.2 [REDACTED] P-0547, P-0520, P-0602

236. P-0547 provided false evidence. She did not personally experience the events she recounted to this Chamber, but recycled information from [REDACTED] concerning [REDACTED]

237. [REDACTED] that she did not meet P-0547 in Timbuktu but rather in Bamako, where she prepared her to testify.⁷⁹³ For her and [REDACTED]⁷⁹⁴ [REDACTED] are the same person.⁷⁹⁵ Consequently, when [REDACTED] gave P-0547 [REDACTED] to review before testifying, which was [REDACTED]'s standard practice,⁷⁹⁶ she would have given P-0547 [REDACTED] corresponding to [REDACTED]. The Prosecution was in contact with P-0547 immediately after her Bamako testimony,⁷⁹⁷ so the exposure to [REDACTED] account was fresh in her mind.

238. The inference that P-0547 improperly adopted [REDACTED] account is further supported by the following factors: i) similarities between accounts, ii) reliance on rumours and hearsay, iii) contradictions with D-0514's account, and iv) P-0547's tendency to embellish and exaggerate.

239. First, the Prosecution acknowledged that their respective accounts are similar.⁷⁹⁸ In addition to the duplication of details concerning their account of being arrested and taken to the BMS, both claimed to be [REDACTED] [REDACTED]⁷⁹⁹ If both accounts were true, P-0547 would know [REDACTED] as her neighbour, yet P-0547 feigned ignorance of this name.⁸⁰⁰

240. Second, P-0547's account lacks internal coherence and reliability. She testified based on rumours and information she was exposed to through interactions with [REDACTED] and at victim group meetings,⁸⁰¹ rather than true memory recall. Although P-0547 claimed to have been detained at the BMS, her description of the BMS cannot be reconciled with the actual floorplan. Her description of the room in which she was allegedly detained corresponds to the well-known

⁷⁹³ [REDACTED]

⁷⁹⁴ [MLI-OTP-0077-5163-R01](#).

⁷⁹⁵ [REDACTED] See also [MLI-OTP-0078-1923](#) at 1924, para. 10; [MLI-OTP-0080-4698](#); [MLI-OTP-0077-5166](#); [MLI-OTP-0077-5163-R01](#); [Annex B to Defence BTM on Witnesses and NGO influence](#), pp. 2-5.

⁷⁹⁶ [REDACTED].

⁷⁹⁷ [MLI-OTP-0080-4702](#); [MLI-OTP-0080-4698](#).

⁷⁹⁸ [MLI-D28-0006-9079](#)

⁷⁹⁹ [Defence Application to Recall P-0547](#), fn. 38.

⁸⁰⁰ **P-0547**: T-153, p. 35, lines 3-5 (Conf).

⁸⁰¹ **P: 0547**: [MLI-OTP-0077-5166](#); **P-0547**: T-153, p. 14, line 16 – p. 16, line 24 (Conf).

ATM room.⁸⁰² She also claimed to be taken from the room to an internal corridor,⁸⁰³ yet the ATM room had no inside access to the BMS.⁸⁰⁴ The area she recognised from a photo of the BMS did not correspond to the ATM room.⁸⁰⁵ She also identified two different locations and was unable to describe the inside of the BMS.⁸⁰⁶ The likelihood that P-0547's account is based on regurgitated rumours rather than actual memories is further bolstered by her temporally impossible timeline. P-0547 claims to have been arrested before Ramadan,⁸⁰⁷ but also claims her arrest occurred after the women's march to the BMS protesting Mohamed Moussa.⁸⁰⁸ This march occurred in October 2012. P-0547 also claims that ██████ had ██████ and broke the glass in the cell before P-0547 was arrested.⁸⁰⁹ ██████ appears to have broken the glass in the ATM room in December 2012.⁸¹⁰

241. Third, P-0547's account is controverted by D-0514, who gave evidence under oath that P-0547 lied about being raped at the BMS.⁸¹¹ ██████,⁸¹² as ██████,⁸¹³ D-0514 saw her and her husband regularly ██████⁸¹⁴ and ██████.⁸¹⁵ Although they spoke regularly about the Islamists, P-0547 and her husband never mentioned any problems.⁸¹⁶ If there had been an issue, P-0547 would have told D-0514.⁸¹⁷ P-0547's husband, ██████ worked for and was on friendly terms with the Islamists throughout 2012.⁸¹⁸ His continued employment cannot be reconciled with P-0547's account that she told her husband she was raped in the BMS. Given the small size of their neighbourhood, it would be impossible for her to be taken at gunpoint in broad daylight without the knowledge of her husband or neighbours.

242. Fourth, even if P-0547 was arrested, she exaggerates and embellishes facts, which prevents the Chamber from safely relying on her evidence. P-0547 claimed there was an incident where everyone on her street was arrested by the Islamists before she was taken to the

⁸⁰² **P-0547**: T-151, p. 28, lines 13-16; p. 29, line 15, 20-25 (Conf).

⁸⁰³ **P-0547**: T-151, p. 4, lines 1-2; p. 28, line 11 – p. 29, line 25 (Conf).

⁸⁰⁴ **P-0608**: T-155, p. 23, lines 9-11 (Conf).

⁸⁰⁵ MLI-REG-0001-0212; [MLI-OTP-0006-1877](#); [MLI-OTP-0006-1873](#).

⁸⁰⁶ **P-0547**: T-152, p. 59, line 16 – p. 60, line 3; p. 62, lines 4-13 (Conf).

⁸⁰⁷ **P-0547**: T-151, p. 21, line 21 (Conf).

⁸⁰⁸ **P-0547**: T-153, p. 3, line 17 – p. 4, line 6 (Conf).

⁸⁰⁹ **P-0547**: T-153, p. 4, lines 10-25 (Conf).

⁸¹⁰ See *supra* para. 211.

⁸¹¹ **D-0514**: T-208, p. 35, line 22 – p. 36, line 3; p. 37, line 19 – p. 38, line 10 (Conf).

⁸¹² **D-0514**: T-208, p. 26, lines 5-6 (Conf).

⁸¹³ **D-0514**: T-208, p. 25, lines 11-22 (Conf).

⁸¹⁴ **D-0514**: T-208, p. 61, line 1 (Conf).

⁸¹⁵ **D-0514**: T-208, p. 26, lines 14-22 (Conf).

⁸¹⁶ **D-0514**: T-208, p. 31, line 5 – p. 32, line 3; p. 34, line 9 – p. 35, line 7 (Conf).

⁸¹⁷ **D-0514**: T-208, p. 35, lines 1-7 (Conf).

⁸¹⁸ **D-0514**: T-208, p. 27, lines 12-17 (Conf).

BMS.⁸¹⁹ Even though D-0514 [REDACTED], he never saw or heard this.⁸²⁰ Whereas P-0547 claimed that [REDACTED] died after being whipped,⁸²¹ D-0514 gave evidence that [REDACTED] died of natural causes. He had not suffered from any incident with the Islamists.⁸²² The Chamber also cannot deduce from the photos tendered by the Prosecution that P-0547 must have been flogged. Defence expert Dr Sommerlad gave evidence that it was not possible to draw such conclusions from the photographs.⁸²³

243. When the above indicia of unreliability are viewed in conjunction with the significant due process violations that occurred because of the Prosecution's disclosure violations,⁸²⁴ the decision to not recall P-0547,⁸²⁵ and the Prosecution decision to not call P-0524 and [REDACTED] [REDACTED] as *viva voce* witnesses,⁸²⁶ the Chamber cannot conclude that the Prosecution's burden of proof has been fairly and fully discharged.

244. The tainted aspects of P-0547's evidence extend to P-0520, although the Defence was unable to fully confront P-0520 due to the Prosecution's failure to disclose that P-0547 was not [REDACTED] at the time of P-0520's testimony.⁸²⁷ P-0520 appears to have the same mother as [REDACTED].⁸²⁸ The [REDACTED] has no dossier concerning her, so P-0520's details and account were transmitted to [REDACTED] by [REDACTED].⁸²⁹ P-0547 provided P-0520's number to OTP investigators,⁸³⁰ and gave evidence that she attended the marriage of [REDACTED].⁸³¹ P-0602 also testified that she is friend with P-0520's [REDACTED].⁸³² Nonetheless, P-0520 denied knowing anyone called [REDACTED],⁸³³ [REDACTED] [REDACTED]⁸³⁴ in 2012. While it is possible, albeit unlikely, P-0520 did not know P-0602, the different positions of P-0520 and P-0547 are unreconcilable. It is reasonable to infer that P-0547's knowledge of P-0520's personal details and account stems solely from her access to victim dossiers or attendance at victims' groups. It is also reasonable to infer that P-0520 provided false evidence concerning the persons she

⁸¹⁹ **P-0547**: T-152, p. 18, lines 9-20 (Conf).

⁸²⁰ **D-0514**: T-208, p. 35, lines 17-19 (Conf).

⁸²¹ **P-0547**: T-152, p. 18, lines 9-20 (Conf).

⁸²² **D-0514**: T-208, p. 43, lines 5-17 (Conf).

⁸²³ [MLI-D28-0006-2778](#).

⁸²⁴ [Decision on Defence Application to Recall P-0547](#).

⁸²⁵ [Decision on Defence Application to Recall P-0547](#)

⁸²⁶ [OTP Rule 68 Application re: P-0524](#); Prosecution email, 13 October 2021, 15:25.

⁸²⁷ **P-0520** testified immediately before P-0547.

⁸²⁸ [MLI-OTP-0032-0222-R02](#) at 0222.

⁸²⁹ [REDACTED]

⁸³⁰ **P-0547**: T-152, p. 22, lines 21-24 (Conf).

⁸³¹ **P-0547**: T-152, p. 21, lines 22-25 (Conf).

⁸³² **P-0602**: T-085, p. 35, line 23 – p. 36, line 1 (Conf).

⁸³³ **P-0520**: T-150, p. 67, lines 14-20 (Conf).

⁸³⁴ **P-0520**: T-150, p. 38, lines 19-24 (Conf).

interacted with during her marriage to prevent any real investigation or independent verification of her account.

245. Based on a holistic appreciation of evidence, it appears that P-0520's [REDACTED] mother entered into a consensual agreement that P-0520 would marry the husband. The marriage followed traditional practices. P-0520 confirmed her marriage was celebrated at dusk.⁸³⁵ [REDACTED] also said she attended P-0520's wedding celebration.⁸³⁶ This is consistent with D-0514's evidence, who knew P-0520 and [REDACTED] P-0547.⁸³⁷ He explained that her marriage was not forced and was conducted in Islamic tradition with her mother's consent.⁸³⁸ D-0514 testified that P-0520's wedding was according to the rules, as the marriage was announced and had a dowry.⁸³⁹ P-0520's mother visited D-0514's [REDACTED] with a gift.⁸⁴⁰ [REDACTED] also said that P-0520's mother was in agreement with the marriage.⁸⁴¹ P-0520 gave evidence that local tradition places responsibility on the parents, not the woman, to negotiate the marriage.⁸⁴² The marriage was subsequently dissolved in accordance with Islamic traditions.⁸⁴³ These traditions specify that the divorced woman should not socialise with other men for a set period of time after her divorce.⁸⁴⁴ This period appears to correspond to the time P-0520 spent in an unguarded house.⁸⁴⁵ P-0520 was able to interact with friends and family during the marriage. According to [REDACTED], P-0520 visited her family during the marriage, which is when she [REDACTED].⁸⁴⁶ P-0520 claimed she received a visit from a friend named [REDACTED],⁸⁴⁷ although she claimed not to know her friend's last name. [REDACTED] appears to have freely entered the second house, as with [REDACTED] and her friends when they visited P-0520.⁸⁴⁸

246. P-0520's further accounts of her marriage are intrinsically incoherent and unreliable. While trauma impacts memory, it does not increase reliability. Rather, memory becomes more susceptible to influence.⁸⁴⁹ There are clear indicia that P-0520's memory was impacted or influenced. During cross-examination, P-0520 claimed to have no memory of appearing before

⁸³⁵ P-0520: T-150, p. 32, lines 3-11 (Conf).

⁸³⁶ [REDACTED]

⁸³⁷ P-0514: T-208, p. 27, line 18 – p. 28, line 4 (Conf).

⁸³⁸ P-0514: T-208, p. 20, line 14 – p. 24, line 18 (Conf).

⁸³⁹ P-0514: T-208, p. 20, line 23 – p. 21, line 5 (Conf).

⁸⁴⁰ P-0514: T-208, p. 21, lines 8-17 (Conf).

⁸⁴¹ [REDACTED]

⁸⁴² P-0520: T-150, p. 34, lines 9-12 (Conf).

⁸⁴³ D-0514: T-208, p. 22, line 7 – p. 24, line 18 (Conf).

⁸⁴⁴ D-0514: T-208, p. 24, lines 10-18 (Conf).

⁸⁴⁵ See *infra*, para. 249.

⁸⁴⁶ [REDACTED]

⁸⁴⁷ P-0520: T-149, p. 54, line 20 – p. 55, line 12 (Conf).

⁸⁴⁸ [REDACTED]

⁸⁴⁹ D-0502: T-179, p. 13, line 15 – p. 16, line 23 (Conf); see [Ntaganda TJ](#), para. 79.

a judge in Bamako in 2015.⁸⁵⁰ Although she remembered meeting with [REDACTED] as summarised by the Presiding Judge, “the witness doesn't remember the people she met, she doesn't remember the topic of their discussion, she doesn't remember where they met,” and as such, it would “wast[e] time” to ask further questions on meetings that occurred in 2015.⁸⁵¹

247. These memory lapses create significant gaps and discrepancies in her evidence. P-0520 was unable to provide any information on the approximate date of the marriage⁸⁵² and could not provide probative evidence on the identity of her husband. She told the judge in Bamako that she married “El Hassan”, although she acknowledged on the stand that she did not know Al Hassan and has never seen him,⁸⁵³ and to the Trial Chamber, she said it was [REDACTED]⁸⁵⁴. Although she also testified that she heard him being referred to as a “chief”,⁸⁵⁵ this cannot be attributed weight given her poor command of Arabic. It is also possible his associates referred to him as Cheikh, the Arabic word for chief, which is also used for people who are older or those with a reputation for scholarship.⁸⁵⁶ Whereas P-0520 told OTP investigators her husband smoked and that it may have been drugs, on the stand she gave evidence that she never saw him smoke.⁸⁵⁷ She did not recognise [REDACTED] when shown a photograph.⁸⁵⁸ P-0520 also testified her husband and his associates always wore turbans and she did not see their faces.⁸⁵⁹ While this may be correct, it also prevents the Chamber from reaching meaningful conclusions concerning the alleged involvement of Ansar Dine and AQIM or the role of particular sections in this marriage. P-0520 was unable to say whether the persons who initially visited her house to ask for her in marriage were from the same group as the persons who visited her house the second time.⁸⁶⁰ P-0520 also did not remember what they said to her at her house.⁸⁶¹ In any case, given that P-0520 only speaks a little Arabic and no Tamasheq,⁸⁶² no weight can be placed on her description of conversations with her husband or his associates. P-0520's claim of seeing a weapon the night she was driven to the first house is undermined by her acknowledgment that she could not see very well, her

⁸⁵⁰ P-0520: T-150, p. 10, lines 1-6 (Conf).

⁸⁵¹ P-0520: T-150, p. 27, lines 22-25 (Conf).

⁸⁵² P-0520: T-149, p. 14, line 18 – p. 15, line 4 (Conf).

⁸⁵³ P-0520: T-150, p. 50, lines 13-17 (Conf).

⁸⁵⁴ P-0520: T-149, p. 29, lines 5-6 (Conf).

⁸⁵⁵ P-0520: T-149, p. 29, line 6 (Conf).

⁸⁵⁶ [Collins Dictionary](#), sheikh.

⁸⁵⁷ P-0520: T-150, p. 50, lines 21-23; p. 51, lines 15-19 (Conf).

⁸⁵⁸ P-0520: T-150, p. 48, line 14 – p. 49, line 6 (Conf).

⁸⁵⁹ P-0520: T-149, p. 10, lines 19-21; p. 11, lines 3-4 (Conf).

⁸⁶⁰ P-0520: T-149, p. 17, lines 5-8 (Conf).

⁸⁶¹ P-0520: T-149, p. 17, lines 22-25 (Conf).

⁸⁶² P-0520: T-149, p. 7, lines 2-5 (Conf).

inability to describe it or provide any details,⁸⁶³ her evidence that her husband's associates were unarmed, and that he had put his arm aside before entering the house with her.⁸⁶⁴

248. During witness preparation, P-0520 recognised there were different versions of her evidence and stated that she was unable to tell which version was true. During her 2018 interview, she was unable to remember the evidence she gave in 2015.⁸⁶⁵ When asked to explain her comments during the preparation session, P-0520 testified that being confronted with these different versions "really mixed things up for me because there are things that I'm not aware of. I didn't speak about this that much. I said I spoke about it to [the OTP investigator] more than anyone else. And also because, when I spoke to [REDACTED], I didn't understand everything."⁸⁶⁶ Given her confusion, the Chamber cannot place weight on evidence elicited through witness refreshing⁸⁶⁷ or prompts, such as "did he do anything else violent to you?"⁸⁶⁸ The Chamber should draw adverse inferences concerning her credibility in light of her unauthorised contact with an OTP investigator after the preparation session.⁸⁶⁹ The photographs of P-0520's [REDACTED] do not support her account. P-0520 [REDACTED] shown in MLI-OTP-0060-9512 occurred from falling on something metallic or from being whipped.⁸⁷⁰ Dr Sommerlad g [REDACTED] is the result of an attempt to surgically remove a lesion such as a cyst.⁸⁷¹ [REDACTED]

[REDACTED]⁸⁷² P-0520's account of being detained for one day and one night lacks probative detail, as she claimed she could not remember details of where she was kept.⁸⁷³ There is no indication as to when this occurred. When shown a photograph, P-0520 did not recognise the BMS.⁸⁷⁴

249. These memory issues negatively impacted her evidence concerning the location she stayed at after her marriage. P-0520 testified that she was first taken to a single-story house

⁸⁶³ P-0520: T-149, p. 16, lines 21-24 (Conf).

⁸⁶⁴ P-0520: T-149, p. 24, lines 18-25 (Conf).

⁸⁶⁵ P-0520: T-150, p. 57, lines 4-22 (Conf).

⁸⁶⁶ P-0520: T-150, p. 59, lines 1-4 (Conf).

⁸⁶⁷ P-0520: T-149, p. 40, line 1 – p. 42, line 15 (Conf); [Hadžihanović Decision on Witness Refreshment](#), p. 3.

⁸⁶⁸ P-0520: T-149, p. 49, lines 2-3 (Conf).

⁸⁶⁹ P-0520: T-150, p. 59, lines 14-23 (Conf).

⁸⁷⁰ P-0520: T-149, p. 59, line 25 – p. 60, line 15 (Conf).

⁸⁷¹ [MLI-D28-0006-2722-R01](#) at 2723. See D-0500: T-177, p. 30, line 17 – p. 31, line 9 (Conf).

⁸⁷² D-0500: T-177, p. 22, line 18 – p. 23, line 23 (Conf).

⁸⁷³ P-0520: T-149, p. 52, line 19 – p. 53, line 2 (Conf).

⁸⁷⁴ P-0520: T-150, p. 49, lines 11-13 (Conf).

between Koiratao and PMI.⁸⁷⁵ She then claimed to have been taken to a “white house”.⁸⁷⁶ Although P-0520 described this [REDACTED], she acknowledged that this was not information that she knew herself. Rather, it was something that was told to her.⁸⁷⁷ P-0520 did not specify when she heard this information. This suggests P-0520 heard this description of the [REDACTED] during the proceedings. [REDACTED] is not [REDACTED], and P-0520 did not recognise [REDACTED] when shown a video.⁸⁷⁸ P-0602 also testified that she visited P-0520 during her marriage at a clay house with a courtyard [REDACTED].⁸⁷⁹

250. There is no indication that any groups were involved in this aspect of her marriage. When P-0520’s husband drove her to this second location, they were alone in the car.⁸⁸⁰ P-0520 appears to have testified that she could leave this second house,⁸⁸¹ and she ultimately did so by walking out the gate.⁸⁸² She did not see any weapons on the men who came into this house.⁸⁸³

251. Although P-0520 [REDACTED] P-1162, staying there, this evidence was only elicited after P-0520’s memory was refreshed.⁸⁸⁴ P-0520 also gave evidence that she knew nothing about [REDACTED] situation.⁸⁸⁵ P-0520 did not know about her marriage and only saw P-1162’s husband once⁸⁸⁶ and did not know his name.⁸⁸⁷ Although she claims to have heard someone say the word [REDACTED],⁸⁸⁸ no weight can be placed in this given her language limitations. There are insufficient probative details to make any factual findings of this individual.

252. Given these discrepancies and lack of details to sustain a charge under Regulation 52 of the Regulations of the Court, the evidence before the Chamber can only support the conclusion that P-0520 appears to have married a foreigner and that the marriage and divorce may have conformed to his customs and not the alleged Ansar Dine or AQIM policy. There is no reliable

⁸⁷⁵ P-0520: T-149, p. 21, line 25 – p. 22, line 4 (Conf).

⁸⁷⁶ P-0520: T-149, p. 27, lines 11-12 (Conf).

⁸⁷⁷ P-0520: T-149, p. 26, lines 21-23 (Conf).

⁸⁷⁸ P-0520: T-150, p. 49, lines 7-10 (Conf).

⁸⁷⁹ P-0602: T-085, p. 37, line 25 – p. 38, line 17 (Conf).

⁸⁸⁰ P-0520: T-149, p. 27, lines 6-7 (Conf).

⁸⁸¹ P-0520: T-149, p. 34, lines 8-14 (Conf). No weight can be placed on evidence elicited through an improperly leading question (*i.e.* T-149, p. 53, lines 18-21 (Conf)).

⁸⁸² P-0520: T-149, p. 56, lines 9-21 (Conf).

⁸⁸³ P-0520: T-149, p. 47, lines 1-4 (Conf).

⁸⁸⁴ P-0520: T-149, p. 40, line 1–p. 42, line 15 (Conf). See [Hadžihasanović Decision on Witness Refreshment](#), p. 3.

⁸⁸⁵ P-0520: T-149, p. 38, lines 6-11, 23-25; p. 42, line 22 (Conf).

⁸⁸⁶ P-0520: T-149, p. 45, lines 3-4; p. 47, line 7 (Conf).

⁸⁸⁷ P-0520: T-149, p. 47, lines 17, 25 (Conf).

⁸⁸⁸ P-0520: T-149, p. 43, lines 2-3 (Conf).

evidence that the marriage was sanctioned or facilitated by Ansar Dine or AQIM or that the leaders or Mr Al Hassan could have been aware that P-0520 did not consent to the marriage.

253. The evidence elicited from P-0602 is tainted due to suggestive questioning techniques used during the Bamako hearing and by the Prosecution during her in-court testimony before the ICC. No weight can safely be placed on P-0602's identification of particular clothes, which was elicited by suggestive and vague questioning⁸⁸⁹ using video images.⁸⁹⁰ P-0602 never mentioned "vests" in prior interviews when describing the clothes of her husband.⁸⁹¹ Her evidence concerning the treatment of women in Timbuktu is based on rumours, not her personal experience.⁸⁹² There are significant, inexplicable discrepancies between P-0602's evidence before █████ and the Bamako proceedings and her evidence before the ICC, such as the fact that she never mentioned being threatened with a gun when she appeared in Bamako.⁸⁹³ No weight can safely be placed on this claim.

254. Based on the P-0602's evidence, it is impossible for anyone other than the husband to have known that P-0602 did not consent to the marriage or to relations with her husband, and her evidence supports outward manifestations of a traditional marriage. P-0602 agreed to the marriage after the husband told P-0602's father that he just wanted to marry P-0602 and would not harm her.⁸⁹⁴ P-0602 was pregnant and unmarried at the time of the marriage.⁸⁹⁵ There is no indication that her husband was told about her pregnancy. Given P-0602's evidence that her pregnancy was a problem for her family⁸⁹⁶ and the evidence that unmarried pregnant women would be ostracised,⁸⁹⁷ it is reasonable to infer that P-0602's family intentionally married her to an outsider who would not know about P-0602's pregnancy. There was a religious ceremony at the mosque with P-0602's father and grandfather, at which point the dowry was given.⁸⁹⁸ During her marriage, P-0602 spent the day at her parents' home and her friends came to visit.⁸⁹⁹ At night, she went to and stayed at an abandoned house alone.⁹⁰⁰ According to P-0602, physical

⁸⁸⁹ **P-0602**: T-085, p. 43, line 22 (Conf).

⁸⁹⁰ **P-0602**: T-085, p. 43, lines 1-24 *cf.* T-086, p. 57, line 5 – p. 60, line 13 (Conf).

⁸⁹¹ **P-0602**: T-085, p. 57, line 14 – p. 61, line 20 (Conf).

⁸⁹² **P-0602**: T-084, p. 80, lines 9-11 (Conf).

⁸⁹³ **P-0602**: T-086, p. 54, lines 1-23 (Conf).

⁸⁹⁴ **P-0602**: T-085, p. 13, line 17 – p. 14, line 16 (Conf).

⁸⁹⁵ **P-0602**: T-086, p. 49, lines 6-8 (Conf).

⁸⁹⁶ **P-0602**: T-086, p. 49, lines 9-11 (Conf).

⁸⁹⁷ **P-0150**: T-113, p. 10, lines 19-23 (Conf).

⁸⁹⁸ **P-0602**: T-085, p. 15, line 23; p. 16, line 10 – p. 17, line 9 (Conf).

⁸⁹⁹ **P-0602**: T-085, p. 19, lines 1-8 (Conf).

⁹⁰⁰ **P-0602**: T-085, p. 20, line 25 – p. 21, line 19 (Conf).

relations with the husband occurred on two nights.⁹⁰¹ She did not complain to anyone concerning the conduct of her husband.

7.3 Absence of identifying evidence of the perpetrator

255. The perpetrators' identification provided by witnesses regarding forced marriage lack differentiating detail which can authoritatively establish a link with Ansar Dine.

7.3.1 *Flags, vehicles, and language*

256. Various Prosecution witnesses used the black and white flag to identify persons,⁹⁰² yet they failed to explain the context in which they saw the flag or were unable to link it directly with the alleged perpetrator of the incident.⁹⁰³ Others could not remember any flag when testifying⁹⁰⁴ despite previous assertions.⁹⁰⁵ The black flag was used by other groups, including MUJAO and Ansar Al Sharia,⁹⁰⁶ and so it cannot reliably be used to attribute responsibility to an AQIM member. Indeed, there were numerous groups present in Timbuktu in 2012,⁹⁰⁷ and extensive evidence has indicated that witnesses had an inability to differentiate between the groups.⁹⁰⁸ Ansar Dine used a white flag⁹⁰⁹ and there is no evidence that Ansar Dine or AQIM used a flag with black writing.⁹¹⁰ The witnesses did not identify the Ansar Dine flag, despite acknowledging that different flags for the groups existed.⁹¹¹ Further, flags were not always allowed to be displayed on vehicles. Groups were unable to exhibit their flag when coming into Timbuktu,⁹¹² and flags were not always displayed on their vehicles when travelling within and

⁹⁰¹ [MLI-OTP-0024-2814](#) at 2828-2829.

⁹⁰² **P-0538**: T-161, p. 19, lines 12-17 (Conf); **P-0547**: T-151, p. 22, lines 18-22 (Conf); **P-0636**: T-071, p. 41, lines 11-17 (Conf); **P-0570**: [MLI-OTP-0049-0047-R05](#) at 0052.

⁹⁰³ **P-0602**: T-084, pp.75-76 (Conf); **P-0520**: T-149, p. 15, lines 11-21 (Conf); **P-0538**: T-161, p. 19, lines 12-17 (Conf); **P-0636**: T-071, pp. 40-41, lines 21-27 (Conf).

⁹⁰⁴ **P-0520**: T-150, p. 50, lines 18-20 (Conf).

⁹⁰⁵ **P-0520**: T-150, p. 50, lines 18-20 (Conf).

⁹⁰⁶ [MLI-OTP-0077-3925](#); see also **P-0114**: T-060, p. 79, lines 10-22 (Conf).

⁹⁰⁷ **P-0514**: T-208, p. 9, line 21 – p. 10, line 8 (Conf); **P-0065**: T-038, p. 9, line 16 – p. 10, line 4 (Conf); **P-0065**: T-045, p. 11, line 3 – p. 12, line 21 (Conf); **P-0557**: T-056, p. 6, lines 14-21 (Conf); **P-0654**: T-135, p. 22, lines 15-20 (Conf); **P-0638**: T-058, p. 7, lines 14-17 (Conf); **P-0547**: T-151, p. 11, lines 12-21 (Conf); **P-0622**: T-160, p. 33, lines 17-25 (Conf).

⁹⁰⁸ **P-0605**: T-192, p. 46, line 24 – p. 27, line 4 (Conf); **P-0160**: T-066, p. 16, lines 13-17; p. 24, lines 9-25 (Conf); **P-0610**: T-158, p. 89, lines 10-20 (Conf); **P-0622**: [MLI-OTP-0065-558-R02](#) at 0566, para. 43; at 0562, para. 25; **P-0622**: T-160, p. 27, lines 17-21 (Conf); **P-0114**: T-060, p. 79, lines 20-22 (Conf); **D-0544**: T-196, p. 36, lines 17-22 (Conf).

⁹⁰⁹ [MLI-OTP-0012-0963](#).

⁹¹⁰ P-0065 testified that Al Qaeda in Afghanistan used in a white flag with black writing; [REDACTED] it has not been established that the persons who held it were members of AQIM/Ansar Dine (as opposed to outsiders who had travelled to Timbuktu to witness the event): **P-0065**: T-041, p. 39, lines 17-23; [REDACTED]

⁹¹¹ **P-0602**: T-84, p. 75, lines 14-17.

⁹¹² **P-0150**: T-107, p.7, lines 7-11, p. 8, lines 20-25.

around Timbuktu daily.⁹¹³ Therefore, it is impossible to know what flag the witness saw or when they saw it to reliably link the flag to Ansar Dine.

257. Prosecution witnesses also attempted to provide details of the alleged perpetrators' vehicle as a means of identification. Witnesses provided vague references, describing that part of the car was "closed" and the back was "not covered",⁹¹⁴ or that the vehicle was white,⁹¹⁵ while others were unable to identify any vehicle at all.⁹¹⁶ The similarity in vehicles used by all the armed groups⁹¹⁷ highlights the impossibility that such identifications could be attributed to an Ansar Dine member. The only difference in the vehicles used by the armed groups was their colour,⁹¹⁸ which the witnesses were unable to recall. Further, local MNLA members continued to stay in their homes in Timbuktu⁹¹⁹ and the local Berabiche militia and the FNLA also drove stolen vehicles around Timbuktu.⁹²⁰ The Islamists also loaned their vehicles for local use.⁹²¹

258. Witnesses attempted to identify alleged perpetrators based on languages spoken, despite testifying that they did not speak those languages.⁹²² "Islamists" also spoke multiple languages,⁹²³ making it impossible to link the language spoken to a specific group. Further, these witnesses do not have speaking proficiency of the language allegedly overheard, so their evidence is unreliable for identification.⁹²⁴ The Prosecution bears the onus to prove that these witnesses can reliably identify Songhai, Tamasheq or Arabic, and have failed to bring forth any evidence.

259. Finally, the Chamber cannot reasonably infer that all marriages were conducted or overseen by Ansar Dine or, in the absence of reliable information concerning the identity of the perpetrator, or, in the face of other reasonable alternatives, conclude that the perpetrator must have been a member of Ansar Dine or AQIM.⁹²⁵ Marriages continued to take place during 2012 without any involvement from Ansar Dine as a group or participation by Ansar Dine

⁹¹³ **P-0641**: T-138, p. 12, line 23 (Conf); *see also* [REDACTED]

⁹¹⁴ **P-0602**: T-084, p. 76, lines 13-14; p. 20, lines 17-18 (Conf).

⁹¹⁵ **P-0570**: [MLI-OTP-0049-0047-R05](#) at 0052, para. 24.

⁹¹⁶ **P-0520**: T-149, p. 15, lines 18-19 (Conf).

⁹¹⁷ **P-0150**: T-107, p. 7, lines 20-22 (Conf).

⁹¹⁸ **P-0150**: T-107, p. 7, lines 20-22 (Conf).

⁹¹⁹ **D-0202**: T-202, p. 80, lines 10-14 (Conf).

⁹²⁰ **P-0641**: T-139, p. 38, line 21 – p. 40, line 1 (Conf).

⁹²¹ **P-0641**: T-139, p. 55, line 7 – p. 56, line 2; p. 57, line 23 – p. 58, line 20 (Conf).

⁹²² **P-0520**: T-149, p. 7, lines 1-5; p. 15, lines 22-24 (Conf); **P-0636**: T-071 p. 14, lines 9-23; p. 20, lines 7-22 (Conf).

⁹²³ **P-0602**: T-084, p. 76, lines 22-24 (Conf).

⁹²⁴ [Bošković TJ](#), para. 546.

⁹²⁵ [Bemba AJ](#), para. 152.

members. Marriages also took place between civilians themselves.⁹²⁶ The Chamber cannot infer Ansar Dine's involvement in all marriages in Timbuktu when other groups and persons continued to marry.

7.3.2 *Lack of physical identifiers*

260. Most Prosecution's witnesses barely provided descriptions of the alleged perpetrator. Evidence included vague or imprecise details lacking identifiable characteristics of the alleged perpetrators.⁹²⁷ Witnesses also provided generalised evidence of the clothing worn by the alleged perpetrators,⁹²⁸ although there were no uniforms or specific outfits to distinguish group membership in Timbuktu.⁹²⁹ The absence of identifying evidence made it impossible for the Defence to undertake relevant investigations to ascertain the alleged perpetrator's connection with Ansar Dine and cannot furnish the Chamber with any positive probative value as to their membership to Ansar Dine.

261. Prosecution witnesses, through discussions with other women and victim associations, heard recurrent names from members of the groups resulting in confusion as to their true identities. P-0608, [REDACTED] confused names and nationalities of various individuals, such as misidentifying Demba Demba,⁹³⁰ conflating member of the groups such as Adama and Moussa, and describing Moussa as the Islamic commissioner.⁹³¹

262. Such identification evidence cannot be given substantive weight by the Chamber to provide a reliable link to Ansar Dine or any member of the group to the extent required to enter a conviction beyond reasonable doubt in accordance with the charged mode of liability.⁹³²

7.4 **The evidence does not fulfil the elements of the crime**

7.4.1 *No nexus to war crimes or a wide-spread or systematic attack*

263. The Prosecution has failed to discharge their burden of demonstrating, beyond reasonable doubt, that the alleged acts of forced marriage and rape occurred within the context of an armed conflict or a wide-spread or systematic attack against a civilian population.

⁹²⁶ **P-0547**: T-152, p. 18, lines 11-15 (Conf); **D-0514**: T-208, p. 62, lines 14-17 (Conf); **P-0150**: T-113, p. 19, line 22 – p. 22, line 7.

⁹²⁷ **P-0602**: T-085, p. 6, line 24; p. 14, line 5 (Conf); **P-0610**: T-158, p. 38, lines 1-9 (Conf); **P-0538**: T-161, p. 25, line 5; pp. 27-28 (Conf).

⁹²⁸ **P-0538**: T-161, pp. 24, line 25 – p. 25, line 5 (Conf); **P-0547**: T-151, p. 23, lines 14-19 (Conf); **P-0636**: T-071, p. 33, lines 21-22. *See also* **P-0602**: T-084, p. 74, lines 22-25 (Conf).

⁹²⁹ **P-0180**: T-121, p. 75, lines 10-13 (Conf); **P-0654**: T-134, p. 17, lines 8-20 (Conf); **P-0150**: T-107, p. 8, lines 8-13 (Conf).

⁹³⁰ **P-0608**: T-155, p. 12, lines 8-25.

⁹³¹ **P-0608**: T-155, p. 8, line 23 – p. 12, line 25. *See also* **P-0160**: T-067, p. 25, lines 1-8 (Conf).

⁹³² *Katanga TJ*, para. 1626; *Bemba TJ*, para. 243.

264. Given the absence of reliable and specific evidence concerning the physical perpetrators, the Chamber cannot infer a connection between these marriages and the charged “attack against the civilian population”.

265. The Prosecution relied on an alleged purpose to use *Shari'a* and the activities of the Islamic Tribunal to satisfy the “attack” threshold.⁹³³ However, there is no connection between this conduct and the charged incidents of rape and forced marriage. Forced marriage is not a virtually certain consequence of a plan to install *Shari'a*. The *Quran* prohibits rape and forced marriage⁹³⁴ and the Islamic Tribunal applied these prohibitions.⁹³⁵ The approach followed mirrored traditional practices concerning the formalisation of marriage and the criteria for divorce. The absence of celebrations had no impact on the issue of consent or the conduct of the marriages. Apart from P-0538, who was released from her marriage with the help of [REDACTED] [REDACTED] the groups’ organs were not involved in the charged incidents of marriage. The charged incidents of rape in the BMS lack probative value. Regardless, the alleged incidents are isolated events which reflect the conduct of individual perpetrators acting directly against the instructions of the group. They did not occur because of the presence and policies of Ansar Dine or AQIM, but despite them.⁹³⁶

266. There is no basis to conclude that the perpetrators were linked to the military functions of Ansar Dine or AQIM or that their actions occurred under the guise of an armed conflict. There were no temporal or geographic connections between the alleged incidents and protracted hostilities between groups. Opportunistic crimes carried out by non-combatants do not satisfy the nexus requirement.⁹³⁷ Members of the groups, including AQIM, married members of the local population before the outbreak of any armed confrontations.⁹³⁸ AQIM members would marry “poorer” tribes to redistribute wealth and demonstrate non-discrimination.⁹³⁹ The Prosecution did not lead any evidence to suggest AQIM changed its modus operandi regarding the way such marriages were negotiated or carried out. If IHL did not regulate such marriages before 2012, then it did not regulate them in 2012. The commission of rape was also directly contrary to the goals of the groups that were present in Timbuktu and cannot therefore, be linked to a military objective.

⁹³³ [OTP Final Trial Brief](#), paras 560, 563.

⁹³⁴ [MLI-D28-0005-1247](#) at 1631, para. 32. See also M. Lippman et al., *Islamic Criminal Law and Procedure: an introduction* (Praeger 1988), pp. 45-46; **P-0150**: T113, p. 9, line 18 – p. 10, line 1.

⁹³⁵ See *infra*, para. 390, fn. 1471.

⁹³⁶ **P-0150**: T-105, p. 12, line 24 – p. 13, line 4 (Conf). See also **P-0150**: T-112, p. 67, lines 15-16 (Conf).

⁹³⁷ [Rutaganda AJ](#), para. 570.

⁹³⁸ **P-0152**: T-032, p. 79, lines 11-24 (Conf).

⁹³⁹ **P-0152**: T-032, p. 79, lines 11-24 (Conf).

271. This was also a practice that pre-dated the groups' arrival.⁹⁴⁷ There was a long tradition of AQIM members marrying locals, particularly the Tamasheq noire, before 2012.⁹⁴⁸ P-0610 also confirmed that members of the Songhai community married Arabs before 2012.⁹⁴⁹ According to P-0065, who was present in Timbuktu during the charged period, the marriages of which he was aware were concluded with the consent of the women who had the chance to refuse.⁹⁵⁰

272. International criminal law draws a distinction between traditional or arranged marriages, which might violate human rights law without attracting individual criminal responsibility, and forced marriages, which do.⁹⁵¹ Distinguishing factors include whether i) the wife's family members were involved in negotiating the marriage, ii) a ceremony was performed, and iii) if the wife had recourse to any institutions to address the conduct of the husband.⁹⁵²

273. According to the traditional approach in Timbuktu, if a woman had not been married before, the guardian decides whether to accept the marriage.⁹⁵³ The evidence demonstrates that members of the groups concluded marriages following traditional practices. Either the woman or her guardian consented, a dowry was negotiated and provided, and there was a religious ceremony with witnesses.⁹⁵⁴ As held by the European Court of Human Rights, "marriage has deep-rooted social and cultural connotations which may differ largely from one society to another" and dowry can "reasonably be accepted as representing a gift from one family to another, a tradition common to many different cultures in today's society."⁹⁵⁵ Women also

⁹⁴⁷ **P-0150**: T-113, p. 63, lines 3 -19 (Conf).

⁹⁴⁸ **P-0152**: T-032, p. 79, lines 11 – p. 80, line 8 (Conf).

⁹⁴⁹ **P-0610**: T-158, pp. 51-52 (Conf).

⁹⁵⁰ **P-0065**: T-045, p. 73, lines 14-24 (Conf).

⁹⁵¹ [Brima TJ, Separate Opinion of Judge Sebutinde](#), p. 578, para. 12. See [Brima AJ](#), para. 194 (approving Judge Sebutinde's approach).

⁹⁵² [Brima TJ, Separate Opinion of Judge Sebutinde](#), p. 578, para. 11; [Brima TJ, Dissenting Opinion of Judge Doherty](#), p. 588, para. 36. See also Mali, "[Code des Personnes et de la Famille](#)", Art. 325, stating « *Le divorce peut être prononcé soit par consentement mutuel, soit pour rupture de la vie commune, soit pour faute* ». Accordingly, women could seek a divorce based on fault attributable to the husband and this occurred throughout 2012. See e.g. [MLI-OTP-0001-7409](#); [MLI-OTP-0001-7521](#); [MLI-OTP-0001-7516](#); [MLI-OTP-0002-0021](#); [MLI-OTP-0002-0029](#); [MLI-OTP-0002-0057](#).

⁹⁵³ **D-0202**: T-202, p. 46, line 6 – p. 47, line 2 (Conf).

⁹⁵⁴ **D-0539**: [MLI-D28-0005-9317-R01](#) at 9321; **P-0152**: T-032, p. 80, lines 1-8 (Conf).

⁹⁵⁵ [ECtHR, M. and Others v. Italy and Bulgaria](#), para. 161.

continued to possess the ability to seek a divorce. The divorce process was not more stringent than the approach applied before 2012 or that which existed under Malian law.⁹⁵⁶

274. The Prosecution failed to demonstrate beyond reasonable doubt that the alleged perpetrators were aware that the proper process for consent had not been followed. Pressure came from the wives' families who wanted a good economic match.⁹⁵⁷ Evidence indicates that P-0538's husband was incorrectly informed by the family that P-0538 consented.⁹⁵⁸ [REDACTED] also gave evidence that local intermediaries acting as interpreters conveyed incorrect information.⁹⁵⁹ Issues that arose were due to communication problems.⁹⁶⁰ These problems lessened once locals interacted with the Islamists and knew them better.⁹⁶¹ P-0065 further explained that during 2012, the marriages were not seen as shameful. Rather, this stigma only arose because the Islamists were seen as "terrorists" following the French intervention.⁹⁶² For this reason, women and families who consented in 2012 claimed the contrary afterwards.

275. The essential element of sexual slavery is servitude, which "relates first and foremost to the impossibility of the victim's changing his or her condition."⁹⁶³ Women could request and obtain divorces and obtain protection against abusive husbands.⁹⁶⁴ Women could also complain about rape, even if the accusation involved a member of the group.⁹⁶⁵

⁹⁵⁶ In Mali, the "[Code des Personnes et de la Famille](#)" ("Code"), which was maintained throughout 2012, regulated *inter alia* the provision of divorce, which was only granted in specific, enumerated circumstances. The practice of the Islamic Tribunal in 2012 in respect of divorce mirrored these provisions.

Article 352, for example, stipulates that a spouse may request a divorce when the husband refuses to meet her basic needs: food, housing, clothing and medical care. In 2012, [REDACTED]

See [MLI-OTP-0068-4777](#); [MLI-OTP-0069-4781](#) (ENG translation). For similar cases, see also [MLI-OTP-0001-7516](#); [MLI-OTP-0052-0021](#) (ENG translation); [MLI-OTP-0002-0029](#); [MLI-OTP-0002-0029](#) (ENG translation).

Article 368 of the Code also defines the spouse's right to receive alimony. In this respect, the Islamic Tribunal in [REDACTED] as maintenance every month: [MLI-OTP-0002-0048](#); [MLI-OTP-0069-2811](#) (ENG translation).

Article 327 provides that, except in matters of divorce by mutual consent, the attempt at conciliation is compulsory in all other cases of divorce. Similarly, in the case of 65/1433-2012 of [REDACTED]

[REDACTED] the judge directed the couple to achieve conciliation based on mutual agreement, which they accepted): Original (ARB): MLI-OT-0068-4777; Translation (ENG): [MLI-OTP-0078-1766](#).

Article 350 obliges the spouse seeking the divorce to bear the charges of the divorce. The Islamic Tribunal similarly ordered a wife who initiated divorce proceedings to pay *Khula* when the divorce was pronounced, as is required under Islamic law; the wife was required to return the dowry paid by her husband at the time of marriage: Original (ARB): [MLI-OTP-0002-0065](#); Translation (ENG): MLI-OTP_0069-2979.

⁹⁵⁷ **P-0065**: T-046, p. 5, line 20 – p. 6, line 3 (Conf).

⁹⁵⁸ **P-0538**: [MLI-OTP-0001-7930](#) at 7931; [MLI-OTP-0078-6006](#) at 6007.

⁹⁵⁹ [REDACTED]

⁹⁶⁰ [REDACTED]

⁹⁶¹ [REDACTED]

⁹⁶² **P-0065**: T-045, p. 77, lines 4-8 (Conf).

⁹⁶³ [Katanga TJ](#), para. 976.

⁹⁶⁴ [MLI-OTP-0001-7378](#); [MLI-OTP-0002-0065](#); [MLI-OTP-0001-7577](#); [MLI-OTP-0001-7408](#); [MLI-OTP-0001-7521](#); [MLI-OTP-0002-0042](#); [MLI-OTP-0002-0048](#); [MLI-OTP-0002-0057](#); [MLI-OTP-0002-0064](#); [MLI-OTP-0002-0066](#); [MLI-OTP-0002-0067](#); [MLI-OTP-0002-0073](#).

⁹⁶⁵ See *infra* fns [1471](#), [2070](#), [2136](#).

7.5 The Prosecution failed to establish that the perpetrators were members of a group sharing or acting pursuant to the charged common purpose

276. The Prosecution failed to establish any nexus between the purpose and goals of Ansar Dine or AQIM and the commission of sexual violence offences. Ansar Dine and AQIM adopted a clear stance that rape was *Haram*.⁹⁶⁶ When Ansar Dine first arrived in Timbuktu, they encouraged locals to bring forward complaints and promised to investigate any allegations of rape.⁹⁶⁷ Members of Ansar Dine and AQIM were informed that any form of *Zina* (including rape) was prohibited and would be punished. This rule was actively applied and enforced in relation to members of Ansar Dine and AQIM.⁹⁶⁸ No lenience was applied to members of the group, as everyone was equal before the Tribunal.⁹⁶⁹ The Prosecution also failed to establish that the leaders of the groups or the Islamic Tribunal were aware of any incidents where women were raped in detention.⁹⁷⁰ When general complaints were raised with Abu Zeid, he gave further instructions to *Hesbah* and the Islamic Police which led to better treatment.⁹⁷¹ Multiple witnesses confirmed that the situation for women improved after the women's march, following discussions with the leaders.⁹⁷²

277. The Prosecution's charges of forced marriage rest on the two premises: i) that forced marriage was a virtually certain consequence of the "rules" installed by the groups and ii) that the groups were responsible for creating a coercive environment which eliminated the locals' ability to freely consent to marriages. The bulk of the evidence does not support these premises. The system for organising marriages followed the approach that was used before 2012, even when members of the groups were involved. D-0202 confirms that "Ansar Dine did not change [the approach]".⁹⁷³ The Tribunal followed local interpretations of Islam, which dictated that it was necessary to obtain the consent of the woman or the woman's guardian.⁹⁷⁴ Neither Ansar Dine nor AQIM condoned the threat or use of force to obtain consent.⁹⁷⁵ Members were given sermons and training sessions on the procedures for marriage under the Malikite approach, which was followed in the region before and after 2012.⁹⁷⁶ These procedures required the

⁹⁶⁶ D-0202: T-203, p. 11, lines 9-11 (Conf).

⁹⁶⁷ P-0150: T-089, p. 29, lines 13-23; p. 32, line 17 – p. 33, line 4 (Conf).

⁹⁶⁸ [REDACTED]

⁹⁶⁹ [REDACTED]

⁹⁷⁰ [REDACTED]

⁹⁷¹ P-0150: T-092, p. 36, line 21 – p. 37, line 1 (Conf).

⁹⁷² D-0315: T-185, p. 51, lines 18-22; D-0551: T-200, p. 83, lines 9-19 (Conf).

⁹⁷³ D-0202: T-203, p. 56, lines 15-22 (Conf).

⁹⁷⁴ D-0202: T-203, p. 18, line 24 – p. 19, line 5 (Conf).

⁹⁷⁵ P-0150: T-113, p. 29, lines 13-16 (Conf).

⁹⁷⁶ P-0150: T-113, p. 9, lines 3-17; D-0605: T-192, p. 69, lines 11-15; P-0152: T-032, p. 55, line 18 – p. 56, line 10. (Conf); D-0529: T-189, p. 9, lines 4-11 (Conf).

against their husbands or families and they exercised this right.⁹⁸⁹ The emphasis on reconciliation also pre-dated and existed independently of the groups' arrival. This approach was consistent with Malian law and jurisprudence and the approach of local *Qādīs* prior to 2012.⁹⁹⁰

280. The Prosecution failed to demonstrate that the actions of individual perpetrators, who allegedly committed forced marriage or rape, can be attributed to a "group" or an overarching common criminal purpose. There is no credible evidence that Ansar Dine adopted an approach to marriage different from existing local practices.⁹⁹¹ When foreigners tried to apply foreign practices, local members of Ansar would intervene and mediate to explain local traditions.⁹⁹² None of the forced marriages were attributed to members of Ansar Dine.

281. The actions of foreigners and rogue elements were also independent of Ansar Dine or AQIM and cannot be attributed to the charged common purpose. Foreigners came to Timbuktu and the North of Mali before, during, and after 2012, and entered into temporary marriages with local women.⁹⁹³ These marriages were not considered forced marriages.⁹⁹⁴ P-0099 described these marriages as "normal marriage".⁹⁹⁵ Women were not required to work and were allowed to conduct visits with friends and family in compliance with religious traditions.⁹⁹⁶ Miscommunications in the negotiation process were also attributable to the actions of locals acting independently of the groups.⁹⁹⁷ These misunderstandings lessened once locals had more contact with foreigners and understood they bore no ill-motives.⁹⁹⁸ The threat or use of force also ran directly counter to the objectives of either Ansar Dine or AQIM, which were to establish collaboration and accommodation with the local population and to not use force and to treat the local population well.⁹⁹⁹ As set out in paragraphs 276-277 above, given that the charged common purpose involved prohibiting and penalising *Zina* (including rape), acts of rape fall outside the scope of the charged common purpose.

⁹⁸⁹ Original: [MLI-OTP-0001-7516](#), Translation (ENG): [MLI-OTP-0052-0021](#); Original: [MLI-OTP-0001-7509](#), Translation (ENG): [MLI-OTP-0034-0167](#); Original: [MLI-OTP-0002-0042](#), Translation (ENG): [MLI-OTP-0069-2114](#).

⁹⁹⁰ **D-0202**: T-202, p. 47, line 20 – p. 49, line 18 (Conf).

⁹⁹¹ **P-0152**: T-032, p. 96, lines 14-20 (Conf).

⁹⁹² **D-0605**: T-192, p. 37, lines 7-12 (Conf); **D-0006**: T-207, p. 39, line 24 – p. 42, line 20 (Conf).

⁹⁹³ [MLI-D28-0004-2942](#).

⁹⁹⁴ **P-1086**: T-122, p. 11, line 22 – p. 12, line 8 (Conf).

⁹⁹⁵ **P-0099**: T-146, p. 63, line 7 (Conf).

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⁹⁹⁹ **P-0582**: [MLI-OTP-0062-3788](#)-R-01 at 3802, line 475; **P-0605**: T-192, pp. 10, lines 4-17; p. 84, lines 8-15 (Conf); **D-0315**: T-185, p. 53, line 12 – p. 54, line 11 (Conf).

7.6 The Prosecution failed to demonstrate that Mr Al Hassan made culpable contributions to these charged incidents

282. There is no evidence of Mr Al Hassan's general contributions that would incur responsibility under Article 25(3)(d). The evidence does not reflect that Mr Al Hassan directly or indirectly took any part in, or otherwise generally contributed to, a system of forced marriage, rape, or other gender-based crimes in Timbuktu during the relevant period. To incur liability under Article 25(3)(c) and (d), the Prosecution must demonstrate that Mr Al Hassan knew and intended his actions to contribute to the commission of these crimes, but it manifestly failed to do so. The Prosecution also failed to acknowledge Mr Al Hassan's immediate intervention upon learning of isolated gender-based incidents committed by individual perpetrators.

283. The Prosecution failed to demonstrate that Mr Al Hassan was aware women were detained for dress code violations.¹⁰⁰⁰ The Islamic Police were not involved in issues concerning women or the application of the dress code.¹⁰⁰¹ The proper *Ta'zir* for dress code violations was a warning, not detention.¹⁰⁰² "Detention", in the sense of a deprivation of liberty of more than just a few hours, was not part of the organisational rules or policy.¹⁰⁰³ In case of continuous violations, women were asked to wait at the BMS until their guardian arrived.¹⁰⁰⁴

284. There were also no incidents of arrest or detention of women at the BMS until October 2012.¹⁰⁰⁵ Accordingly, there was no pre-existing common purpose to detain women and Mr Al Hassan cannot be aware of a common purpose that did not exist. When such detention did occur, Mr Al Hassan and other group members too immediate steps to rectify the isolated incidents. According to D-0554 and the CDRs relied upon by the Prosecution, Mr Al Hassan was not present in Timbuktu during the 27th day of Ramadan when incidents concerning women allegedly arose.¹⁰⁰⁶ Similarly, the CDRs indicate that D-0554 informed Mr Al Hassan

¹⁰⁰⁰ [OTP Final Trial Brief](#), fn. 1803 does not indicate that Mr Al Hassan was aware of women being detained by the Islamic Police for violations of the dress code.

¹⁰⁰¹ **P-0654**: T-129, p. 43, line 12 – p. 44, line 23 (Conf); [MLI-OTP-0024-0015](#); **P-0150**: T-092, p. 34, line 6 – p. 35, line 2 (Conf); T-101, p. 54, lines 20-24 (Conf); **P-0626**: T-141, p. 54, lines 4-12 (Conf).

¹⁰⁰² See *infra*, paras 377, 513.

¹⁰⁰³ D-0605: T-193, p. 6, lines 7-15 (Conf).

¹⁰⁰⁴ **P-0150**: T-112, p. 50, line 18 – p. 51, line 8 (Conf); **P-0654**: T-129, p. 36, line 8 – p. 41, line 1 (Conf); **P-0641**: T-138, p. 70, lines 2-10 (Conf).

¹⁰⁰⁵ **P-0654**: T-134, p. 87, lines 13-21; p. 88, lines 16-21 (Conf).

¹⁰⁰⁶ [MLI-OTP-0061-1933](#) (Sheet Connections InOut), row 8295, where the correspondent number on 18 August 2012 at 15:40:51 [REDACTED]. **D-0544** confirmed that his phone number [REDACTED] and that he had contacted Mr Al Hassan by telephone: T-196, p. 11, lines 6-15, p. 58 lines 17-18 (Conf). The cell tower ID shows Mr Al Hassan was in Zohro when he received the call: [MLI-OTP-0061-1933](#) (Sheet Location), line 7577: ID cell tower 610-02-60203-62861 to be read in conjunction with [MLI-OTP-0056-0297](#), row 286.

about [REDACTED].¹⁰⁰⁷

Immediately after this, Hamed Moussa was replaced as Head of *Hesbah*.

285. As set out in paragraphs 457-459 below, P-0638 was never detained at the BMS. The Chamber cannot place weight on his false evidence concerning what he claimed to have transpired. P-0984 had no personal knowledge of women being detained at the BMS and the Prosecution failed to elicit any foundation for his general claims.¹⁰⁰⁸ He also did not know the difference between the Islamic Police and *Hesbah*, and his claims concerning Mr Al Hassan were based on a different person.¹⁰⁰⁹ P-0641 never personally witnessed women being flogged,¹⁰¹⁰ acknowledged that “we didn’t know what was happening or who did what”,¹⁰¹¹ believed that Hamed Moussa and the persons working for him worked for the Islamic Police, and acknowledged the difficulty to properly identify the different sections.¹⁰¹² P-0641 provided an example of [REDACTED] “at the time of Al Hassan”,¹⁰¹³ who was arrested by *Hesbah* and detained at the BMS when *Hesbah*, and not the Islamic Police, were present.

286. The Prosecution failed to demonstrate that Mr Al Hassan knew of and intended to contribute to the mistreatment or sexual abuse of women in detention at the BMS. His knowledge cannot be inferred from the circumstances. P-0065 repeatedly expressed incredulity at the idea of women being sexually abused by group members while in detention, clearly stating that “everyone is certain that there has not been any sexual abuse or any rape in Timbuktu.”¹⁰¹⁴ Despite lengthy and repetitive questioning by the Prosecution, [REDACTED] testified that he was unaware of any rape that could have occurred while women were detained.¹⁰¹⁵

287. The Prosecution has also not elicited any evidence demonstrating that Mr Al Hassan either knew of, or intentionally contributed to, a system of forced marriages. Knowledge of marriages does not equate to knowledge of forced marriages. The key elements of a forced marriage are an absence of will or consent and the threat of physical or psychological force or coercion.¹⁰¹⁶ P-0608 testified that rumours regarding forced marriages were “not verified, or even

¹⁰⁰⁷ [MLI-OTP-0061-1933](#) (Connections AB), rows 18454, 18460, 18469, 18474; **D-0544**: T-196, p. 11, lines 8-15; p. 54, lines 9-11; p. 54, line 21 – p. 55, line 1 (Conf).

¹⁰⁰⁸ **P-0984**: T-068, p. 61, line 10 – p. 62, line 25 (Conf).

¹⁰⁰⁹ **P-0984**: T-069, p. 10, line 1 – p. 12, line 12 (Conf).

¹⁰¹⁰ **P-0641**: T-137, p. 54, line 8 (Conf).

¹⁰¹¹ **P-0641**: T-137, p. 59, line 10 (Conf).

¹⁰¹² **P-0641**: T-139, p. 68, line 18 – p. 69, line 16 (Conf).

¹⁰¹³ **P-0641**: T-137, p. 60, lines 1-18. *See also* **P-0641**: T-138, p. 44, lines 1-10 (Conf).

¹⁰¹⁴ **P-0065**: T-050, p. 51, lines 2-12 (Conf); T-045, p. 70, lines 5-15 (Conf). *See also* **P-0065**: T-050, p. 25, line 20 – p. 26, line 9; p. 28, lines 13-14 (Conf).

¹⁰¹⁵ [REDACTED]

¹⁰¹⁶ [Ongwen TJ](#), para. 2751.

verifiable”¹⁰¹⁷ and that she did not believe them because “the people from Timbuktu, sometimes they have a habit of inventing things.”¹⁰¹⁸ She confirmed that she did not know of and or see a single woman who was forcibly married.¹⁰¹⁹

288. P-0623, [REDACTED] from whom the Prosecution elicited evidence on the alleged system of forced marriages, should be given limited weight. She admitted her information was based on rumour or hearsay¹⁰²⁰ in general terms without any real details.¹⁰²¹ She also testified that [REDACTED] about his alleged involvement with forced marriages.¹⁰²² P-0623 confused Mr Al Hassan with the head of Islamic Police and did not connect Mr Al Hassan to the information she received in 2012 and 2013 until after she saw the media coverage of his arrest, his initial appearance, and after [REDACTED].¹⁰²³

289. The Prosecution relied solely on Mr Al Hassan’s statements to suggest a link between his actions and forced marriage. However, Mr Al Hassan’s statements are unreliable and cannot be used as evidence to base a conviction. Furthermore, [REDACTED] on whom the Prosecution relies to establish the general practice of dowries under Ansar Dine, testified that Mr Al Hassan acted only as a mediator and never in a coercive environment.¹⁰²⁴ [REDACTED]’s testimony also establishes that the allocation of funds by Ansar Dine for the provision of dowry did not imply criminal activity or intention. Rather, the marriages complied with longstanding traditional customs and requirements such as dowry and that they were not forced marriages.

290. There is no basis to infer that Mr Al Hassan knew that women or their families did not provide genuine consent to the marriages, especially since consent is a cornerstone of marriage under Islamic law¹⁰²⁵ and the marriages seemed to conform to local traditions.¹⁰²⁶ In addition to the Defence’s opposition of reliance on Mr Al Hassan’s statements, the contents reflect Mr Al Hassan’s belief that traditional procedures for obtaining the woman’s consent were followed throughout 2012.¹⁰²⁷

¹⁰¹⁷ P-0608: T-154, p. 21, lines 21-25 (Conf).

¹⁰¹⁸ P-0608: T-154, p. 22, lines 3-4 (Conf).

¹⁰¹⁹ P-0608: T-154, p. 22, lines 1-2 (Conf).

¹⁰²⁰ P-0623: T-030, p. 45, lines 13-19 (Conf). *See also* T-030, p. 46, lines 13-19 (Conf).

¹⁰²¹ P-0623: T-030, p. 55, lines 13-21 (Conf).

¹⁰²² P-0623: T-030, p. 59, lines 3-9 (Conf).

¹⁰²³ P-0623: T-030, p. 45, line 1 – p. 47, line 19 (Conf).

¹⁰²⁴ [REDACTED]

¹⁰²⁵ P-0529: T-189, p. 9, lines 4-11 (Conf).

¹⁰²⁶ P-0152: T-032, p. 96, lines 14-20 (Conf).

¹⁰²⁷ [MLI-OTP-0051-0967](#) at 0993, lines 878 to 891.

committed by a member of the Islamic Police.¹⁰⁴⁴ When Mr Al Hassan became aware of a rape perpetrated by a fellow police-officer, he expressed clear disapproval for such conduct, and further assisted, within the limits of his authority, the process of ensuring that the perpetrator did not escape liability.¹⁰⁴⁵ The perpetrator was punished and removed from the group,¹⁰⁴⁶ and the victim financially compensated.¹⁰⁴⁷

294. There was no reliable foundation to conclude that Mr Al Hassan was aware of any other incidents of rape, at the time of the charged events. P-0608 testified that newspapers were publishing false stories about “jihadists [...] raping women who were at the Islamic police”, and that she had neither seen nor heard about such events.¹⁰⁴⁸ P-0646 also indicated that in the October 2012 [REDACTED] report about the women’s march, there was “no mention of rape”¹⁰⁴⁹ despite the demonstrators calling for the closure of the women’s prison in which rapes were alleged to have taken place. P-0114 similarly stated that rumours of rapes were unconfirmed and that many locals confused the Islamist groups with the MNLA.¹⁰⁵⁰

295. Given the isolated nature of these types of incidents, and the measures taken subsequently to discipline the individuals involved, these incidents are not probative of the element that Mr Al Hassan knew that his participation in the police would contribute to the commission of the charged crimes. His actions also speak to a clear lack of intent to contribute to any incidents of rape that occurred in Timbuktu during the relevant time period and demonstrate a clear effort to prevent criminal activity, which is a factor that affects and diminishes the “level of participation attributed to the accused and whether that participation is deemed significant”.¹⁰⁵¹

7.7 Mistake of fact/law

296. Regarding allegations of forced marriage, Mr Al Hassan was not present when the charged marriages were negotiated and concluded. He lived in a private house with his family and was not privy to the way marriages were carried out daily. He informed P-0605 that he was unaware of any forced marriages in Timbuktu in 2012.¹⁰⁵² He appears to have been operating

¹⁰⁴⁴ **D-0605**: T-194, p. 22, line 23 – p. 23, line 4 (Conf).

¹⁰⁴⁵ **D-0605**: T-193, p. 37, lines 19-23 (Conf); [REDACTED] testified that Sanda initiated the rape investigation and [REDACTED] liaised at the BMS with a Bambara speaking person who seemed to be a Peul: [REDACTED]. P-0582 testified that Mr Al Hassan assisted as an interpreter in relation to the investigation of this incident: **P-0582**: [MLI-OTP-0062-3820-R01](#) at 3823, lines 92-94.

¹⁰⁴⁶ **D-0605**: T-193, p. 37, lines 14-16 (Conf). *See also* **P-0065**: T-045, p. 70, lines 16-24 (Conf).

¹⁰⁴⁷ **D-0605**: T-193, p. 37, lines 8-16 (Conf).

¹⁰⁴⁸ **P-0608**: T-154, p. 80, lines 19-21 (Conf).

¹⁰⁴⁹ **P-0646**: T-078, p. 17, lines 2-4 (Conf).

¹⁰⁵⁰ **P-0114**: T-060, p. 53, lines 18-22; p. 57, lines 13-17 (Conf).

¹⁰⁵¹ [Kvočka TJ](#), para. 311. *See also* paras 280, 284, fns. 662, 668, 670, 673.

¹⁰⁵² **P-0605**: [MLI-OTP-0062-2888-R02](#) at 2902-2903, lines 507-516.

under a good faith belief that marriages between groups members and locals were consensual. It is also not reasonable to conclude that Mr Al Hassan knew and intended that such marriages were non-consensual because of the power differential between locals and group members, given that i) locals did in fact reject such marriage proposals without negative consequences,¹⁰⁵³ and ii) legal expert P-0160 believed such marriages fell outside the definition of “forced marriage”.¹⁰⁵⁴ In terms of rape, Mr Al Hassan’s response to the complaint filed in relation to Bocar demonstrates his reasonable belief that all acts of rape were punishable and prohibited, including group members.¹⁰⁵⁵ This negates the Prosecution’s allegation that Mr Al Hassan knew and intended for his actions to contribute to the commission of rape or other acts of sexual violence.

8 THE PROSECUTION HAS FAILED TO PROVE THE CHARGES UNDER Article 8(2)(c)(iv)

297. The Prosecution has failed to discharge its burden of demonstrating Mr Al Hassan’s responsibility under Article 8(2)(c)(iv) due to its overextended reliance on uncorroborated and untested documentary evidence, comprised of Islamic Police reports and judgments. The probative weight of such documents is severely limited given the flawed chain of custody and absence of reliable authentication as concerns stamps and signatures. Even if the documents are what they purport to be, the Chamber cannot assume the contents are true. In the absence of independently tested corroboration, the Chamber cannot base a conviction on such records.

8.1 No weight can be placed on the interviews of Mr Al Hassan (P-0398)

298. The Defence adduced substantial factual and expert evidence demonstrating that Mr Al Hassan experienced severe cognitive impairment at the time of his Prosecution interviews.¹⁰⁵⁶ Even though the Chamber found that the threshold for exclusion had not been satisfied, the Chamber cannot rely on the statements to corroborate any of the charged incidents, due to the Prosecution’s failures to lay a proper foundation or elicit evidence in an impartial and non-leading manner. In line with the Chamber’s commitment to holistically assess evidence, no reliance can be placed on incriminating segments that have been divorced from an exculpatory context.

299. A key example of inappropriate memory prods and implantation arises in relation the Prosecution’s reliance on Mr Al Hassan’s interviews to establish his participation in the

¹⁰⁵³ See *supra*, fn. 137.

¹⁰⁵⁴ **P-0160**: T-068, p. 30, line 19 – p. 31, line 8; p. 37, line 18 – p. 38, line 9 (Conf).

¹⁰⁵⁵ See *infra*, fns 1045 and 2136.

¹⁰⁵⁶ See [Defence Request for Reconsideration of Evidence Submission](#).

flogging of ██████████ When the Prosecution first showed Mr Al Hassan a photograph purportedly taken on the date of the flogging, Mr Al Hassan indicated that he had no memory of the event.¹⁰⁵⁷ Later, after having been shown flogging videos shot at the same location, he states “[j]’ai participé à un cas de flagellation” concerning adultery,¹⁰⁵⁸ a phrase that he previously used to mean attendance rather than physical commission.¹⁰⁵⁹ He did not make any link to the prior photograph. He also states this immediately before requesting to be transferred to the central prison,¹⁰⁶⁰ creating the reasonable inference that the information was exchanged in hope that it would lead to improvement of his deplorable conditions. When shown the related judgment in March, Mr Al Hassan again states that he does not have “une bonne memoire” concerning this case, having erroneously claimed in October that the sentence was 300 rather than 200 flogs.¹⁰⁶¹ He had also informed the Prosecution earlier that day, that he had started to experience tremors.¹⁰⁶² The Article 56 Counsel further recorded Mr Al Hassan’s complaints of how he suffered from several ailments and had not received appropriate medical care.¹⁰⁶³ Notwithstanding these considerations, the following day the Prosecution attempted to elicit further evidence from Mr Al Hassan regarding this incident. When questioned openly on his memory, Mr Al Hassan is again unable to recall details¹⁰⁶⁴ and is invited to speculate.¹⁰⁶⁵ After indicating that he could not recall cases of more than two persons being flogged on the same day,¹⁰⁶⁶ Mr Al Hassan affirms that no punishment was imposed on ██████████.¹⁰⁶⁷ The Prosecution then shows him the photograph put to him in October, which he cannot recall,¹⁰⁶⁸ stating in addition, “[j]’oublie ... beaucoup.”¹⁰⁶⁹ The Prosecution then describes the persons Mr Al Hassan identified in October and asks “[e]st-ce que vous vous souvenez un peu plus maintenant de ce jour où il y a eu cette flagellation?” even though there had been no confirmation of a flogging that date. Mr Al Hassan again states that he has no memory.¹⁰⁷⁰ The Prosecution show him a series of images and put highly leading language to him, such as “[e]st-

¹⁰⁵⁷ [MLI-OTP-0051-0967](#) at 0975, lines 251-254.

¹⁰⁵⁸ [MLI-OTP-0051-0967](#) at 0986, line 642.

¹⁰⁵⁹ [MLI-OTP-0051-0912](#) at 0931, line 633.

¹⁰⁶⁰ [MLI-OTP-0051-0967](#) at 0991, lines 806-810.

¹⁰⁶¹ [MLI-OTP-0062-0988](#) at 1010, lines 727-728.

¹⁰⁶² [MLI-OTP-0062-0969](#) at 0970, lines 23-26.

¹⁰⁶³ [MLI-OTP-0062-0988](#) at 1012, lines 791-796.

¹⁰⁶⁴ [MLI-OTP-0062-1058](#) at 1060, lines 44-48.

¹⁰⁶⁵ [MLI-OTP-0062-1058](#) at 1060, lines 54-70.

¹⁰⁶⁶ [MLI-OTP-0062-1058](#) at 1062, lines 120-124.

¹⁰⁶⁷ [MLI-OTP-0062-1058](#) at 1063, lines 146-155.

¹⁰⁶⁸ [MLI-OTP-0062-1058](#) at 1064, lines 174 –183.

¹⁰⁶⁹ [MLI-OTP-0062-1058](#) at 1064, line 195.

¹⁰⁷⁰ [MLI-OTP-0062-1058](#) at 1068, lines 317-321.

ce que ça vous rafraîchit la mémoire si je vous dis que cette femme a également été flagellée ce jour-là?”¹⁰⁷¹ When Mr Al Hassan responds again that he does not remember, the Prosecution persists in putting to him “[e]st-ce que ça vous rafraîchit la mémoire si je vous dis que au [phon.] moins 6 personnes ont été flagellées ce jour-là ?” to which he responds that although it was possible, he did not remember.¹⁰⁷² The Prosecution then asks Mr Al Hassan to read an article [REDACTED] which describes the flogging of three couples on 29 November 2012, including the step-brother and step-sister,¹⁰⁷³ and informs him that the photographs they had shown him were dated 29 November (even though the photographs did not depict the women being flogged).¹⁰⁷⁴ After the Prosecution once again puts a highly leading question as to whether his memory was refreshed in relation to the step-brother, flogged on the same day as five other persons, Mr Al Hassan states that he remembers being present on the day when the step-brother was flogged.¹⁰⁷⁵ The Prosecution responds by telling Mr Al Hassan that he previously stated “*que vous étiez présent et que vous avez participé à cette flagellation*”.¹⁰⁷⁶ Only then does Mr Al Hassan state that he was among the persons who flogged the step-brother,¹⁰⁷⁷ although he was clearly unable to remember the incident or independently recall any details.¹⁰⁷⁸

300. Mr Al Hassan’s ultimate admission that he participated in the flogging [REDACTED] [REDACTED] is an example of a false memory, a well-documented psychological phenomenon wherein “over 85 per cent of the people” subjected to uncontrollable stress agree to untrue narratives.¹⁰⁷⁹ In painstaking detail following review of Mr. Al Hassan’s interview transcripts, Dr. Morgan described how Mr. Al Hassan’s “recollection” about the flogging of [REDACTED] came to be created: “I note this section [of Mr. Al Hassan’s interviews] because it is like a recipe of what we would do in research to create a false memory.”¹⁰⁸⁰ The Prosecution’s particular phrasing of questions (“Does this refresh your memory, were I to say to you that this woman was also flogged on this day?”; “Does it refresh your memory if I say to you at that least six individuals were flogged on that day?”; “You have no recollection of a day when at least six

¹⁰⁷¹ [MLI-OTP-0062-1058](#) at 1077, lines 617-621.

¹⁰⁷² [MLI-OTP-0062-1058](#) at 1077, lines 622-631.

¹⁰⁷³ [MLI-OTP-0062-1058](#) at 1078-1079, lines 660- 691.

¹⁰⁷⁴ [MLI-OTP-0062-1058](#) at 1080, lines 735-739.

¹⁰⁷⁵ [MLI-OTP-0062-1058](#) at 1081-1082, lines 750-770.

¹⁰⁷⁶ [MLI-OTP-0062-1058](#) at 1081, lines 772-773.

¹⁰⁷⁷ [MLI-OTP-0062-1058](#) at 1082, line 790.

¹⁰⁷⁸ [MLI-OTP-0062-1058](#) at 1082-1083, lines 811-819, 828-832; [MLI-OTP-0062-1084](#) at 1085-1086, lines 27-31, 51.

¹⁰⁷⁹ **D-0502**: T-179, p. 38, lines 1-2 (Conf).

¹⁰⁸⁰ **D-0502**: T-179, p. 38, lines 10-13 (Conf).

individuals were flogged in Yobotaa?") combined with the introduction of a photo, replicated¹⁰⁸¹

the methodology by which [psychological experts] influence memory, whereby pairing a familiar photo with then something new, along with a statement about the actions, about the event, and then moving forward having someone agree with us, results in them finally forming a memory.

301. Dr Morgan pointed out that the Prosecution's "questions do include in the questions themselves a narrative about a certain number of people being whipped or flogged",¹⁰⁸² leading a subject to "incorporate the information that was mentioned into their subsequent recall of information".¹⁰⁸³ Dr Morgan then highlighted the use of a [REDACTED] article by the Prosecution to assist Mr. Al Hassan's "recall" of his "involvement" in the flogging, testifying that you "[h]ave him read the contents of the article, get him to agree that the article says what it says, and then after that, it's used as proof of what must have occurred. [...] this facilitates the process of acquiring a memory that may not be true."¹⁰⁸⁴

302. Following Mr Al Hassan's "admission" that he "was there" at the flogging, Dr Morgan testified that the "pattern [of questioning] is getting him to agree and slightly rephrasing what he has previously said, placing what he has previously said more centrally in the narrative that the interviewer is interested in."¹⁰⁸⁵ Dr Morgan emphasised that "[t]his is a direct example of how we believe we get false confessions from people in an interview process, whether or not it was intended on the part of the questioners."¹⁰⁸⁶ Dr Morgan described the manner in which the Prosecution employed psychological hooks, such as photos or articles that contain "an element of truth," which are "more effective at creating a false memory."¹⁰⁸⁷ Dr Morgan highlighted the¹⁰⁸⁸

progression from [Mr Al Hassan] saying "I don't, I don't remember, "getting him to gently recognise and acknowledge that he recognises a place, he perhaps recognises an individual. And then by showing him photos – and we find that photographs or videos are very effective ways of influencing someone's memory – and adding in the narrative of how many people were being whipped and flogged, and including "you were there"[...] this pattern of exposure is the very method that we use to create false memory.

¹⁰⁸¹ **D-0502**: T-179, p. 40, lines 12-16 (Conf).

¹⁰⁸² **D-0502**: T-179, p. 40, lines 18-20 (Conf).

¹⁰⁸³ **D-0502**: T-179, p. 40, lines 22-23 (Conf).

¹⁰⁸⁴ **D-0502**: T-179, p. 45, line 4-6, 16-17 (Conf).

¹⁰⁸⁵ **D-0502**: T-179, p. 46, line 24 – p. 47, line 1 (Conf).

¹⁰⁸⁶ **D-0502**: T-179, p. 47, lines 1-3 (Conf).

¹⁰⁸⁷ **D-0502**: T-179, p. 48, lines 5-6 (Conf).

¹⁰⁸⁸ **D-0502**: T-179, p. 41, line 6-12 Conf).

303. The Prosecution used this pattern of questioning throughout the interviews, eliciting evidence on the information shown or read to him rather than true independent memory recall. On these occasions, Mr Al Hassan would initially indicate that he had no memory of the incident in question. The Prosecution would then request Mr Al Hassan to read documents, after which he would provide responses based on provided information. This tactic was used with the cases of [REDACTED],¹⁰⁸⁹ [REDACTED]¹⁰⁹⁰ [REDACTED]¹⁰⁹¹ and [REDACTED]¹⁰⁹². In the latter case, the interview process and responses were tainted by the Prosecution's false assertion that a separate sheet with the words "to the Islamic Tribunal" were linked to the report concerning [REDACTED]¹⁰⁹³. The Prosecution cherry-picked from Mr Al Hassan's responses, claiming in its closing brief that Mr Al Hassan confessed to referring the [REDACTED] case to the Tribunal,¹⁰⁹⁴ but he told the Prosecution that the Emir had referred it for reasons unknown to Mr Al Hassan.¹⁰⁹⁵

8.2 The Prosecution failed to demonstrate the authenticity of each record

304. The Prosecution collected reports and judgments from three different and equally unreliable sources: P-0007, P-0055, and [REDACTED]. P-0007's testimony can be given no credence, as it is implausible that he was able to discover and neatly catalogue stacked reports and judgments after several journalists had already entered the Hotel Maison. In addition to the arguments raised following P-0007's testimony,¹⁰⁹⁶ subsequent witnesses provided evidence that controverted P-0007's account. [REDACTED] testified that when the Islamists left Timbuktu, they left nothing behind at the Hotel Maison.¹⁰⁹⁷ [REDACTED] confirmed that the footage had been shot at the Hotel Maison and further, that the person depicted in the footage was [REDACTED]¹⁰⁹⁸. In MLI-OTP-0009-1749, dated 31 January 2013, the journalists (accompanied by the hotel employee) state that the Islamists left nothing in the Hotel Maison.¹⁰⁹⁹ D-0240 also gave evidence that the Malian and French authorities entered and searched the premises when

¹⁰⁸⁹ [MLI-OTP-0001-7456](#); [MLI-OTP-0077-2307](#) at 2308; [MLI-OTP-0060-1605](#) at 1617-1619, lines 382-470.

¹⁰⁹⁰ [MLI-OTP-0001-7560](#); [MLI-OTP-0052-0031](#) at 0032; [MLI-OTP-0060-1605](#) at 1606-1607, lines 13-69.

¹⁰⁹¹ [MLI-OTP-0001-7542](#); [MLI-OTP-0034-0175](#) at 0176; [MLI-OTP-0060-1453](#) at 1468-1471, lines 495-573.

¹⁰⁹² [MLI-OTP-0001-7555](#); [MLI-OTP-0068-2931](#) at 2932; [MLI-OTP-0060-1453](#) at 1471-1473, lines 576-646.

¹⁰⁹³ [MLI-OTP-0060-1453](#) at 1473, lines 636-645.

¹⁰⁹⁴ [OTP Final Trial Brief](#), para. 352.

¹⁰⁹⁵ [MLI-OTP-0060-1453](#) at 1470, lines 556-563.

¹⁰⁹⁶ Defence email, 14 September 2020, 13:09.

¹⁰⁹⁷ [REDACTED]

¹⁰⁹⁸ [REDACTED] [MLI-OTP-0009-1749](#) at 00:11:25:00 – 00:12:31:00.

¹⁰⁹⁹ [MLI-OTP-0009-1749](#) at 00:11:42:21 – 00:11:49:08; [MLI-OTP-0028-0839](#) at 0847, lines 255-256.

they first arrived in Timbuktu.¹¹⁰⁰ After their departure, [REDACTED] conducted an inventory: apart from furniture and some books, nothing else was left.¹¹⁰¹

305. Regarding the laptop with electronic files [REDACTED], the Prosecution's evidence confirmed the absence of sufficient digital integrity and reliability,¹¹⁰² given it was buried for several years in sand.¹¹⁰³

306. P-0055's evidence concerning his collection of documents from the Hotel Maison is implausible and contradictory.¹¹⁰⁴ While the Trial Chamber determined that such considerations did not justify the exclusion of the contested items,¹¹⁰⁵ this determination was without prejudice to its assessment of their assigned weight. Since chain of custody is a core element of reliability, absence of reliable and consistent evidence confirming an intact chain of custody diminishes the weight assigned to these documents.¹¹⁰⁶ When coupled with evidence indicating that first, local civilians broke into houses to find documentation that would incriminate the Islamists,¹¹⁰⁷ and second, the Malian authorities committed severe abuses in Timbuktu during their investigations,¹¹⁰⁸ the Chamber cannot conclude the documents were collected through lawful or reliable means. Given the modifiable nature of Microsoft Word and the indications that multiple revisions were made to Word files,¹¹⁰⁹ the Chamber also cannot conclude that the Word versions of judgments [REDACTED] correspond to the final versions issued by the Islamic Tribunal in 2012.

307. The probative weight of the Islamic Police Reports and Islamic Tribunal judgments is further undermined by the absence of reliable evidence concerning signatures. P-0620's evidence was largely inconclusive¹¹¹⁰ and the strength of P-0620's conclusions was artificially inflated due to cognitive bias and absence of necessary safeguards.¹¹¹¹ P-0620 also failed to

¹¹⁰⁰ **D-0240**: T-191, p. 24, lines 19-22 (Conf).

¹¹⁰¹ **D-0240**: T-191, p. 24, line 23 – p. 25, line 4 (Conf).

¹¹⁰² Defence email, 23 July 2021, 16:38 (*see* arguments set out under "Objection D"). *See* **P-0075**: T-028, p. 83, lines 20-24 (Conf).

¹¹⁰³ [REDACTED]

¹¹⁰⁴ Defence email, 06 September 2021, 13:30 (challenges to evidence to be tendered through P-0055). *See* [Defence Response to OTP Request to Modify its List of Evidence](#), paras 19-24.

¹¹⁰⁵ Trial Chamber, Email 07 September 2020, 17:37 (P-0007 materials); Trial Chamber, Email 8 September 2021, 16:08 (P-0055 materials).

¹¹⁰⁶ [Bagosora et al. Admission Decision](#), paras 10-11; [Renzaho Exclusion Decision](#), paras 1-2.

¹¹⁰⁷ [REDACTED] [MLI-OTP-0011-0326](#) at 00:00:00:00 – 00:01:57:00.

¹¹⁰⁸ [Defence Trial Brief](#), para. 96. *See also* **P-1086**: T-122, p. 17, lines 17-25 – p.18, lines 1-7 (Conf); **P-0099**: [MLI-D28-0004-8029](#); **P-0654**: T-133, p. 66, line 6 – p. 71, line 5 (Conf); **D-0511**: [MLI-D28-0006-2629-R01](#) at 2637; **D-0539**: [MLI-D28-0005-9317-R01](#) at 9319; **P-0623**: T-030, p. 16, lines 2-6 (Conf); **P-0065**: T-050, p. 60, lines 22–25 (Conf).

¹¹⁰⁹ **P-0075**: T-028, p. 82, line 2 – p. 85, line 15 (Conf).

¹¹¹⁰ [MLI-OTP-0064-0175](#) at 0301-0302.

¹¹¹¹ [MLI-D28-0005-9928-R01](#) at 9932-9936, 9939-9946.

context of testimonial evidence,¹¹²³ the rationale equally applies to documentary records.¹¹²⁴ The Chamber must reject incidents the Prosecution has substantiated exclusively through reports or judgments and not through independently corroborated evidence from witnesses with personal knowledge of the drafting of these specific reports or judgments. Police reports and hearing records are quasi-testimonial in nature, tending to “consist of a mixture of personal observation by the author, and hearsay provided by unnamed informants or interviewees.”¹¹²⁵

309. Based on an overview of ICTY and ICTR case law, Gosnell concludes that even if a member of the police offers “testimony about general methodologies or practices”, the reports and records could only be tendered “for general purpose” (i.e. not to sustain a conviction).¹¹²⁶ These findings are directly applicable to the police reports and records the Prosecution seeks to rely upon as exclusive proof for the truth of their contents. The Chamber must resist spurious considerations to facilitate “easier” prosecutions for atrocity crimes. Any erosion of the prescription against using untested evidence to secure a conviction would undermine the presumption of innocence to such an extent that “nothing would be left [...], save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases.”¹¹²⁷

310. Concerning the tendered police reports, the contents appear to be testimonial in nature, reflecting information provided by the local population.¹¹²⁸ As demonstrated in the case of ██████████ the report is a mere transcription or minutes of the concerned individuals’ statement written in the first person.¹¹²⁹ There is no record of who conducted the investigations and who conveyed the information recorded in the reports. The Islamic Tribunal did not rely on police reports due to concerns of accuracy.¹¹³⁰

311. The same reliability issues infect the Islamic Tribunal records, if relied upon for the truth of their contents without independent corroboration. ██████████ made errors

¹¹²³ [Martić Decision on Witness Evidence](#), para. 20; [Popović AJ](#), para. 96.

¹¹²⁴ [Haradinaj Evidence Admission Decision](#), para. 18; [Prlić AJ](#), 29 November 2017, para. 134; [Haraqija Contempt AJ](#), paras 61-62.

¹¹²⁵ K. Khan, et al., *Principles of Evidence in International Criminal Justice*, OUP (2010), p. 411.

¹¹²⁶ K. Khan, et al., *Principles of Evidence in International Criminal Justice*, OUP (2010), pp. 411-412; see [Milutinović Bar Table Decision](#), para. 23; [Haradinaj Evidence Admission Decision](#), para. 18.

¹¹²⁷ See [South Africa, State v. Coetzee](#), para. 220.

¹¹²⁸ [MLI-OTP-0001-7553](#); [MLI-OTP-0001-7552](#); [MLI-OTP-0052-0105](#); [MLI-OTP-0068-2931](#) at 2932; [MLI-OTP-0001-7513](#); [MLI-OTP-0001-7514](#); [MLI-OTP-0069-5680](#); [MLI-OTP-0034-0169](#); [MLI-OTP-0055-1072](#); [MLI-OTP-0054-0306](#) at 0307; [MLI-OTP-0001-7560](#); [MLI-OTP-0052-0031](#); [MLI-OTP-0001-7555](#); [MLI-OTP-0068-2931](#) at 2932; [MLI-OTP-0001-7555](#); [MLI-OTP-0001-7554](#); [MLI-OTP-0068-2931](#) at 2932; [MLI-OTP-0001-7542](#); [MLI-OTP-0034-0175](#) at 0176; [MLI-OTP-0001-7538](#); [MLI-OTP-0034-0173](#) at 0174; [MLI-OTP-0001-7528](#); [MLI-OTP-0077-2795](#) at 2797; [MLI-OTP-0001-7525](#); [MLI-OTP-0077-2793](#).

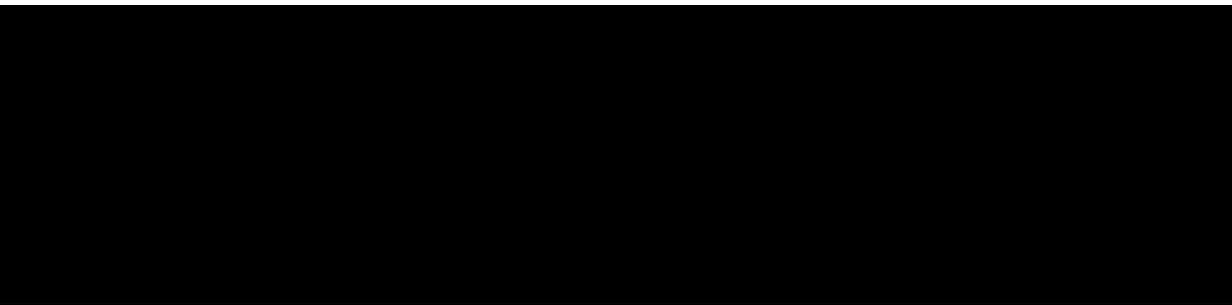
¹¹²⁹ [MLI-OTP-0053-0114](#); [MLI-OTP-0069-5682](#). The OTP signature expert, P-0620, could not establish that the signatures on [MLI-OTP-0001-7514](#), [MLI-OTP-0055-1072](#), and [MLI-OTP-0001-7538](#) are the Accused’s signature. See [MLI-OTP-0064-0175](#) at 0302.

¹¹³⁰ See *infra*, para. 146380.

throughout drafting the reports,¹¹³¹ and the judgments do not purport to be a full record of what transpired at the Tribunal. Therefore, it is not possible to infer that something did not occur simply because it is not expressly stated in the judgment.

312. Apart from the interviews with Mr Al Hassan (which can be afforded no weight), the Prosecution did not obtain any independent corroboration or contextualisation concerning the content of a considerable number of reports and judgments. Although the Prosecution put certain reports to viva voce witnesses such as ██████ and ██████, they were not present when the police reports were drafted and had no personal knowledge of their contents.¹¹³²

313. Given these clear limitations, the Chamber cannot enter convictions concerning the following incidents, which are based exclusively on untested documentary evidence: ██████



¹¹³¹ ██████.

¹¹³² ██████

¹¹³³ [MLI-OTP-0001-7514](#); [MLI-OTP-0034-0169](#) at 0170; [MLI-OTP-0001-7490](#); [MLI-OTP-0078-1636](#) at 1637. The OTP signature expert, P-0620, could not establish that the signature on [MLI-OTP-0001-7490](#) is the Accused's signature. See [MLI-OTP-0064-0175](#) at 0302.

¹¹³⁴ [MLI-OTP-0001-7513](#); [MLI-OTP-0001-7514](#); [MLI-OTP-0069-5680](#); [MLI-OTP-0034-0169](#). See [MLI-OTP-0064-0175](#) at 0302; [MLI-OTP-0001-7487](#); [MLI-OTP-0077-2322](#).

¹¹³⁵ [MLI-OTP-0055-1072](#); [MLI-OTP-0054-0306](#) at 0307; [MLI-OTP-0002-0082](#); [MLI-OTP-0078-0238](#) at 0239. The OTP signature expert, P-0620, could not establish that the signature on [MLI-OTP-0055-1072](#) is the Accused's signature. See [MLI-OTP-0064-0175](#) at 0302.

¹¹³⁶ [MLI-OTP-0001-7560](#); [MLI-OTP-0052-0031](#) at 0032; [MLI-OTP-0001-7465](#); [MLI-OTP-0077-2239](#) at 2240.

¹¹³⁷ [MLI-OTP-0001-7553](#); [MLI-OTP-0001-7552](#); [MLI-OTP-0052-0105](#) at 0106; [MLI-OTP-0001-7437](#); [MLI-OTP-0078-0212](#) at 0213. The OTP signature expert, P-0620, could not establish that the signature [MLI-OTP-0001-7552](#) is the Accused's signature. See [MLI-OTP-0064-0175](#) at 0302.

¹¹³⁸ [MLI-OTP-0001-7555](#); [MLI-OTP-0068-2931](#) at 2932; [MLI-OTP-0001-7434](#); [MLI-OTP-0069-4112](#) at 4113.

¹¹³⁹ [MLI-OTP-0001-7554](#); [MLI-OTP-0052-0107](#) at 0108. The OTP signature expert, P-0620, could not establish that the signature on [MLI-OTP-0001-7554](#) is the Accused's signature. See [MLI-OTP-0064-0175](#) at 0302. [MLI-OTP-0001-7434](#); [MLI-OTP-0069-4112](#) at 4113-4114.

¹¹⁴⁰ [MLI-OTP-0001-7542](#); [MLI-OTP-0034-0175](#) at 0176; [MLI-OTP-0001-7425](#); [MLI-OTP-0078-0185](#) at 0187.

¹¹⁴¹ [MLI-OTP-0001-7413](#); [MLI-OTP-0077-2378](#) at 2380; [MLI-OTP-0001-7538](#); [MLI-OTP-0034-0173](#) at 0174. The OTP signature expert, P-0620, could not establish that the signature on [MLI-OTP-0001-7538](#) is the Accused's signature. See [MLI-OTP-0064-0175](#) at 0302.

¹¹⁴² [MLI-OTP-0001-7528](#); [MLI-OTP-0077-2795](#) at 2797; [MLI-OTP-0001-7373](#); [MLI-OTP-0077-2371](#) at 2372.

¹¹⁴³ [MLI-OTP-0001-7482](#); [MLI-OTP-0077-2251](#).

¹¹⁴⁴ [MLI-OTP-0001-7478](#); [MLI-OTP-0077-2310](#); [MLI-OTP-0053-0270](#).

¹¹⁴⁵ [MLI-OTP-0001-7475](#); [MLI-OTP-0077-2245](#) at 2246.

¹¹⁴⁶ [MLI-OTP-0001-7473](#); [MLI-OTP-0078-0374](#) at 0375.

¹¹⁴⁷ [MLI-OTP-0001-7472](#); [MLI-OTP-0078-0372](#) at 0373.

¹¹⁴⁸ [MLI-OTP-0001-7470](#); [MLI-OTP-0078-0224](#) at 0225.

315. The corresponding judgment does not corroborate [REDACTED] alleged torture. There is no reference to this alleged mistreatment even though the alleged victim was heard by the Tribunal. [REDACTED] has no personal memory of this hearing.¹¹⁶⁴ The media report is anonymous hearsay and does not record any allegations of physical mistreatment separate to or preceding the flogging.¹¹⁶⁵ The Defence was prevented from putting articles to P-0114 demonstrating that the photograph accompanying the media report concerning this incident was a “fake”, further undermining the reliability of the anonymous source for the report.¹¹⁶⁶ The contemporaneous hospital records also note no injuries from flogging or physical mistreatment.¹¹⁶⁷

316. The same considerations apply to the case of [REDACTED].¹¹⁶⁸ While the Prosecution claimed it would elicit “testimonial evidence from victims, insider witnesses, and other witnesses who were present in Timbuktu and its region at the relevant time,”¹¹⁶⁹ it was only shown to [REDACTED], who provided commentary without demonstrating personal knowledge of the report or judgment.¹¹⁷⁰ It would be entirely inappropriate for the Chamber to rely on a testimonial civil party complaint¹¹⁷¹ to establish any facts.

317. Case [REDACTED] is not supported by the unsigned, unstamped, and unauthenticated list of detainees,¹¹⁷² which [REDACTED] had never seen before his interviews with the Prosecution. In the absence of any independent evidence concerning the list’s authorship and accuracy, the list also fails to corroborate the following incidents: [REDACTED]

¹¹⁶⁴ **P-0626**: T-142, p. 69, lines 14-18; p. 70, lines 6-11 (Conf).

¹¹⁶⁵ [MLI-D28-0004-3116](#).

¹¹⁶⁶ The Defence had placed [MLI-D28-0004-4750](#) on its exhibit list for **P-0114**. This report has identical text to [MLI-D28-0004-3116](#). In T-060, **P-0114** acknowledged he used the photograph from [MLI-D28-0004-4750](#) in his presentation: [MLI-OTP-0033-5637](#) at 5644; T-060, p. 66, lines 6-17 (Conf). When the Defence tried to connect this photograph with earlier articles relating to a flogging in Somalia ([MLI-D28-0004-4744](#) at 4746) with a view to demonstrating that the information in [MLI-D28-0004-4750](#) derived from an unreliable source in Timbuktu, the Presiding Judge prohibited the Defence with an oral ruling: T-060, p. 68, line 1 – p. 69, line 22 (Conf).

¹¹⁶⁷ [MLI-OTP-0028-0976](#).

¹¹⁶⁸ [MLI-OTP-0001-7465](#); [MLI-OTP-0077-2239](#) at 2240.

¹¹⁶⁹ [OTP Trial Brief](#), para. 181 (footnotes omitted).

¹¹⁷⁰ [REDACTED]

¹¹⁷¹ [OTP Final Trial Brief](#), para. 336.

¹¹⁷² [MLI-OTP-0001-7361](#); [MLI-OTP-0034-0063](#).

¹¹⁷³ [MLI-OTP-0001-7478](#); [MLI-OTP-0077-2310](#); [MLI-OTP-0053-0270](#).

¹¹⁷⁴ [MLI-OTP-0001-7476](#); [MLI-OTP-0077-2438](#) at 2439; [REDACTED]

¹¹⁷⁵ [MLI-OTP-0001-7475](#); [MLI-OTP-0077-2245](#) at 2246.

¹¹⁷⁶ [MLI-OTP-0001-7472](#); [MLI-OTP-0078-0372](#) at 0373.

¹¹⁷⁷ [MLI-OTP-0001-7470](#); [MLI-OTP-0078-0224](#) at 0225.

¹¹⁷⁸ [MLI-OTP-0001-7456](#); [MLI-OTP-0077-2307](#) at 2308.

8.4 Negative inferences should be drawn due the Prosecution's failure to introduce relevant evidence

318. The Trial Chamber should draw adverse inferences with respect to incidents whereby the Prosecution inexplicably failed to call a relevant witness or tender evidence on the basis that it would not have assisted in proving its case.¹¹⁷⁹ In the case of ██████████ and others,¹¹⁸⁰ while the Prosecution discussed the alleged incident with ██████████ in the witness interview, they failed to raise it with him in court. The Prosecution also did not demonstrate that ██████████ had personal knowledge of the alleged incidents or the contents of the report or judgment. In the case of ██████████, which directly concerns ██████████, the Prosecution failed to question ██████████ concerning this incident or call him as a witness. Since the Chamber rejected the Defence's request to call ██████████ by video-link from Timbuktu,¹¹⁸¹ it would be unduly prejudicial for the Chamber to rely on this incident. Regarding Case ██████████ ██████████¹¹⁸² although ██████████ indicated he knew the defendant, ██████████, the Prosecution only asked ██████████ to describe facial elements of the document (the stamp, signature, and date). The Prosecution's deliberate failure to bring such highly relevant evidence before the Court has resulted in an incomplete evidentiary record with respect to these incidents. As a result, the Chamber cannot be satisfied that such incidents meet the requisite standard of proof in the face of missing evidence.¹¹⁸³

8.5 The evidence does not fulfil the elements of the crime

319. The charges under Article 8(2)(c)(iv) fail to satisfy critical elements of this provision, including but not limited to the nexus and knowledge elements.

8.5.1 The Prosecution failed to establish that the cases concerned conflict-related crimes

320. The Prosecution failed to establish that the charged incidents concern crimes related to the alleged armed conflict.

321. Article 8(2)(c)(iv) imports a specific nexus requirement that has not been met. The provision was not intended to capture every execution or sentence that takes place contemporaneously to a NIAC, but only those concerning crimes related to or arising from the NIAC.¹¹⁸⁴ This restricted ambit is derived from how international humanitarian law does not

¹¹⁷⁹ [Australia, Jones v Dunkel](#); [Australia, RPS v The Queen](#), para. 29; [Australia, FC of T v Montgomery](#); [Canada, Boucher v The Queen](#) at 19, 23-24; [USA, Graves v. US](#).

¹¹⁸⁰ [MLI-OTP-0001-7513](#); [MLI-OTP-0001-7514](#); [MLI-OTP-0069-5680](#); [MLI-OTP-0034-0169](#). See [MLI-OTP-0064-0175](#) at 0302; [MLI-OTP-0001-7487](#); [MLI-OTP-0077-2322](#).

¹¹⁸¹ [Defence Application to Withdraw Witness Evidence](#), para. 3(a).

¹¹⁸² [MLI-OTP-0001-7476](#); [MLI-OTP-0077-2438](#) at 2439; ██████████

¹¹⁸³ [Katanga TJ \(Minority Opinion of Judge Van den Wyngaert\)](#), paras 148-149.

¹¹⁸⁴ K. Fortin, [The Accountability of Armed Groups under Human Rights Law](#) (OUP 2017), p. 50.

regulate civil governance or civilian life during NIACs.¹¹⁸⁵ It is further evidenced by the restrictive wording of IHL provisions from which Article 8(2)(c)(iv) is derived.¹¹⁸⁶ Common Article 3 only regulates the administration of justice in criminal matters.¹¹⁸⁷ For AP II, “it was concluded that it was more effective to limit the scope of the Protocol by “criteria related to persons, and not to places’.”¹¹⁸⁸ Consequently, Article 6(1) AP II plainly states that the entire article “applies to the prosecution and punishment of criminal offences related to the armed conflict.” As clarified by ICRC commentary, “these must be criminal offences and not merely administrative or disciplinary offences or procedures.”¹¹⁸⁹ Terms such as “penalty”, “guilty of an offence” and “sentence” throughout Article 6 AP II further reflect the intent to regulate criminal rather than civil proceedings.¹¹⁹⁰ The focus is thus exclusively on criminal trials related to the conflict. The 1972 ICRC Expert Report concerning the drafting of AP II also indicates that the purpose of this war crime was to regulate the situation where persons were prosecuted “only by reason of having taken part in the hostilities”.¹¹⁹¹ Since AP II was to further develop protections set out in Common Article 3,¹¹⁹² any restrictive interpretation of the scope and content of Article 6 AP II applies to Common Article 3.

322. The criterion that the crimes must be “related to the conflict” imports a distinction between proceedings where the person is charged with “war crimes”(“criminal offences related to the conflict”) as opposed to “war-time crimes”(crimes that were committed at the same time as a conflict). According to leading commentators, examples of war-time crimes that do not possess a nexus with an armed conflict include shooting a wife suspected of adultery, stealing goods

¹¹⁸⁵ G. Giacca, *Economic, Social, and Cultural Rights in Armed Conflict*, OUP (2014), p. 241; W. Schabas, “[Al Mahdi Has Been Convicted of a Crime He Did Not Commit](#)” (2017) 49 Case W. Res. J. Int’l L. 75, 97-98; K. Fortin, “[The Application of Human Rights Law to Everyday Civilian Life Under Rebel Control](#)”, *Netherlands International Law Review* 63, 161-181 (2016), pp. 172, 178; M. Sassòli, “[L’administration d’un territoire par un groupe armé, peut-elle être régie par le droit?](#)” in M. Hottelier et al. (eds), *Études en l’honneur du Professeur Thierry Tanquerel*, Schulthess (2019), p. 270.

¹¹⁸⁶ M. Klamberg, “[The Legality of Rebel Courts during Non-International Armed Conflicts](#)”, *Journal of International Criminal Justice* 16, 235-263 (2018), p. 237.

¹¹⁸⁷ R. Provost, *Rebel Courts: The Administration of Justice by Armed Insurgents*, OUP (2021), p. 169. See [ICRC Commentary on First Geneva Convention](#), para. 676.

¹¹⁸⁸ K. Fortin, “[Which legal framework applies to deprivation of liberty by non-State armed groups and do they address the particular challenges when detention is conducted by non-State armed groups?](#)”, *Int’l Inst. Humanitarian Law*, 6-8 September 2018, p. 5, citing fn. 18; [ICRC Commentary on API & II](#), p. 1360, para. 4490.

¹¹⁸⁹ [ICRC Commentary on AP II](#), para. 4599.

¹¹⁹⁰ [ICRC Commentary on AP II](#), para. 4599.

¹¹⁹¹ [ICRC 1972 Report on the Work of the Conference](#), p. 83, para. 2.202 (emphasis added). See also p. 83, para. 2.199; p. 84, para. 2.216.

¹¹⁹² Art. 1(1) AP II states that the protocol “develops and supplements Article 3 common to the Geneva Conventions”.

from a local shop, or stealing cattle.¹¹⁹³ IHL does not regulate steps taken by an NSA to protect the local population against criminal acts unrelated to the conflict.¹¹⁹⁴ This is consistent with how participation in police services does not constitute direct participation in the hostilities.¹¹⁹⁵ As Schabas explains, “the observation that a group may be in a position to do things after it has taken power that it was not previously able to do hardly seems an adequate nexus for war crimes law to apply.”¹¹⁹⁶

323. This nexus criterion must be strictly interpreted and applied, otherwise NSAs would be disincentivised from attempting to erect or apply civilian rule of law protections or justice structures in connection with ordinary crimes and nuisances. This would result in less, rather than more, civilian protection. A broader nexus for IHL in connection with this provision would have a counterproductive effect in the realm of IHRL and the internationally recognised right to an effective remedy.¹¹⁹⁷ Schabas notes,¹¹⁹⁸

[s]uppose, then, for the sake of argument, that a rape took place in Timbuktu while it was ruled by the fundamentalists [...]. To whom should the crime be reported? Ought the victim to be warned that if she makes a complaint and provides evidence for prosecution she might risk being deemed an accomplice to a war crime punishable under the Rome Statute?

324. Broadening the nexus element beyond conflict-related crimes would result in an asymmetrical IHL system, as members of NSAs would risk incurring criminal responsibility for due process violations stemming from the prosecution of ordinary offences whereas the state would not.¹¹⁹⁹ Inequality of belligerent status is inconsistent with the underlining principles of IHL as it discourages compliance.¹²⁰⁰

325. The evidence shows that the establishment of *Shari'a* courts in the North of Mali predated Ansar Dine and MNLA and the existence of any tensions or clashes between groups.¹²⁰¹

¹¹⁹³ M. Sassòli, “[L’administration d’un territoire par un groupe armé, peut-elle être régie par le droit?](#)” in M. Hottelier et al. (eds), *Études en l’honneur du Professeur Thierry Tanquerel*, (Schulthess, 2019), p. 270.

¹¹⁹⁴ G. Giacca, *Economic, Social, and Cultural Rights in Armed Conflict*, OUP (2014), p. 241.

¹¹⁹⁵ United States Department of Defense, [Law of War Manual](#) (2016), pp. 232-233.

¹¹⁹⁶ W. Schabas, “[Al Mahdi Has Been Convicted of a Crime He Did Not Commit](#)” (2017) 49 Case W. Res. J. Int’l L. 75, 97.

¹¹⁹⁷ K. Fortin, “[The Procedural Right to a Remedy When the State has Left the Building? A Reflection on Armed Groups, Courts and Domestic Law](#)” (2022) J. Human Rights Practices 387, 389-390, 407.

¹¹⁹⁸ W. Schabas, “[Rebel Courts](#)” Book Symposium – *Rebel Justice Can Be Music to My Ears*, *Armed Groups and International Law* (Blog Post, 3 June 2022).

¹¹⁹⁹ K. Fortin, “[The Procedural Right to a Remedy When the State has Left the Building? A Reflection on Armed Groups, Courts and Domestic Law](#)” (2022) J. Human Rights Practices 387, 408.

¹²⁰⁰ M. Klamberg, “[The Legality of Rebel Courts during Non-International Armed Conflicts](#)”, (2018) 16(2) *Journal of International Criminal Justice* 235, pp. 235-263, 236, citing A. Clapham, “[Detention by Armed Groups under International Law](#)”, 93 *International Law Studies* (2017) 1, pp. 2-3.

¹²⁰¹ **P-0150**: T-107, p. 28, lines 7-25 (Conf).

Given that in early 2012, the Malian authorities proposed that Ansar Dine could establish their own *Qādi* in each town in the North,¹²⁰² it was unnecessary to pursue this goal through armed conflict. [REDACTED] expressly clarified that it was not Ansar Dine that brought *Shari'a* to Timbuktu, but the *Quran*: the obligation to apply *Shari'a* was dictated by God, not individuals or groups.¹²⁰³

326. [REDACTED] also testified that after the groups arrived in Timbuktu, they established a different system for investigating and adjudicating offences related to actions of Al Qaeda and armed members of the group.¹²⁰⁴ In contrast, the Islamic Tribunal's work was "considered a civilian activity, not a military one for Ansar Dine."¹²⁰⁵ Sheik Abdallah, Koutaiba, and [REDACTED] presided over the "military tribunal".¹²⁰⁶ The charged incidents were not adjudicated before this parallel system, none of the charged offences concern conflict related offences and a significant amount also fail to concern penal offences.¹²⁰⁷ The type of debt, marriage and divorce cases that were heard by the Islamic Tribunal were the same as were dealt with by Houka Houka before 2012.¹²⁰⁸ The complaint system was civilian led, as reflected by the majority of complaints stemming from complaints filed by members of the local population.¹²⁰⁹ In several cases, the individuals voluntarily cooperated with or requested police assistance for incidents where a civilian filed a complaint against another.¹²¹⁰ For instance, according to a police report, [REDACTED] complained against individuals [REDACTED] for a long time without his permission, and "now that the Islamic Sharia is in force, he is able to lodge a complaint."¹²¹¹ [REDACTED] also gave evidence that the [REDACTED] was called upon to express civilians'

¹²⁰² [MLI-D28-0005-9336](#).

¹²⁰³ [REDACTED] Video: [REDACTED]; Translation (ENG): [REDACTED]

¹²⁰⁴ [REDACTED]

¹²⁰⁵ [REDACTED]

¹²⁰⁶ [REDACTED]

¹²⁰⁷ [REDACTED]

¹²⁰⁸ [REDACTED] **D-0240**: [MLI-D28-0006-4226-R01](#) at 4426, lines 9-14

(Conf).

¹²⁰⁹ See e.g. [REDACTED]

¹²¹⁰ [MLI-OTP-0001-7437](#); [MLI-OTP-0078-0212](#); See [Defence Confirmation Submissions](#), para. 100; [MLI-OTP-0001-7425](#); [MLI-OTP-0078-0185](#) at 0186; [MLI-OTP-0001-7549](#), [MLI-OTP-0034-0177](#) at 0178; [MLI-OTP-0001-7434](#); [MLI-OTP-0069-4112](#) at 4113-4114; [MLI-OTP-0001-7555](#); [MLI-OTP-0001-7554](#); [MLI-OTP-0068-2931](#) at 2932; [MLI-OTP-0001-7413](#); [MLI-OTP-0077-2378](#) at 2380; [MLI-OTP-0001-7538](#); [MLI-OTP-0034-0173](#) at 0174; [MLI-OTP-0001-7437](#); [MLI-OTP-0078-0212](#) at 0214. The OTP signature expert, [REDACTED] could not establish that the signature on [MLI-OTP-0001-7554](#); [MLI-OTP-0001-7538](#) is the Accused's signature. See [MLI-OTP-0064-0175](#) at 0302.

¹²¹¹ [MLI-OTP-0001-7510](#); [MLI-OTP-0052-0017](#) at 0018.

indignation concerning the theft of fuel committed by an EDM guard,¹²¹² a sentiment that was expressed in [REDACTED] on the incident.¹²¹³

327. Even before 2012, the decisions of the *Qādī* would be respected,¹²¹⁴ and parties “would present themselves before the *cadi*, they are morally obliged to do so.”¹²¹⁵ Therefore, the Islamic Tribunal was consistent with previous structures and practices.

328. In the totality of incidents pertaining to the Islamic Police or the Islamic Tribunal, the Prosecution failed to establish that the “conduct took place in the context of and was associated with an armed conflict not of an international character” as required by Article 8(2)(c)(iv). The incidents are solely related to civilians and civilian matters such as using or selling of alcohol by a member of the population;¹²¹⁶ using and selling tobacco by a member of the population;¹²¹⁷ theft by a civilian of civilian property;¹²¹⁸ *Zina* or other marital issues;¹²¹⁹ practising magic;¹²²⁰

¹²¹² [REDACTED]

¹²¹³ [MLI-OTP-0064-0701-R02](#) at 0738.

¹²¹⁴ **D-0240**: T-191, p. 23, lines 1-7 (Conf); **D-0006**: T-205, p. 9, line 6 – p. 11, line 12; **P-0150**: T-096; p. 12, lines 9-20; **P-0654**: T-133, p. 50 line 1 – p. 53, line 6.

¹²¹⁵ **P-0643**: T-083, p. 66, lines 4-5 (Conf) (emphasis added). *See also* **D-0534**: [MLI-D28-0006-4188-R01](#) at 4191, lines 15-27; **D-0511**: [MLI-D28-0006-2629-R01](#) at 2632, para. 15.

¹²¹⁶ [MLI-OTP-0001-7514](#); [MLI-OTP-0034-0169](#) at 0170; [MLI-OTP-0001-7490](#), [MLI-OTP-0078-1636](#) at 1637.

¹²¹⁷ [MLI-OTP-0001-7555](#); [MLI-OTP-0068-2931](#) at 2932; [MLI-OTP-0001-7434](#); [MLI-OTP-0069-4112](#) at 4113; [MLI-OTP-0001-7542](#); [MLI-OTP-0034-0175](#) at 0176; [MLI-OTP-0001-7425](#); [MLI-OTP-0078-0185](#) at 0187.

¹²¹⁸ Original (AR): [MLI-OTP-0001-7513](#), Translation (ENG): [MLI-OTP-0069-5680](#); Original (AR) [MLI-OTP-0001-7514](#); Translation (ENG): [MLI-OTP-0034-0169](#). *See* [MLI-OTP-0064-0175](#) at 0302; Original (AR): [MLI-OTP-0001-7487](#); Translation (ENG): [MLI-OTP-0077-2322](#); Original (AR): [MLI-OTP-0001-7553](#), Translation (ENG) [MLI-OTP-0052-0105](#) at 0106; Original (AR): [MLI-OTP-0001-7552](#); Translation (ENG): [MLI-OTP-0034-0179](#); Original (AR): [MLI-OTP-0001-7437](#); Translation (ENG): [MLI-OTP-0078-0212](#) at 0213; Original (AR): [MLI-OTP-0001-7413](#); Translation (ENG): [MLI-OTP-0077-2378](#) at 2380; Original (AR): [MLI-OTP-0001-7538](#); Translation (ENG): [MLI-OTP-0034-0173](#) at 0174; Original (AR): [MLI-OTP-0001-7528](#); Translation (ENG): [MLI-OTP-0077-2795](#) at 2797; Original (AR): [MLI-OTP-0001-7373](#); Translation (ENG): [MLI-OTP-0077-2371](#) at 2372; Original (AR): [MLI-OTP-0001-7525](#); Translation (ENG): [MLI-OTP-0077-2793](#); Original (AR) [MLI-OTP-0001-7376](#); Translation (ENG): [MLI-OTP-0069-2489](#) at 2490; Original: [MLI-OTP-0001-7482](#); Translation (ENG): [MLI-OTP-0077-2251](#); Original (AR): [MLI-OTP-0001-7475](#); Translation (ENG): [MLI-OTP-0077-2245](#) at 2246; Original (AR): [MLI-OTP-0002-0051](#); Translation (ENG): [MLI-OTP-0078-0276](#) at 0277; Original (AR): [MLI-OTP-0001-7473](#); Translation (ENG): [MLI-OTP-0078-0374](#) at 0375; Original (AR): [MLI-OTP-0001-7461](#); Translation (ENG): [MLI-OTP-0077-2426](#) at 2427; Original (AR): [MLI-OTP-0001-7456](#); Translation (ENG): [MLI-OTP-0077-2307](#) at 2308.

¹²¹⁹ [MLI-OTP-0053-0114](#); [MLI-OTP-0069-5682](#); [MLI-OTP-0053-0132](#); [MLI-OTP-0069-5685](#); [MLI-OTP-0001-7430](#); [MLI-OTP-0078-0200](#) at 0201; [MLI-OTP-0001-7431](#); [MLI-OTP-0078-0203](#) at 0204; [MLI-OTP-0001-7549](#); [MLI-OTP-0034-0177](#) at 0178; [MLI-OTP-0001-7478](#); [MLI-OTP-0077-2310](#); [MLI-OTP-0053-0270](#); [MLI-OTP-0001-7419](#); [MLI-OTP-0077-2395](#) at 2396; [MLI-OTP-0001-7413](#); [MLI-OTP-0077-2378](#) at 2379; [MLI-OTP-0001-7411](#); [MLI-OTP-0077-2373](#) at 2374.

¹²²⁰ [MLI-OTP-0055-1072](#); [MLI-OTP-0054-0306](#) at 0307; [MLI-OTP-0002-0082](#); [MLI-OTP-0078-0238](#) at 0239; [MLI-OTP-0001-7560](#); [MLI-OTP-0052-0031](#) at 0032; [MLI-OTP-0001-7465](#); [MLI-OTP-0077-2239](#) at 2240; [MLI-OTP-0001-7476](#); [MLI-OTP-0077-2438](#) at 2439; [REDACTED] [MLI-OTP-0001-7470](#); [MLI-OTP-0078-0224](#) at 0225; [MLI-OTP-0001-7419](#); [MLI-OTP-0077-2395](#) at 2397.

debt between members of the population;¹²²¹ obscenity;¹²²² and personal injury between members of the population.¹²²³

8.5.2 *The element of passing a sentence or carrying out of executions has not been satisfied*

329. Article 8(2)(c)(iv) relates to the judicial act of passing a sentence as part of a criminal process or the implementation of executions in circumstances which fails to comport with the requirements in Article 8(2)(c)(iv). Use of force in connection with pre-trial arrest or detention falls outside the scope of this provision. The use of physical force, outside the framework of a criminal process and sentence, also falls outside the scope of this provision.

330. According to the ICRC, a “[s]entence” is defined as “[t]he judgment that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer’.”¹²²⁴ The article does not cover mediation or arbitration. As clarified by the Elements of Crimes, the perpetrator must have passed a sentence or executed a person.¹²²⁵ The article does not therefore regulate the use of force outside the context of a sentencing procedure or execution. Physical assaults or pre-trial restrictions do not fall within the scope of this article. In the context of a NIAC, the infliction of force is regulated by other IHL provisions. If the degree of force insufficient to trigger these provisions, the act itself is not prohibited by IHL.

331. Apart from executions (meaning the death penalty), there are no specific sentences that are automatically prescribed. The type of sentence must trigger a sufficiently severe consequence to constitute a “serious violation of IHL”. In terms of state practice concerning the degree of severity required to trigger this provision, thus far, convictions have only been entered in connection with proceedings that resulted in the death penalty.

332. The drafting history of Article 3 of the Geneva Conventions also supports the conclusion that only very serious penalties, such as the death penalty, fall within the scope of this provision. The status of corporal punishment was considered during the drafting of Article 3 of the Geneva Conventions, and it was decided not to incorporate a specific prohibition because

¹²²¹ [MLI-OTP-0001-7472](#); [MLI-OTP-0078-0372](#) at 0373.

¹²²² [MLI-OTP-0001-7460](#); [MLI-OTP-0078-0221](#) at 0222.

¹²²³ [MLI-OTP-0001-7437](#); [MLI-OTP-0078-0212](#) at 0214.

¹²²⁴ [ICRC Commentary on First Geneva Convention](#), citing B. Garner (ed.), *Black’s Law Dictionary*, 10th ed., Thomson Reuters (2014), pp. 1569–1570.

¹²²⁵ [ICC Elements of Crimes](#), Art. 8(2)(c)(iv), para. 1.

corporal punishment is still employed in many national jurisdictions.¹²²⁶ It follows that corporal punishment, of the type practised in multiple jurisdictions, would not trigger Article 8(2)(c)(iv). 333. It follows from the above that “*Ta’zirs*”, provisional detention, or individual assaults inflicted by members of the groups do not trigger Article 8(2)(c)(iv). Mr Al Hassan should be acquitted of the following incidents because the conduct was not imposed pursuant to a sentence issued in connection with criminal proceedings pertaining to a conflict-related offence: P-0170, P-1710, P-1711, P-1712, P-1721, P-0547, P-0574, P-0580, P-0580’s daughter, P-0580’s mother, P-0570, P-0542, [REDACTED], P-1134, and P-0636.

8.6 The Islamic Tribunal was a regularly constituted court, which complied with the laws of the group

334. Courts established by NSAs are regularly constituted if they were established pursuant to a decision by an effective authority and vested with a broad mandate to administer justice by means of an identified source of law through rules of general application.¹²²⁷ Courts do not need to be established in accordance with domestic law,¹²²⁸ nor must they comply with the same standards of human rights law that apply to states. The applicable criteria must be tailored to the circumstances and capacity of the group in question.

335. The Elements of Crimes defines a “regularly constituted court” as one which does not afford essential guarantees of independence and impartiality or which renders a judgment that does not comply with other judicial guarantees generally recognised as indispensable under international law.¹²²⁹ This exhaustive definition contains no reference to domestic law. The emphasis falls on the capacity of the tribunal to conduct a fair trial by reference to structural guarantees, rather than the tribunal’s legal position within domestic infrastructure or constitutions.¹²³⁰

336. Applicable sources under Article 21(2) of the Statute further confirm that it is unnecessary for tribunals established by NSAs to comply with domestic law or constitutional provisions. Article 6 of AP II places emphasis on whether the court offers “guarantees of independence and impartiality”. According to Article 6’s drafting history, this language was chosen to avoid

¹²²⁶ [ICRC Commentary on First Geneva Convention](#), para. 595; also *see* fn. 33 citing [ICRC Official Records of the Diplomatic Conference, Vol. VIII](#), pp. 421–429, paras 5, 12; [Vol. X](#), pp. 49–50, paras 146–147; pp. 103–104. For examples, see [U.S. Code, Title 10, Armed Forces, Article 15](#), “Commanding officer’s non-judicial punishment”.

¹²²⁷ R. Provost, *Rebel Courts: The Administration of Justice by Armed Insurgents*, OUP (2021), pp. 199, 215.

¹²²⁸ M. Bothe et al., *New Rules for Victims of Armed Conflict: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Pub., 2nd ed., 2013), pp. 745-746.

¹²²⁹ [ICC, Elements of Crimes](#), Article 8(2)(c)(iv), para. 4; [Al Hassan Confirmation Decision](#), para. 376.

¹²³⁰ [Al Hassan Confirmation Decision](#), para. 376. *See* [ICRC Commentary on Second Geneva Convention](#), para. 700; [ICRC Commentary on Third Geneva Convention](#), para. 714.

debate of whether insurgent parties could establish courts.¹²³¹ ICRC commentary to Common Article 3 indicates that the notion of a “regularly constituted court” should encompass courts established in accordance with the laws of the armed group. Otherwise, the reference in Common Article 3 to “each party to the conflict” would be deprived of any force.¹²³² Replacing the requirement of a “regularly constituted court” with the phrase “essential guarantees of independence and impartiality” reflects states’ understanding that a strict definition of a “regularly constituted court” would deprive this provision’s application to “each party” of any effect.¹²³³ Defining a “regularly constituted court” by reference to Article 6 AP II allows the Elements of the Crimes to reflect states’ intention that the ICC should follow the flexible approach of Article 6 AP II.¹²³⁴

337. IHL does not prohibit NSAs from passing their own laws.¹²³⁵ Since Article 6 AP II prohibits NSA from passing unfair sentences, the NSA must also have the power to pass sentences. Article 6(2)(c) AP II defines the principle of legality by reference to the “law” in force when the offence was committed. The term “law” is unqualified, allowing the “law” of armed groups to fall within the term’s scope.¹²³⁶ This position is accepted by scholarship and state military manuals.¹²³⁷ The ICRC recognises that both states’ and rebel groups’ law could be considered as “national law” coexisting in the territory of a state.¹²³⁸ A tribunal established by an NSA complies with the principle of legality when it implements norms promulgated and applied by the rebel groups when the offences were committed.¹²³⁹

¹²³¹ [ICRC Commentary on AP I & II](#), p. 1398, para. 4600.

¹²³² [ICRC Commentary on First Geneva Convention](#), para. 692; see A. Amoroso, “[Should the ICC Assess Complementarity with Respect to Non-State Armed Groups? Hidden Questions in the Second Al-Werfalli Arrest Warrant](#)” (2018) 16(5) JICJ 1063, 1077; M. Bothe et al., *New Rules for Victims of Armed Conflict: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Pub., 2nd ed., 2013), pp. 745-746.

¹²³³ See [ICRC Commentary on First Geneva Convention](#), paras 692-693.

¹²³⁴ [ICC, Elements of Crimes](#), Article 8(2)(c)(iv), para. 4.

¹²³⁵ K. Fortin, “[The Procedural Right to a Remedy When the State has Left the Building? A Reflection on Armed Groups, Courts and Domestic Law](#)” (2022) J. Human Rights Practices 387, 400.

¹²³⁶ S. Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012), pp. 507-508; M. Bothe et al., *New Rules for Victims of Armed Conflict: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Pub., 2nd ed., 2013), pp. 745-746.

¹²³⁷ See, e.g., UK Ministry of Defence, [The Joint Service Manual of the Law of Armed Conflict](#), 2004, para. 15.42, fn. 94; see S. Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012), p. 507; R. Provost, *Rebel Courts: The Administration of Justice by Armed Insurgents*, (OUP, 2021) pp. 190-191; E. Heffes, [Detention by Non-State Armed Groups Under International Law](#) (CUP, 2022) , p. 171.

¹²³⁸ [ICRC Commentary on AP I & II](#), p. 1399, paras 4605– 4606; [ICRC Commentary on Second Geneva Convention](#), para. 714.

¹²³⁹ R. Provost, *Rebel Courts: The Administration of Justice by Armed Insurgents*, OUP (2021), p. 342.

338. IHL or criminal law do not indicate that a court must be established in accordance with national law to be “regularly constituted”.¹²⁴⁰ IHL’s overall goal of ensuring civilian protection and security is best served by encouraging NSAs to erect accountability mechanisms.¹²⁴¹ Since the purpose of insurgency or rebellion is to change the existing order, it would be illogical to expect NSAs to establish such mechanisms in accordance with existing domestic legislation.¹²⁴²

339. Although it is suggested that the legal capacity to establish courts is limited to the prosecution of conduct related to hostilities, this position is based on the argument that rights must stem from obligations.¹²⁴³ This position bolsters the Defence’s position that Article 8(2)(c)(iv) only regulates the prosecution of conflict-related offences. Everything outside this scope is not covered by combat immunity and would fall within the jurisdiction of domestic law. The power to prosecute conflict-related offences also stems from the notion of responsible command, implying a duty to hold IHL violators accountable. Case law on the scope of responsible command affirms that the absence of *de jure* capacity or “formal legal competence” does not absolve commanders from taking steps within their material capacity.¹²⁴⁴ Therefore, the duty to punish is not circumscribed by the need to comply with domestic legal requirements.

8.6.1 The threshold for Article 8(2)(c)(iv), which is triggered by egregious violations of fair trial/flagrant denials of justice, has not been met

340. Article 8(2)(c)(iv) of the Rome Statute is derived from the protection under Common Article 3 to the Geneva Conventions and Article 6 of AP II, which were designed to protect combatants from retaliatory show trials or collective punishment.¹²⁴⁵ Article 8(2)(c)(iv) was never intended to penalise traditional or transitional forms of justice or to intrude into the realm of ordinary offences. An overly vigorous or extensive interpretation of Article 8(2)(iv) would threaten the Court’s system of complementarity, which is built on the premise that “the Court was not established to be an international court of human rights, sitting in judgment over

¹²⁴⁰ R. Provost, *Rebel Courts: The Administration of Justice by Armed Insurgents*, (OUP, 2021), p. 215; M. Klamberg, “[The Legality of Rebel Courts during Non-International Armed Conflicts](#)”, (2018) 16(2) *Journal of International Criminal Justice* 235, 243.

¹²⁴¹ [ICRC Commentary on Third Geneva Convention](#), para. 725.

¹²⁴² M. Bothe et al., *New Rules for Victims of Armed Conflict: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Pub., 2nd ed., 2013), pp. 745-746.

¹²⁴³ J. Somer, “[Jungle justice: passing sentence on the equality of belligerents in non-international armed conflict.](#)” (2007) 89 (867) *International Review of the Red Cross* 655, p. 658.

¹²⁴⁴ [Kamuhanda TJ](#), para. 610; see [Bemba Confirmation Decision](#), para. 501.

¹²⁴⁵ [ICRC Official Records of the Diplomatic Conference, Vol. II](#), p. 83, paras 2.198, 2.200.

domestic legal systems to ensure that they are compliant with international standards on human rights.”¹²⁴⁶

341. Not every due process violation triggers Article 8(2)(c)(iv).¹²⁴⁷ Rather, the Court must consider whether the cumulative effect of such violations deprives the person of a fair trial. Therefore, due process violations during the investigation phase will not trigger this provision if the Tribunal provided a remedy in its judgment. The ICC Appeals Chamber recognised that the existence of due process violations in the investigations phase does not render the proceedings unfair even if violations result in the dismissal of certain charges or a termination of the process.¹²⁴⁸

342. The threshold for triggering Article 8(2)(c)(iv) must also be interpreted according to the Statute, including the legal framework to assess whether the ICC should defer to domestic courts. This framework defines the notion of independent and impartial proceedings primarily by reference to whether the proceedings are consistent with a genuine intent to bring the person to justice. Thus, as part of its assessment as to whether Libya was willing and able to prosecute Senussi (pursuant to a domestic code that incorporated *Shari'a*), the Appeals Chamber emphasised that due process violations would not exclude the competence of a domestic court. Rather, the violations would need to be “so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the accused so that they should be deemed [...] to be “inconsistent with an intent to bring [Mr Al-Senussi] to justice.””¹²⁴⁹ Otherwise, due process violations would only be considered if they evidenced “sham” proceedings inconsistent with the duty to eliminate impunity.¹²⁵⁰ The Appeals Chamber’s willingness to permit a trial that falls below the “egregious” threshold supports the conclusion that the defendant should not bear individual criminal responsibility for participating in trial proceedings that satisfy the ICC’s admissibility threshold.

343. A lower threshold would also have profound implications for extradition law. Under Article 6 the European Convention of Human Rights, an extradition bar only arises if the defendant faces the prospect of a flagrant denial of justice in the requesting state.¹²⁵¹ As explained in *Othman*,¹²⁵²

¹²⁴⁶ [Al Senussi Admissibility Decision](#), para. 219.

¹²⁴⁷ M. Klamberg, “[The Legality of Rebel Courts during Non-International Armed Conflicts](#)”, (2018) 16(2) *Journal of International Criminal Justice* 235, 249.

¹²⁴⁸ [Al Senussi Admissibility Decision](#), para. 200.

¹²⁴⁹ [Al Senussi Admissibility Decision](#), para. 230 (emphasis added).

¹²⁵⁰ [Al Senussi Admissibility Decision](#), para. 224.

¹²⁵¹ [ECtHR, Othman v. UK](#), para. 260.

¹²⁵² [ECtHR, Othman v. UK](#), para. 260.

“flagrant denial of justice” is a stringent test of unfairness. A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.

344. Since tests for imposing individual criminal responsibility are more stringent than the threshold for finding state human rights violations, the bar for triggering Article 8(2)(c)(iv) cannot be more lenient than the “flagrant denial of justice standard”. It would be perverse if human rights law could permit state authorities to extradite individuals to be tried in proceedings that could entail responsibility under Article 8(2)(c)(iv). The prospect that extraditing states could incur accomplice liability by cooperating with the transfer of a suspect to a domestic court that lacks full due process compliance would also undermine the Rome Statute goal of eliminating impunity.

8.6.2 *Notions of independent, impartiality and due process must also be tailored to the capacity of the NSAs and the circumstances in existence at time*

345. Certain human rights standards are more applicable to courts operated by state authorities,¹²⁵³ making it counterproductive to impose IHL obligations that exceed the capabilities of armed groups.¹²⁵⁴ After all, “[i]f humanitarian considerations dominate to the exclusion of the capacity of the insurgents [...] then the proposed rules are divorced from reality.”¹²⁵⁵ It follows that “[r]ules that are inherently beyond the reach of armed groups and which they have no hope of meeting serve little useful purpose.”¹²⁵⁶ Since nobody can be held to the impossible, the circumstances (i.e. the capacity of the group and the constraints posed by the context) offers a justification for partial implementation of fair trial rights.¹²⁵⁷ Thus, the due process guarantees in this provision must be¹²⁵⁸

interpreted in a manner which respects their substance while also making compliance with them possible. Anything less sacrifices real protection for

¹²⁵³ [ICRC Commentary on Third Geneva Convention](#), para. 715; see D. Marchesi, “[The War Crimes of Denying Judicial Guarantees and the Uncertainties Surrounding Their Material Elements](#)”, 54 *Israel Law Review* (2021) 2, p. 197.

¹²⁵⁴ S. Sivakumaran, “[Courts of Armed Opposition Groups: Fair Trials or Summary Justice?](#)” (2009) 7 JICJ 489, 503, referring to [ICRC Official Records of the Diplomatic Conference, Vol. VIII](#), p. 350 (expressing the views of the delegates of the UK and Belgium); 362 (expressing the view of the delegate of Spain); see [ICRC Commentary on API & II](#), p. 1360, para. 4490; pp. 1396-1397, para. 4597.

¹²⁵⁵ G. Draper, “[Humanitarian Law and Internal Armed Conflicts](#)” (1983) 13 *Ga. J. Int’l and Comp. Law* 253, 264.

¹²⁵⁶ S. Sivakumaran, “[Courts of Armed Opposition Groups: Fair Trials or Summary Justice?](#)” (2009) 7 JICJ 489, 501.

¹²⁵⁷ See R. Provost, *Rebel Courts: The Administration of Justice by Armed Insurgents*, OUP (2021), pp. 161, 164.

¹²⁵⁸ S. Sivakumaran, “[Courts of Armed Opposition Groups: Fair Trials or Summary Justice?](#)” (2009) 7 JICJ 489, 503.

the sake of paper standards, proving correct that old adage, the best is the enemy of the good.

346. Scholarship confirms that the due process requirements must be tailored to the capacities of NSAs. Otherwise, if the threshold falls beyond their legal capacities, NSAs have no incentive to attempt compliance.¹²⁵⁹

347. This capacity-based approach is consistent with the content and limits of command responsibility. In *Hadžihasanović*, the ICTY Appeals Chamber confirmed that the duty to punish must be interpreted through the lens of what is “feasible”.¹²⁶⁰ The assessment is fact-based and depends on the circumstances in existence at the time.¹²⁶¹ If the power to prosecute derives from the duty to punish IHL violations, tribunals cannot be held to a higher standard than that of command responsibility. As underlined by scholarship, courts operated by NSAs must act pursuant to a “reasonable interpretation of the judicial guarantees requirements which is sensitive to the asymmetrical relationship between states and armed opposition groups”.¹²⁶²

348. The goals of transitional justice skew towards ensuring effective access to justice to eliminate impunity.¹²⁶³ UN and regional standards of transitional justice emphasise the extent to which judicial entities strengthen the rule of law by “ensuring that nobody is above the law, that institutions have adequate resources and are accountable, and that people have equal and effective access to justice.”¹²⁶⁴ Courts of NSAs provide “an important alternative to summary execution”, “can contribute to the maintenance of law and order in rebel-held territory” and can “go some way towards reducing the climate of impunity”.¹²⁶⁵ For this reason, real and authentic attempts to administer justice should not be criminalised. Without trials, summary executions, arbitrary detention and punishment flourish. Courts create possibilities for avenues of justice that normally would not exist, or “armed opposition groups will have the incentive simply to detain individuals indefinitely in order to avoid their international obligations.”¹²⁶⁶

¹²⁵⁹ R. Provost, *Rebel Courts: The Administration of Justice by Armed Insurgents*, OUP (2021), p. 200; J. Somer, “[Jungle justice: passing sentence on the equality of belligerents in non-international armed conflict](#)”, 89 *International Review of the Red Cross* (2007) 655, pp. 658, 689.

¹²⁶⁰ [Hadžihasanović AJ](#), para. 33.

¹²⁶¹ [Hadžihasanović AJ](#), para. 33.

¹²⁶² J. Somer, “[Jungle justice: passing sentence on the equality of belligerents in non-international armed conflict](#)”, 89 *International Review of the Red Cross* (2007) 655, p. 658.

¹²⁶³ See [Separate Opinion of Judge Péter Kovács](#), para. 65.

¹²⁶⁴ [EEAS, “The EU’s Policy Framework on support to transitional justice”, 2015](#), p. 2. See also Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, 9 August 2012, A/HRC/21/46, para. 12.

¹²⁶⁵ S. Sivakumaran, “[Courts of Armed Opposition Groups: Fair Trials or Summary Justice?](#)” (2009) 7 JICJ 489, 489-490.

¹²⁶⁶ J. Somer, “[Jungle justice: passing sentence on the equality of belligerents in non-international armed conflict](#)”, 89 *International Review of the Red Cross* (2007) 655, p. 689.

As underlined by Sivakumaran, “rather than ignoring [insurgents’ courts] or criticizing them [...] they may be utilized in order to aid enforcement of the law.”¹²⁶⁷ Compliance to minimal guarantees is better than non-compliance because the standards are too high, as armed groups are “more likely to work towards compliance if they feel that the law allows them to meet their obligations without it being prejudicial towards them.”¹²⁶⁸

349. The requirement of “independence” should also consider how NSAs have a more “fluid” and “integrated” structure.¹²⁶⁹ It would defeat the requirements of command responsibility in NIACs to forbid NSAs from conducting trials simply because they are structurally unable to appoint persons from outside the group.¹²⁷⁰ Provost underlines that allegations of armed judges incorporated into the group and subject to the superior authority of the group’s commander do “not per se signal lack of sufficient independence.”¹²⁷¹ NSAs also cannot be required to adhere to standards of independence not applied by state authorities in situ. In many countries, including Mali, judges sitting in military courts are military officers subject to the chain of command and military discipline.¹²⁷² Furthermore, in Mali, ordinary magistrates called to sit in military tribunals do so for one year and are designated by the President of the Republic by suggestion of the Ministry of Justice.¹²⁷³ Military justice is also entrusted by IHL to try prisoners of war¹²⁷⁴ and civilians in occupied territories.¹²⁷⁵

350. Impartiality requires the decider to remain neutral for reasons unrelated to the case. It does not require neutrality vis-à-vis the policy objectives of the group that constituted the court,¹²⁷⁶ or independence from the group itself.¹²⁷⁷ Judicial impartiality is also “presumed unless the contrary is shown”.¹²⁷⁸

¹²⁶⁷ S. Sivakumaran, “The Law of Non-International Armed Conflict”, OUP (2012), p. 562.

¹²⁶⁸ J. Somer, “[Jungle justice: passing sentence on the equality of belligerents in non-international armed conflict](#)”, 89 *International Review of the Red Cross* (2007) 655, p. 687.

¹²⁶⁹ R. Provost, [Rebel Courts: The Administration of Justice by Armed Insurgents](#) (OUP 2021), pp. 201, 211.

¹²⁷⁰ R. Provost, [Rebel Courts: The Administration of Justice by Armed Insurgents](#) (OUP 2021), pp. 207-208, 212.

¹²⁷¹ R. Provost, [Rebel Courts: The Administration of Justice by Armed Insurgents](#) (OUP 2021), p. 213.

¹²⁷² *Code de Justice Militaire au Mali*, Article 9; *Defence Force Discipline Act 1982* (Cth), sections 116, 127 (Australia); *Uniform Code of Military Justice* (effective 20 December 2019), Articles 25(a), 26(b), 26A(a) (United States); *Laws of the State of Israel, Vol. 9, 5715-1954/55, Military Justice Law 5715-1955*, Article 1 (Israel). See also R. Provost, [Rebel Courts: The Administration of Justice by Armed Insurgents](#) (OUP 2021), p. 212.

¹²⁷³ *Code de Justice Militaire au Mali*, Art. 8.

¹²⁷⁴ [Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135](#), Art. 84

¹²⁷⁵ R. Provost, [Rebel Courts: The Administration of Justice by Armed Insurgents](#) (OUP 2021), p. 209; see also [Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287](#), Art. 66.

¹²⁷⁶ R. Provost, [Rebel Courts: The Administration of Justice by Armed Insurgents](#) (OUP 2021), pp. 208, 213.

¹²⁷⁷ M. Sassòli, “[L’administration d’un territoire par un groupe armé, peut-elle être régie par le droit?](#)”, in M. Hottelier et al. (eds), *Études en l’honneur du Professeur Thierry Tanquerel*, Schulthess (2019), p. 271.

¹²⁷⁸ [Al Senussi Admissibility Decision](#), para. 250.

351. With respect to the definition of “judicial guarantees which are generally recognized as indispensable by international law”, this element does not automatically import human rights concepts, particularly when such concepts are displaced by IHL or human rights derogations. Neither the ICCPR nor regional instruments such as the ECHR or the ACHR include the right to a fair trial as a non-derogable guarantee during emergencies. The possibility of including this right among the list of non-derogable rights was discussed but expressly rejected during the drafting process that led to the three above-mentioned conventions.¹²⁷⁹ After considering the requirements of peremptory norms of international law and IHL, the Human Rights Committee’s General Comment on derogations during an emergency limited its description of fundamental non-derogable fair trial rights to the existence of a “court of law”, the “presumption of innocence”, and the principle of habeas corpus.¹²⁸⁰ During the drafting of the Rome Statute, states also cautioned that “it would be inappropriate to adopt [the judicial guarantees] of international human rights law, which are intended to apply during peacetime”.¹²⁸¹

352. The second obstacle to the automatic incorporation of human rights standards into the war crime of sentencing and execution without due process relates to the addressees of international human rights law. International human rights law outlines the relationship between states and individuals and is directed by the obligations of states. The application of international human rights law to non-state armed groups is controversial.¹²⁸² Individual criminal responsibility only comes into play in relation to criminal norms that are certain and foreseeable.¹²⁸³ Given the current debate as to what extent should NSAs be bound by IHRL, it is impossible to conclude that individual members of NSAs could have anticipated in 2012 that they could have incurred criminal responsibility for failing to apply human rights law.

353. The notion of indispensable guarantees recognised by international law is predicated on “an international minimum standard that would avoid the variations found among national legal

¹²⁷⁹ [S. Stavros, “The Right to a Fair Trial in Emergency Situations”, \(1992\) 41 International & Comparative Law Quarterly 343](#), pp. 347– 348; J. Oraá, *Human Rights in States of Emergency in International Law*, Clarendon Press (1992) p. 91.

¹²⁸⁰ UNHRC, [CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency](#), 31 August 2001, CCPR/C/21/Rev.1/Add.11, para. 16.

¹²⁸¹ [Colombia, Comments on the Proposal Submitted by Costa Rica, Hungary and Switzerland on Article 8 paragraph 2\(c\) of the Rome Statute of the International Criminal Court, UN Doc PCNICC/1999/WGEC/DP.15, 29 July 1999](#), p. 3.

¹²⁸² See J. Henckaerts and C. Wiesener, “[Human Rights Obligations of Non-State Armed Groups: An Assessment Based on Recent Practice](#)” in E. Heffes, et al. (eds), *International Humanitarian Law and Non-State Actors: Debates, Law and Practice*, T.M.C. Asser Press (2020) and K. Fortin, [The Accountability of Armed Groups under Human Rights Law](#) (OUP 2017).

¹²⁸³ See *infra*, para. 503.

systems” and different legal cultures.¹²⁸⁴ This standard should not discriminate between different legal cultures. This is consistent the removal of “civilised nations” in Article 8(2)(c) of the Rome Statute, which exists in Common Article 3. Given the global reach of the Rome Statute, it would be unreasonable to construe Article 8(2)(c) in a manner that privileges a “civilised”(i.e. Western) conception of “justice” to the detriment of legal pluralism. For this reason, the war crime of sentencing and execution without due process cannot put *Shari’a* on trial or criminalise other legal systems. This concern is reflected in commentary and above-cited ICC precedent concerning complementarity.¹²⁸⁵ As a matter of state practice, it is imperative that the Chamber pays heed to the extent to which the application Islamic law during conflicts plays a positive role in ensuring adherence to principles of responsible command and civilian protection. According to Aldawoody, in communications with the ICRC, states and NSAs regularly cite their application of Islamic law when explaining their compliance with IHL principles.¹²⁸⁶

354. Human rights courts also adopt a margin of appreciation, accounting for the specifics of states’ judicial systems and their legal background when assessing the fairness of a trial. As underlined by the ECtHR, “what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case.”¹²⁸⁷ During the Rome Statute negotiations regarding complementarity, it was necessary for the Court to adopt a degree of flexibility reflecting the different state capacities to avoid adverse outcomes triggered “essentially for reasons of poverty”.¹²⁸⁸ NSAs also cannot be expected to adhere to due process standards which fall beyond the capacity of the state or which are rendered impossible due to neglect or omissions by the state.

355. This margin of appreciation based on cultural considerations is also reflected by domestic practice. For example, the Colombian Constitutional Court held that due process guarantees protected under the Constitution, such as the right to a defence counsel, cannot be applied to Indigenous jurisdictions as they apply to state courts. Rather, they must adapt to reflect the

¹²⁸⁴ R. Provost, [Rebel Courts: The Administration of Justice by Armed Insurgents](#) (OUP 2021), p. 206.

¹²⁸⁵ [Al Senussi Admissibility Decision](#), paras 224-230.

¹²⁸⁶ A. Al-Dawoody, “[Laws Of Yesterday’s Wars Symposium – Islamic Laws Of War](#)”, Lieber Institute, West Point (7 April 2023). See also A. Bellal et al., “[From Words to Deeds: A Study of Armed Non-State Actors’ Practice and Interpretation of International Humanitarian and Human Rights Norms](#)”, Geneva Academy, September 2022, p. 29.

¹²⁸⁷ [ECtHR, *Beuze v. Belgium*](#), para. 120.

¹²⁸⁸ M. Damaška, “Reflections on Fairness in International Criminal Justice” (2012) 10 J. Int’l Crim. Just. 611, 615; W. Schabas and M. El Zeidy, “Article 17: Issues of Admissibility” in O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary*, 3rd ed., CH Beck (2016) p. 828; see R. Provost, [Rebel Courts: The Administration of Justice by Armed Insurgents](#) (OUP 2021), pp. 304-305.

peculiarities of Indigenous courts.¹²⁸⁹ The UN Special Rapporteur on the Rights of Indigenous Peoples underscored in this regard that:¹²⁹⁰

Indigenous peoples commonly express deep alienation from systems of justice that appear to them foreign and inaccessible. Judicial structures frequently reflect those of former colonial powers without sensitivity to indigenous culture. Lack of confidence in the ordinary justice system may arise from a long history of impunity, marginalization, discrimination and stigmatization and procedures that do not accommodate or even recognize their cultural specificities.

[...]

Few African countries offer legal recognition of the existence of indigenous peoples in their countries in their national constitutions or legislation. For the Tuareg in Mali, that translates into a lack of recognition as peoples entitled to particular collective rights.

356. Most of these inconsistencies with international human rights norms may be present in ordinary state justice systems and may be more pronounced in the state system than the Indigenous system. Although consistency with international human rights is important for both Indigenous and non-Indigenous justice systems, the mere existence of human rights concerns in Indigenous justice systems should not constitute a valid argument to reject their legitimacy.

357. Rebel groups argued that they cannot be expected to comply with due process standards that fall outside of their capacity for reasons beyond their control. For example, in El Salvador, the FMLN argued that they could not be expected to conduct trials with qualified defence counsel if there were no such counsel in the region.¹²⁹¹ An overly stringent definition of due process requirements in the context of this specific war crime would have far-reaching consequences on post-conflict transitional justice and the right to an effective remedy. As an example, Gacaca courts did not comply with the right to legal representation, but they performed a crucial accountability function and facilitated the release of thousands of individuals from lengthy pre-trial detention when the judiciary lacked capacity.¹²⁹² The lawfulness of Gacaca judgments is reflected by ICTR judgments relying on their contents.¹²⁹³ NGOs and IGOs would also risk incurring accomplice liability if attempts to aid and abet less than perfect transitional justice apparatus could trigger the application of Article 8(2)(c)(iv).

¹²⁸⁹ *Corte constitucional, Sentencia T-349/96* (1996) s 2.4.2.3; *Corte constitucional, Sentencia T-196/15* (2015) s II.3.

¹²⁹⁰ UNHRC, “Rights of indigenous peoples: Report of the Special Rapporteur on the rights of indigenous peoples”, [A/HRC/42/37](#), 2 August 2019, paras 34, 57.

¹²⁹¹ S. Sivakumaran, “[Courts of Armed Opposition Groups: Fair Trials or Summary Justice?](#)” (2009) 7 JICJ 489, 492.

¹²⁹² See [Decision on Investigation in Afghanistan](#), para. 44.

¹²⁹³ [Ngirabatware TJ](#), para. 62.

8.7 Specific due process rights which are not required by IHL

358. The only guarantees deemed indispensable during a conflict are the following: (i) the right to be tried by an independent and impartial tribunal;¹²⁹⁴ (ii) the right to be informed without delay of the particulars of the offence alleged against the accused;¹²⁹⁵ (iii) the right to be afforded necessary rights and means of defence;¹²⁹⁶ (iv) the principle of individual criminal responsibility;¹²⁹⁷ (v) the *nullum crimen sine lege* principle;¹²⁹⁸ (vi) the presumption of innocence;¹²⁹⁹ (vii) the right to be present at trial;¹³⁰⁰ and (viii) the right not to be compelled to testify against oneself or to confess guilt.¹³⁰¹

359. The right to an appeal is not required by IHL¹³⁰² or Islamic law.¹³⁰³ Under IHL or Islamic law, the right to defence does not require assistance by a qualified defence counsel. Islamic law vests the *Qāḍī* with the duty to search for truth that can assist the defendant and apply the burden in their favour.¹³⁰⁴ The ICC found that¹³⁰⁵

the lack of a lawyer due primarily to the security situation in the country, without more, does not lead to a finding that the proceedings were or are not “being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice” within the meaning of article 17 (2) (c) of the Statute.

360. The right to public hearings is a derogable right.¹³⁰⁶ IHL does not require judges to have specific legal training or qualifications. In common law jurisdictions, juries consisting of laypersons decide on the guilt or innocence of people tried with very serious crimes. It is also

¹²⁹⁴ [Additional Protocol II](#), Article 6(2).

¹²⁹⁵ [Additional Protocol II](#), Article 6(2)(a).

¹²⁹⁶ [Additional Protocol II](#), Article 6(2)(a).

¹²⁹⁷ [Additional Protocol II](#), Article 6(2)(b).

¹²⁹⁸ [Additional Protocol II](#), Article 6(2)(c).

¹²⁹⁹ [Additional Protocol II](#), Article 6(2)(d).

¹³⁰⁰ [Additional Protocol II](#), Article 6(2)(e).

¹³⁰¹ [Additional Protocol II](#), Article 6(2)(f).

¹³⁰² S. Sivakumaran, “[Courts of Armed Opposition Groups: Fair Trials or Summary Justice?](#)” (2009) 7 JICJ 489, 508, fn. 115; see M. Bothe et al., *New Rules for Victims of Armed Conflict: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 2nd ed., Martinus Pub. (2013), p. 652. See also M. Klamberg, “[The Legality of Rebel Courts during Non-International Armed Conflicts](#)”, 16 JICJ (2018) 235-263, p. 244.

¹³⁰³ S. Tellenbach, “[Fair Trial Guarantees in Criminal Proceedings Under Islamic, Afghan Constitutional and International Law](#)”, 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2004), pp. 929-941. See also M. Abdel Haleem et al. (eds), *Criminal Justice in Islam: judicial procedure in the Shari’ah*, I.B. Tauris (2003), p. 10.

¹³⁰⁴ M. Abdel Haleem et al. (eds), *Criminal Justice in Islam: judicial procedure in the Shari’ah*, I.B. Tauris (2003), p. 7.

¹³⁰⁵ [Al Senussi Admissibility Decision](#), para. 192.

¹³⁰⁶ S. Stavros, “[The Right to a Fair Trial in Emergency Situations](#)”, (1992) 41 *International & Comparative Law Quarterly* 343, p. 347.

possible for individuals without legal training to judge domestically or at the ICC.¹³⁰⁷ It should be underlined that the Islamic Tribunal applied norms coming from established sources of a religious nature.

8.7.1 The Islamic Tribunal was regularly constituted and applied guarantees recognised as being indispensable

361. The Tribunal was established in accordance with the laws and procedures of the group.¹³⁰⁸ The Tribunal also applied a pre-existing Islamic law and adhered to the Malikite school, a school of interpretation followed in the North of Mali,¹³⁰⁹ although they occasionally deviated to achieve a more lenient result.¹³¹⁰

362. The *Hadd* prohibitions and punishments were prescribed by fixed texts such as the *Quran* and were not arbitrary.¹³¹¹ The groups publicised the rules by preaching on the streets, hosting radio sessions, and giving sermons.¹³¹² According to ██████████ he used the same sermons that he had given before 2012.¹³¹³ Punishments were not applied until after this notification period was completed.¹³¹⁴ Witnesses testified that the rules were known before punishments were imposed.¹³¹⁵

363. Further steps were taken to comply with the principle of legality. According to Abu Zeid's instructions, if someone violated the rules, it was first necessary to inform the person of the contravention.¹³¹⁶ If there was a second contravention, this person would be cautioned.¹³¹⁷ Punishments were only imposed for further contraventions.¹³¹⁸ Abu Zeid consulted with the local imams, including ██████████ and took their views into consideration.¹³¹⁹ ██████████

¹³⁰⁷ [Katanga et al. Re-composition Decision](#), paras 11-17.

¹³⁰⁸ The group leaders, in agreement with local scholars in Timbuktu, planned and implemented a justice system based on local religious tradition and ensured that it was properly applied. See ██████████

¹³⁰⁹ **D-0540**: T-183, p. 54, line 12 – p. 56, line 15; p. 64, lines 1-20 (Conf); [MLI-OTP-0025-0010](#); [MLI-OTP-0033-5244](#) (transcript) at 5247, lines 101-111; ██████████

¹³¹⁰ ██████████

¹³¹¹ ██████████

¹³¹² ██████████

¹³¹³ ██████████

¹³¹⁴ ██████████

¹³¹⁵ **P-0004**: T-165, p. 47, lines 4-7; **P-0646**: T-077, p.8, lines 10-12 (Conf); ██████████

See also ██████████ Video: ██████████, Translation (ENG): ██████████

¹³¹⁶ **P-0654**: T-134, p. 22, line 23 – p. 23, line 2 (Conf); T-129, p. 30, lines 18-25 (Conf); T-130, p. 39, line 24 – p. 40, line 11 (Conf); **P-0150**: T-095, p. 40, lines 2-14 (Conf); T-112, p. 40, line 25 – p. 41, line 4 (Conf).

¹³¹⁷ **P-0654**: T-134, p. 22, line 23 – p. 23, line 2 (Conf); T-129, p. 30, lines 18-25 (Conf); T-130, p. 39, line 24 – p. 40, line 11 (Conf); **P-0150**: T-095, p. 40, lines 2-14 (Conf); T-112, p. 40, line 25 – p. 41, line 4 (Conf).

¹³¹⁸ **P-0654**: T-134, p. 22, line 23 – p. 23, line 2 (Conf); T-129, p. 30, lines 18-25 (Conf); T-130, p. 39, line 24 – p. 40, line 11 (Conf); **P-0150**: T-095, p. 40, lines 2-14 (Conf); T-112, p. 40, line 25 – p. 41, line 4 (Conf).

¹³¹⁹ ██████████

convinced the religious scholars in Ansar Dine and AQIM to apply the interpretation that was most consistent with the madhab followed by local imams.¹³²⁰ The local imams consequently conveyed information in their sermons concerning the application of *Shari'a*.¹³²¹

364. The law was applied independently and impartially to everyone before the Tribunal,¹³²² including members of Ansar Dine or Al Qaeda.¹³²³ Unlike Malian Courts, the Islamic judges were not corrupt and made no distinction between economic class.¹³²⁴ The proceedings reflected a genuine intent to provide justice for the local population.¹³²⁵ They cannot be equated to sham proceedings or show trials.

365. The judges applied Islamic law to resolve disputes¹³²⁶ before and after 2012.¹³²⁷ Before 2012, the Malian justice system relied on the Islamic tribunals to administer justice in Timbuktu. The judges in the Islamic Tribunal were appointed based on their knowledge, experience as a judge, and rapport with the local community.

366. The local population viewed Imams and *Qādīs* as more legitimate and less corrupt than judges appointed under the Malian justice system.¹³²⁸ The Tribunal's composition reflected different communities in Timbuktu,¹³²⁹ and judges were not required to be members of Ansar Dine nor to swear an oath to Al Qaeda.¹³³⁰ Judges were recused from cases in which they had a personal interest.¹³³¹

367. The allegation that there were weapons in the deliberating room does not undermine the Tribunal's independence or impartiality. The Prosecution has not established that weapons were seen by witnesses who appeared before the Tribunal or that the weapons were present during each hearing: P-0565 did not see weapons during the hearings,¹³³² and D-0240 affirmed that no pressure or influence was applied when he appeared as a witness.¹³³³ The Prosecution

¹³²⁰ [REDACTED]

¹³²¹ [REDACTED]

¹³²² [REDACTED]

¹³²³ [REDACTED]

¹³²⁴ P-0065: T-044, p. 66, lines 22-24 (Conf).

¹³²⁵ [REDACTED]

¹³²⁶ [REDACTED] See also P-0065: T-042, p. 39, line 24 – p. 40, line 2 (Conf).

¹³²⁷ D-0240: T-191, p. 23, lines 2-7 (Conf); [REDACTED]

¹³²⁸ P-0643: T-083, p. 52, line 18 – p. 53, line 10 (Conf); [MLI-D28-0004-3482](#) at 3486. See P-0654: T-133, p. 42, line 18 – p. 43, line 1 (Conf); D-0553: [MLI-D28-0005-9325-R01](#) at 9327, para. 11; D-0240: [MLI-D28-0006-4222-R01](#) at 4225, line 25 – 4226, line 14; [MLI-D28-0006-3166](#).

¹³²⁹ [REDACTED] See also [REDACTED]

¹³³⁰ [REDACTED]; [REDACTED]

¹³³¹ [REDACTED]

¹³³² P-0565: T-051, p. 30, line 21-21 (Conf).

¹³³³ D-0240: [MLI-D28-0006-4222-R01](#) at 4231, line 19 – 4233, line 2; T-191, p. 17, line 25- p. 18, line 1 (Conf).

has also not established that the weapons were provided to Judges by Ansar Dine or related to the individual's position in the Tribunal. In Timbuktu during 2012, it was common for individuals to carry weapons for personal protection.¹³³⁴ P-0065, [REDACTED] was filmed with heavy weapons and further affirmed that it was common for [REDACTED] to be filmed bearing weapons as a "souvenir".¹³³⁵ P-0150 testified that many locals and members of the [REDACTED] tribe, who were not members of the groups, carried weapons.¹³³⁶ Whereas some members of the Tribunal had a weapon for personal security,¹³³⁷ others did not.¹³³⁸ The weapons were not used to threaten or intimidate witnesses or suspects.¹³³⁹

368. There were no Islamic Police in the room where witnesses were heard.¹³⁴⁰ Judges examined incriminating and exculpatory issues through an inquisitorial process where both Prosecution and Defence cases were explored in line with Islamic law¹³⁴¹ and traditional practices applied in the North of Mali.¹³⁴² The absence of lawyers from such procedures was also consistent with traditional practices applied in Timbuktu before 2012.¹³⁴³

369. Individuals were informed of the evidence against them¹³⁴⁴ and the reasons for their arrest.¹³⁴⁵ No force was used against persons when they were arrested.¹³⁴⁶ The defendants could call witnesses and were given assistance to locate witnesses.¹³⁴⁷ The proceedings were interpreted into local languages¹³⁴⁸ and public decisions were issued, consistent with the principle of legal certainty.¹³⁴⁹

370. The burden of proof was on the complainant.¹³⁵⁰ When facing a potential *Hadd* penalty, the defendant also had the right to remain silent without any adverse inference being draw.¹³⁵¹ In line with Islamic criminal procedure,¹³⁵² in case of doubt, the complaint would be

1334 [REDACTED]

1335 P-0065: T-048, p. 35, line 20 – p. 37, line 7 (Conf); [MLI-D28-0004-2938](#)

1336 P-0150: T-118, p. 46, lines 1-17 (Conf).

1337 [REDACTED]

1338 [REDACTED]

1339 *See* [REDACTED]

1340 [REDACTED]

1341 [REDACTED]

1342 P-0643: T-083, p. 50, line 18 – p. 51, line 23 (Conf).

1343 P-0004: T-166, p. 21, lines 12-17 (Conf).

1344 P-0557: T-055, p. 9, lines 1-3 (Conf).

1345 [REDACTED]

1346 [REDACTED]

1347 [REDACTED]

1348 [REDACTED]

1349 R. Provost, [Rebel Courts: The Administration of Justice by Armed Insurgents](#) (OUP 2021), p. 338.

1350 [REDACTED]

1351 [MLI-OTP-0043-0272](#); [MLI-D28-0006-5900](#); [MLI-D28-0006-5908](#) at 5913, lines 22-25.

1352 S. Reza, "Due Process in Islamic Criminal Law" (2013) 46 *Geo. Wash. Int'l L. Rev.* 1, 21.

dismissed¹³⁵³ or the *Hadd* would be averted.¹³⁵⁴ In the latter instance, Islamic procedure allows the *Qādi* to issue a *Ta'zir* punishment if the *Hadd* threshold is not met.¹³⁵⁵ This is a testament to the extremely high threshold for imposing *Hadd* punishments. *Hadd* punishments require direct evidence,¹³⁵⁶ whereas a *Ta'zir* can be based on circumstantial evidence.¹³⁵⁷ The Tribunal's issuance of a *Ta'zir* in lieu of a *Hadd* does not mean that the threshold for any criminal penalty was not satisfied.

371. The Islamic Tribunal followed the approach of applying exceptions and the principle of doubt, to avoid applying the *Hadd*, where possible.¹³⁵⁸ As noted by Koutaiba, apart from the case of Dédéou Maiga, “[t]here were dozens of theft cases in Tombouctou and they were all thrown out through doubtful evidence.”¹³⁵⁹ This statement is corroborated by the following judgments: [REDACTED]

¹³⁵³ [REDACTED] [MLI-OTP-0024-0015](#) at 0044.

¹³⁵⁴ Original: [MLI-OTP-0001-7413](#); Translation (ENG): [MLI-OTP-0077-2378](#) at 2380. *See also* [REDACTED]

¹³⁵⁵ S. Reza, “Due Process in Islamic Criminal Law” (2013) 46 *Geo. Wash. Int'l L. Rev.* 1, 21. *See also* M. Lippman et al., *Islamic Criminal law and procedure: An Introduction*, Praeger (1988), p. 52; Original: [MLI-OTP-0068-4781](#), Translation (ENG): [MLI-OTP-0078-1770](#); [MLI-OTP-0068-4783](#); [MLI-OTP-0069-3225](#); [MLI-OTP-0068-4786](#); [MLI-OTP-0069-3227](#).

¹³⁵⁶ W. Hallaq, *Shari'a Theory, Practice, Transformation*, (CUP 2009), pp. 311-312.

¹³⁵⁷ Prof. Dr. Anwarullah, *The Islamic law of evidence*, Kitab Bhavanm (2006), pp. 16-17. *See also* [REDACTED]

¹³⁵⁸ [MLI-OTP-0043-0272](#) (audio); [MLI-D28-0006-5900](#) (transcript); [MLI-D28-0006-5908](#) (translation) at 5913, line 22 – 5914, line 3. Koutaiba was identified by [REDACTED]

¹³⁵⁹ [MLI-OTP-0024-0015](#) at 0044.

¹³⁶⁰ Original: [MLI-OTP-0001-7465](#); Translation (ENG): [MLI-OTP-0077-2239](#) at 2240.

¹³⁶¹ [OTP Trial Brief](#), paras 199-200.

¹³⁶² Original: [MLI-OTP-0001-7554](#); Translation (ENG): [MLI-OTP-0052-0107](#) at 0108. The OTP signature expert, P-0620, could not establish that the signature on [MLI-OTP-0001-7554](#) is the Defendant signature. *See* [MLI-OTP-0064-0175](#) at 0302. [MLI-OTP-0001-7434](#); [MLI-OTP-0069-4112](#) (translation) at 4113-4114.

¹³⁶³ Original: [MLI-OTP-0001-7413](#); Translation (ENG): [MLI-OTP-0077-2378](#) at 2380; Original: [MLI-OTP-0001-7538](#); Translation (ENG): [MLI-OTP-0034-0173](#) at 0174. The OTP signature expert, P-0620, could not establish that the signature on [MLI-OTP-0001-7538](#) is the Accused signature. *See* [MLI-OTP-0064-0175](#) at 0302.

¹³⁶⁴ Original: [MLI-OTP-0001-7528](#); Translation (ENG): [MLI-OTP-0077-2795](#) at 2797; Original: [MLI-OTP-0001-7373](#); Translation (ENG): [MLI-OTP-0077-2371](#) at 2372.

¹³⁶⁵ Original: [MLI-OTP-0001-7525](#); Translation (ENG): [MLI-OTP-0077-2793](#); Original: [MLI-OTP-0001-7376](#); Translation (ENG): [MLI-OTP-0069-2489](#) at 2490.

¹³⁶⁶ Original: [MLI-OTP-0001-7482](#); Translation (ENG): [MLI-OTP-0077-2251](#).

practices employed before 2012, which included “beating the jinn out of them” - a practice prohibited by Ansar Dine.¹³⁸⁵

375. The Tribunal’s approach to debt in the case of ██████████¹³⁸⁶ was also consistent with Malian law, as non-payment of debt is punishable by prison (*contrainte par corps*) for a period between two and 90 days depending on the amount.¹³⁸⁷

376. The due process standards applied by the Tribunal were higher than those applied before or after 2012 under the formal Malian justice system.¹³⁸⁸ Malian judges were corrupt, inefficient, and discriminatory.¹³⁸⁹ As a result, the local population did not trust the Malian justice system,¹³⁹⁰ preferring to use traditional systems of justice or *Qādīs*.¹³⁹¹ There were no Tuareg judges under the Malian judicial system:¹³⁹² the judges were not representative of the composition of the population.¹³⁹³ There was a “lack of confidence on the part of the citizen in the judicial authorities” which “got worse in 2012”.¹³⁹⁴ There was a severe shortage of judges and legal professionals. In 2011, there were 270 lawyers for a population of 15 million.¹³⁹⁵ There were no defence lawyers in the North of Mali before or during 2012.¹³⁹⁶ There were no judges in Timbuktu in 2012, even before the arrival of Ansar Dine.¹³⁹⁷ Arbitrary detention and torture were widely practised by the Malian authorities.¹³⁹⁸ After the *coup d’état* in Bamako, the Constitution was suspended and a state of emergency was declared which resulted in the suspension of several due process protections.¹³⁹⁹ The authorities tolerated exactions and reprisals against minority groups, such as Tuaregs, and failed to prevent or punish the civilian

¹³⁸⁵ ██████████

¹³⁸⁶ Original: [MLI-OTP-0001-7472](#); Translation (ENG): [MLI-OTP-0078-0372](#) at 0373.

¹³⁸⁷ [MLI-D28-0005-3010](#) at 3110, Article 728.

¹³⁸⁸ See ██████████

¹³⁸⁹ See **D-0211**: T-190, p. 29, lines 4-15 (Conf); **P-1086**: T-122, p. 7, line 24 – p. 8, line 11 (Conf); **P-0065**: T-044, p. 63, lines 17-22; p. 64, lines 15-18; p. 66, lines 19-22 (Conf). See also **P-0643**: T-083, p. 48, lines 14-18; p. 48, line 23 – p. 49, line 17 (Conf); [MLI-OTP-0078-3678](#); **P-0152**: T-032, p. 47, lines 1-15 (Conf); **P-0654**: T-133, p. 36, line 20 – p. 37, line 14; **P-0608**: T-154, p. 86, lines 8-14; **D-0511**: Original: [MLI-D28-0005-9310-R01](#), Translation (ENG): [MLI-D28-0006-2629-R01](#) at 2632, 2634, paras 14-15, 22.

¹³⁹⁰ **P-0643**: T-083, p. 49, line 13 – p. 50, line 17 (Conf). See [MLI-D28-0004-7124](#) at 7125.

¹³⁹¹ **P-0643**: T-083, p. 53, lines 1-10 (Conf); **P-0065**: T-046, p. 39, lines 9-12 (Conf); **D-0611**: [MLI-D28-0006-4287-R01](#) at 4269, line 13; **D-0539**: [MLI-D28-0005-9317-R01](#) at 9320, paras 22-24. See [MLI-D28-0004-8148](#) at 8163; **D-0511**: [MLI-D28-0006-2629-R01](#) at 2632, paras 1-17.

¹³⁹² **P-0065**: T-044, p. 64, lines 6-10 (Conf).

¹³⁹³ **P-1086**: T-122, p. 7, line 24 – p. 8, line 7 (Conf).

¹³⁹⁴ **P-0643**: T-084, p. 8, lines 12-16 (Conf).

¹³⁹⁵ [MLI-D28-0004-3341](#) at 3389.

¹³⁹⁶ **P-0150**: T-105, p. 63, lines 13-14 (Conf); **P-1086**: T-122, p. 7, lines 15-23 (Conf); **P-0654**: T-133, p. 36, lines 22-23 (Conf). See also **P-0654**: T-135, p. 79, lines 11-14; **P-0065**: T-044, p. 64, lines 11-18 (Conf); **P-0114**: T-060, p. 45, line 1 (Conf); **P-0643**: T-083, p. 49, lines 1-5 (Conf).

¹³⁹⁷ **P-0643**: T-083, p. 49, lines 6-9 (Conf).

¹³⁹⁸ See **P-0065**: T-050, p. 12, lines 7-11 (Conf).

¹³⁹⁹ **D-0240**: T-191, p. 15, line 15 – p. 16, line 4 (Conf).

population's application of popular forms of vengeance (i.e. "Article 320" which entailed burning thieves alive).¹⁴⁰⁰

8.7.2 *Adequate due process protections were erected concerning the application of Ta'zirs* 377. According to the instructions issued by Abu Zeid, members of the groups could only issue *Ta'zirs* after issuing a warning, and then conducting a proper investigation: only persons who were trusted to follow due process were allowed to apply *Ta'zirs*.¹⁴⁰¹ At a certain point, further instructions were issued, specifying that only the Islamic Tribunal could issue *Ta'zir*.¹⁴⁰² Beatings on the streets cannot be characterised as a legal judgment issued by Ansar Dine or AQIM; these actions were, rather, arbitrary actions of individual members.

8.8 The Prosecution has failed to demonstrate that Mr Al Hassan possessed the special knowledge required by Article 8(2)(c)(iv)

378. Article 8(2)(c)(iv), in combination with Article 30, requires the Prosecution to demonstrate beyond reasonable doubt that Mr Al Hassan knew the charged incidents concerned sentences or judgments were produced by proceedings that were not issued by a regularly constituted court or which failed to adhere to indispensable due process guarantees. This fact-based test cannot be satisfied if the defendant had no actual knowledge of the proceedings in question or the standards that should have been applied. For this reason, convictions for this war crime have been reserved for defendants who were lawyers, who were aware of the requirements of criminal procedure and due process, or who played a substantive role in the prosecution or judgment of the victims.¹⁴⁰³ In contrast, defendants with administrative or logistical roles, such as interpreters or guards, were acquitted.¹⁴⁰⁴ The reviewing authority also overturned convictions pertaining to non-lawyers, who would have had no basis to question the legality of orders that they were requested to execute.¹⁴⁰⁵

379. As concerns the circumstances of Mr Al Hassan, he had no reason to question the legitimacy and decisions of the Tribunal, which was operating under the *Shari'a* principles

¹⁴⁰⁰ MLI-OTP-0078-3678; P-0152: T-032, p. 50, lines 12-24 (Conf).

¹⁴⁰¹ [REDACTED]

¹⁴⁰² [REDACTED]

¹⁴⁰³ UNWCC, [Law Reports of Trials of War Criminals, vol. V](#), His Majesty's Stationery Office (1948), pp. 5-6, 77-78.

¹⁴⁰⁴ [Trial of Sergeant-Major Shigeru Ohashi and Six Others](#), Australian Military Court, Rabaul, 20-23 March 1946, p. 31.

¹⁴⁰⁵ UNWCC, [Law Reports of Trials of War Criminals, vol. V](#), His Majesty's Stationery Office (1948), pp. 6, 8; see [Trial of General Tanaka Hisakasu and Five Others](#), U.S. Military Commission, Shanghai, 13 August – 3 September 1946, p. 70.

long dispensed in Northern Mali.¹⁴⁰⁶ Mr Al Hassan was not a lawyer or religious scholar.¹⁴⁰⁷ He was also not a member of the *Shari'a* Committee,¹⁴⁰⁸ and could not control or predict how the Islamic Tribunal would apply the law to a specific case. Mr Al Hassan was not present during the hearings conducted by the Islamic Tribunal,¹⁴⁰⁹ and had no means of knowing whether the Tribunal properly followed its own law. The decision process within the Tribunal was not known by the Islamic Police.¹⁴¹⁰ The presence of the Emir of *Hesbah* and the *Shari'a* Committee at the implementation of sentences legitimised the punishment ensured that the proper application of Islamic law.¹⁴¹¹ By virtue of their presence, Mr Al Hassan could reasonably believe that the procedure was correct.

8.9 The Prosecution failed to demonstrate that Mr Al Hassan made culpable contribution to these charged incidents

8.9.1 The Islamic Tribunal did not base their judgments on the contents of police reports

380. The Prosecution failed to demonstrate any nexus between Mr Al Hassan's alleged role in drafting police reports and the sentences passed by the Islamic Tribunal. ██████ stated that "Al Hassan did not have any influence over the court and did not contribute in any way to the decisions reached by the court",¹⁴¹² and that Mr Al Hassan "did not take part in any court duties."¹⁴¹³ In practice, once the Tribunal received reports, they conducted fresh investigations and relied on testimony heard by the Tribunal.¹⁴¹⁴ ██████ explained that this operated as a due process protection.¹⁴¹⁵ Unlike *Hesbah*, the Islamic Police did not sit on the Tribunal.¹⁴¹⁶ P-0065 gave evidence that it was the role of the Islamic Tribunal and *Hesbah* to decide the punishments.¹⁴¹⁷ The punishments fell squarely within the parameters of *Shari'a*.¹⁴¹⁸

381. The independent nature of Islamic Tribunal proceedings is further evidenced by the content of judgments. No judgment cites police reports as a source of information or evidence. Further, the judgments rely on information not included in the original police reports. This is

¹⁴⁰⁶ P-0150: T-097, p. 37, lines 6-25 (Conf).

¹⁴⁰⁷ P-0150: T-100, p. 37, line 25 – p. 38, line 14 (Conf); P-0654: T-128, p. 35, lines 17-21 (Conf).

¹⁴⁰⁸ ██████

¹⁴⁰⁹ ██████

¹⁴¹⁰ D-0605: T-192, p. 62, lines 22-25 (Conf).

¹⁴¹¹ ██████

¹⁴¹² ██████

¹⁴¹³ ██████

¹⁴¹⁴ ██████

██████

¹⁴¹⁵ ██████

¹⁴¹⁶ ██████

¹⁴¹⁷ P-0065: T-046, p. 6, line 18 – p. 7, line 22 (Conf).

¹⁴¹⁸ P-0065: T-046, p. 6, lines 21-23 (Conf).

exemplified by the following cases: [REDACTED]

[REDACTED]¹⁴²¹ In the latter case, the defendant's confession was obtained after the police report. The report states that the arrested defendant claimed to not be involved in the burglary.¹⁴²² In contrast, while the judgment notes he had initially denied any involvement, he was made to confess.¹⁴²³ This means that the confession was obtained independently by the Tribunal pursuant to their investigations. The judgment's date also coincided with a period where Ansar Dine was avoiding imposing *Hudud*.¹⁴²⁴ No *Hudud* penalties were issued after 28 November 2012. The reasons set out in the judgment gave the Tribunal a basis to do so.

382. In the case of [REDACTED],¹⁴²⁵ the police report states that [REDACTED] was raped by her stepbrother.¹⁴²⁶ Based on the Islamic Tribunal precedent,¹⁴²⁷ no punishment should have been imposed on her. At the time the case was transmitted, Mr Al Hassan could not have known that any penalty would be imposed on [REDACTED]. Mr Al Hassan also consistently expressed his belief to Prosecution investigators that no punishment had been imposed on her.¹⁴²⁸ [REDACTED] also testified in relation to this specific case that the Tribunal conducted its own investigation and did not rely on the police report.¹⁴²⁹

383. In the case of [REDACTED]¹⁴³⁰ the judgment states "we examined the case and questioned the house guard".¹⁴³¹ The judgment of [REDACTED] refers to the individual being questioned by the Tribunal and confessing before them.¹⁴³²

¹⁴¹⁹ Original: [MLI-OTP-0055-1072](#); Translation (ENG): [MLI-OTP-0054-0306](#) at 0307; Original: [MLI-OTP-0002-0082](#); Translation (ENG): [MLI-OTP-0078-0238](#) at 0239. The OTP signature expert, P-0620, could not establish that the signature on [MLI-OTP-0055-1072](#) is the Accused's signature. See [MLI-OTP-0064-0175](#) at 0302.

¹⁴²⁰ Original: [MLI-OTP-0001-7554](#); Translation (ENG): [MLI-OTP-0052-0107](#) at 0108. The OTP signature expert, P-0620, could not establish that the signature on [MLI-OTP-0001-7554](#) is the Accused's signature. See [MLI-OTP-0064-0175](#) at 0302. Original: [MLI-OTP-0001-7434](#); Translation (ENG): [MLI-OTP-0069-4112](#) at 4113-4114.

¹⁴²¹ Original: [MLI-OTP-0001-7413](#); Translation (ENG): [MLI-OTP-0077-2378](#) at 2380; Original: [MLI-OTP-0001-7538](#); Translation (ENG): [MLI-OTP-0034-0173](#) at 0174. The OTP signature expert, P-0620, could not establish that the signature on [MLI-OTP-0001-7538](#) is the Accused's signature. See [MLI-OTP-0064-0175](#) at 0302.

¹⁴²² Original: [MLI-OTP-0001-7538](#); Translation (ENG): [MLI-OTP-0034-0173](#) at 0174.

¹⁴²³ Original: [MLI-OTP-0001-7413](#); Translation (ENG): [MLI-OTP-0077-2378](#) at 2380.

¹⁴²⁴ P-0654: T-134, p. 81, lines 3-17 (Conf).

¹⁴²⁵ Original: [MLI-OTP-0001-7549](#); Translation (ENG): [MLI-OTP-0034-0177](#) at 0178; Original: [MLI-OTP-0001-7425](#); Translation (ENG): [MLI-OTP-0078-0185](#) at 0186. The OTP signature expert, P-0620, could not establish that the signature on [MLI-OTP-0001-7549](#) is the Accused signature. See [MLI-OTP-0064-0175](#) at 0302.

¹⁴²⁶ Original: [MLI-OTP-0001-7549](#); Translation (ENG): [MLI-OTP-0034-0177](#) at 0178.

¹⁴²⁷ Original: [MLI-OTP-0002-0053](#); Translation (ENG): [MLI-OTP-0078-0280](#).

¹⁴²⁸ [MLI-OTP-0062-1058](#) at 1063, lines 141-157.

¹⁴²⁹ [REDACTED]

¹⁴³⁰ Original: [MLI-OTP-0001-7514](#); Translation (ENG): [MLI-OTP-0034-0169](#).

¹⁴³¹ Original: [MLI-OTP-0001-7487](#); Translation (ENG): [MLI-OTP-0077-2322](#).

¹⁴³² Original: [MLI-OTP-0001-7465](#); Translation (ENG): [MLI-OTP-0077-2239](#) at 2240.

8.9.2 *Judgments where the Islamic Police played no role in bringing the case before the Tribunal*

384. Several cases were brought to the Tribunal directly through complaints brought by the local population,¹⁴³³ or by *Hesbah*.¹⁴³⁴

385. Concerning ██████████,¹⁴³⁵ *Hesbah* was seized of the case following complaints filed by members of the local population.¹⁴³⁶ ██████████ testified that she was arrested by members of the security battalion then transferred to *Hesbah*.¹⁴³⁷ She was taken to the BMS, which was then under *Hesbah*'s control.¹⁴³⁸ The Islamic Police played no role in her arrest, the transfer of the case to the Tribunal, or the proceedings before the Tribunal. A *Hesbah* member oversaw the application of *Shari'a* during her flogging.¹⁴³⁹ Mr Al Hassan was not present during the execution of the sentence. Mr Al Hassan had no personal involvement in this case.

386. Similarly, in the cases of ██████████ ██████████ the Tribunal judgments explicitly refer to the role of *Hesbah* in bringing these matters to the Tribunal.¹⁴⁴⁰ The judgments also refer to independent Tribunal investigations. The Prosecution also adduced no reliable evidence on the execution of this sentence. P-0065 acknowledged he was not present and had no direct evidence for the basis of ██████████.¹⁴⁴¹ He was also unable to specify ██████████ that purportedly related to this incident.¹⁴⁴² This amounts to tenuous and indirect evidence that the Defence was prevented from rebutting through D-0231's either viva voce or through Rule 68(2)(b). D-0231 was in a position to provide the Chamber with the truth on the fact that the persons in question were not flogged and that *Hudud* punishments were suspended during the time period covering this alleged incident. As recognised by the Chamber, D-0231 "was not a mere observer but was himself involved in ██████████

¹⁴³³ ██████████; [MLI-OTP-0062-3773-R01](#) at 3786-3787.

¹⁴³⁴ Original: [MLI-OTP-0055-1813](#); Translation (ENG): [MLI-OTP-0054-0341](#); ██████████

█████████ Original: [MLI-OTP-0001-7391](#); Translation (ENG): [MLI-OTP-0077-2826](#); ██████████

¹⁴³⁵ Original: [MLI-OTP-0001-7413](#); Translation (ENG): [MLI-OTP-0077-2378](#) at 2379.

¹⁴³⁶ **D-0514**: T-208, p. 44, lines 4-17 (Conf); **P-0984**: T-069, p. 21, line 15 – p. 22, line 1 (Conf).

¹⁴³⁷ ██████████

¹⁴³⁸ **P-0641**: T-138, p. 43, lines 7-12 (Conf).

¹⁴³⁹ ██████████

¹⁴⁴⁰ Original: [MLI-OTP-0001-7430](#); Translation (ENG): [MLI-OTP-0078-0200](#) at 0201; Original: [MLI-OTP-0001-7431](#); Translation (ENG): [MLI-OTP-0078-0203](#) at 0204.

¹⁴⁴¹ **P-0065**: T-048, p. 56, line 12 – p. 58, line 4; p. 63, lines 1-12 (Conf).

¹⁴⁴² **P-0065**: T-048, p. 56, line 12 – p. 58, line 9; p. 63, lines 1-12 (Conf).

on the street, they would encourage a quick, amicable resolution.¹⁴⁶⁴ If a complaint was filed, the Islamic Police would try to resolve these cases through mediation to avoid litigation or further conflict.¹⁴⁶⁵ This was consistent with the overarching emphasis that Islamic law places on promoting reconciliation.¹⁴⁶⁶ The local population had a positive view of this aspect of police work, as the peaceful dispute resolution promoted security and avoided conflict.¹⁴⁶⁷ The Emir (Adama or Khaled) would receive any complaints brought to the Islamic Police.¹⁴⁶⁸ If they were not present, Mr Al Hassan had no authority to take action until they arrived.¹⁴⁶⁹

390. *Zina* cases could only be initiated before the Islamic Police by a complaint filed by a member of the local population:¹⁴⁷⁰ this is consistent with the victim's filing of the Bocar complaint.¹⁴⁷¹ The complaint concerning [REDACTED] was filed by her father,¹⁴⁷² and it was [REDACTED] himself who initiated the proceedings at the police.¹⁴⁷³ Following this example, a pregnant local woman also filed a complaint in relation to her lover's refusal of marriage.¹⁴⁷⁴ This appears to be where Mr Al Hassan played a positive role in helping the defendant avoid a more serious penalty by locating witnesses who could testify that the defendant was of slave descent.¹⁴⁷⁵ This shows that where possible, Mr Al Hassan helped the local population.

391. Theft cases were also reported by locals seeking a remedy.¹⁴⁷⁶ If police patrols found individuals who were attempting to commit theft, the police would stop the crime and then usually release the perpetrators.¹⁴⁷⁷ In some cases, it was the local population that reported the crime and arrested the thieves.¹⁴⁷⁸

¹⁴⁶⁴ **P-0582**: [MLI-OTP-0062-3773-R02](#) at 3783-3784, lines 341-381.

¹⁴⁶⁵ [REDACTED] **P-0582**: [MLI-OTP-0062-3773-R02](#) at 3783-3784, lines 341-381.

¹⁴⁶⁶ **D-0551**: T-201, p. 23, lines 1-9 (Conf); T-200, p. 86, lines 22-25 (Conf); **P-0150**: T-093, p. 12, lines 1-5 (Conf).

¹⁴⁶⁷ See *supra* paras. 44, 83.

¹⁴⁶⁸ **P-0582**: [MLI-OTP-0062-3773-R02](#) at 3785, lines 382-391.

¹⁴⁶⁹ **P-0582**: [MLI-OTP-0062-3773-R02](#) at 3785, lines 382-391; **P-0150**: T-110, p. 53, lines 2-10 (Conf).

¹⁴⁷⁰ **D-0514**: T-208, p. 44, lines 4-11 (Conf).

¹⁴⁷¹ Original (AR) [MLI-OTP-0002-0053](#); Translation (ENG): [MLI-OTP-0078-0280](#); **D-0551**: T-201, p. 23, lines 1-9 (Conf).

¹⁴⁷² [REDACTED]

¹⁴⁷³ See *supra* para. 433, fn. 1604.

¹⁴⁷⁴ [MLI-OTP-0034-0167](#) at 0168.

¹⁴⁷⁵ **D-0605**: T-193, p. 59, line 17 – p. 60, line 10 (Conf); T-194, p. 3, line 25 – p. 10, line 6 (Conf); **P-0605**: T-195, p. 106, line 11 – p. 107, line 17 (Conf); **D-0202**: T-203, p. 24, line 16 – p. 26, line 8 (Conf).

¹⁴⁷⁶ Original: [REDACTED], Transcript: [REDACTED], Translation (ENG): [REDACTED], lines 36-44, lines 64-65; Original: [REDACTED], Transcript: [REDACTED], Translation (ENG): [REDACTED]; **D-0554**: [MLI-D28-0006-2623-R01](#), paras 13-15.

¹⁴⁷⁷ [REDACTED]

¹⁴⁷⁸ [REDACTED]

392. The Islamic Police were obliged to transmit complaints to the Tribunal in any situation where the case required a judgment under *Shari'a*.¹⁴⁷⁹ That is, where the complaint involved a *Hudud* crime¹⁴⁸⁰ such as cases concerning *Zina*, bodily harm or murder.¹⁴⁸¹

393. It is false that there is only one signature on police reports. Apart from the absence of conclusive expert evidence, there are examples of distinctly different signatures.¹⁴⁸² Moreover, since the Prosecution did not obtain access to a complete and intact archive, the Chamber cannot make sound evidential extrapolations based on the sample put before it.

394. In such cases, Mr Al Hassan had a clerical role with the Islamic Police.¹⁴⁸³ He would translate and transcribe information conveyed by other persons.¹⁴⁸⁴ The Prosecution did not demonstrate that Mr Al Hassan was responsible for collecting the information that was contained in the reports.¹⁴⁸⁵ The investigations and interviews did not always occur in his presence, and if he had no determinative role when was present,¹⁴⁸⁶ always seeking Adama and Khaled for decisions.¹⁴⁸⁷ P-0582 and D-0605 testified that Adama and Khaled directed the investigations and interrogations.¹⁴⁸⁸

395. The Prosecution failed to adduce reliable and coherent evidence that Mr Al Hassan played a substantive role in investigations or interrogations related to the charged incidents. The only reasonable inference that can be drawn from Mr Al Hassan's investigation involvement in the mosquito-net case is that he was not involved as an investigator in other cases. Otherwise he would be listed as an investigator in the report. The exceptional nature of this case can also be explained by reference to Mr Al Hassan's prior professional relationship with hospital staff, [REDACTED], who was directly involved in the case's resolution. [REDACTED] also testified

¹⁴⁷⁹ [REDACTED]

¹⁴⁸⁰ [REDACTED] See also [MLI-OTP-0062-3845-R01](#) at 3850.

¹⁴⁸¹ **P-0582**: [MLI-OTP-0062-3845-R01](#) at 3850; [REDACTED]

¹⁴⁸² See [MLI-OTP-0001-7207](#). [REDACTED] also identified a signature as Adam's: [REDACTED]

¹⁴⁸³ [REDACTED]

¹⁴⁸⁴ [REDACTED]

[REDACTED]; **P-0065**: T-046, p. 59, lines 13-19 (Conf); [MLI-OTP-0062-3679-R01](#) at 3685-3690; [MLI-OTP-0062-3788-R01](#) at 3792; [MLI-OTP-0062-3820-R01](#) at 3823; **D-0202**: T-204, p. 9, line 8 – p. 10, line 5; p. 15, lines 7-13; p. 42, line 18 – p. 43, line 6 (Conf); [MLI-OTP-0062-3820-R01](#) at 3823.

¹⁴⁸⁵ **P-0150**: T-111, p. 29, line 20 – p. 30, line 1 (Conf).

¹⁴⁸⁶ **D-0605**: T-193, p. 19, lines 17-18 (Conf); See also **D-0605**: T-192, p. 90, lines 5-22 (Conf).

¹⁴⁸⁷ **P-0654**: T-128, p. 36, line 6 – p. 38, line 8 (Conf); [MLI-OTP-0062-3845-R01](#) at 3846-3847; [MLI-OTP-0062-3773](#) at 3784, lines 382-391; [MLI-OTP-0062-3820-R01](#) at 3830.

¹⁴⁸⁸ **P-0582**: [MLI-OTP-0062-3820-R01](#) at 3836; **D-0605**: T-192, p. 84, lines 5-8; p. 90, lines 5-8; p. 91, lines 9-17 (Conf).

that [REDACTED],¹⁴⁸⁹ which indicates that Mr Al Hassan would have carried out such investigations under the direct supervision of the Islamic Tribunal. 396. In addition, no weight can be placed on the evidence of P-0626. His memory was irretrievably impaired through his DGSE detention and he was never present during police investigations. P-0626's evidence was based on pure conjecture, underscored by his inability to provide concrete details of police investigations.¹⁴⁹⁰ P-0641's hearsay evidence on interrogations was based on an incident concerning [REDACTED] that was expressly excluded from the charges. It would be contrary to Mr Al Hassan's statutory rights to make any findings of fact concerning Mr Al Hassan's personal responsibility on the basis of this incident.¹⁴⁹¹ P-0641's inconsistent and unreliable evidence,¹⁴⁹² which was elicited through improperly leading questions¹⁴⁹³ and witness refreshing,¹⁴⁹⁴ can also be given no weight. The incident seemingly occurred in early April,¹⁴⁹⁵ which was before Mr Al Hassan joined the Islamic Police. This demonstrates that [REDACTED] "misidentified the persons who questioned him"¹⁴⁹⁶ or P-0641 incorrectly recalled the names.¹⁴⁹⁷ It was allegedly recounted to P-0641 at a time when false rumours of amputations were swirling around Timbuktu.¹⁴⁹⁸ P-0641 also erroneously claimed during the preparation session that P-0580 was amputated, then claimed he did not.¹⁴⁹⁹ Given that the groups did not enforce rules or punishments against locals until late June,¹⁵⁰⁰ the hearsay anecdote concerning [REDACTED] is implausible.

397. [REDACTED] evidence on Mr Al Hassan's alleged involvement interrogations was specific to when Khaled was the Emir.¹⁵⁰¹ This also coincides with when [REDACTED] was often absent from Timbuktu.¹⁵⁰² [REDACTED] evidence is also contradictory. When asked to provide examples of Mr Al Hassan's role in interrogations, he underscored that Mr Al Hassan's tasks were akin to those of an "assistant" rather than a deputy.¹⁵⁰³ The subordinate and negligible role of Al Hassan is

¹⁴⁸⁹ [REDACTED]

¹⁴⁹⁰ **P-0626**: T-142, p. 33, lines 1-8 (Conf).

¹⁴⁹¹ See [Defence Leave to Appeal Decision on Witness Testimony](#), paras 21-46.

¹⁴⁹² **P-0641**: T-137, p. 27, lines 12-14 (Conf); T-140, p. 44, lines 14-18; p. 45, lines 14-17; p. 48, lines 1-2 (Conf).

¹⁴⁹³ **P-0641**: T-137, p. 22, lines 20-22 (Conf).

¹⁴⁹⁴ **P-0641**: T-137, p. 29, line 24 – p. 32, line 23; p. 34, lines 2-12 (Conf).

¹⁴⁹⁵ **D-0312**: [MLI-D28-0006-5584-R01](#) at 5591, lines 2-3.

¹⁴⁹⁶ **D-0312**: [MLI-D28-0006-5584-R01](#) at 5591, lines 5-6.

¹⁴⁹⁷ **P-0641**: T-140, p. 35, lines 1-2 (Conf); **P-0150**: T-099, p. 13, lines 4-6 (Conf); **P-0641**: T-140, p. 35, line 15 – p. 37, line 1 (Conf).

¹⁴⁹⁸ **P-0641**: T-140, p. 51, line 18 – p. 52, line 14.

¹⁴⁹⁹ **P-0641**: T-140, p. 49, line 5 – p. 50, line 8 (Conf).

¹⁵⁰⁰ See [MLI-D28-0006-3315](#); [MLI-D28-0006-3325](#) at 3327, lines 4-10, 16-19.

¹⁵⁰¹ [REDACTED]

¹⁵⁰² [REDACTED]

¹⁵⁰³ [REDACTED]

further demonstrated by [REDACTED] sole example in which Mr Al Hassan’s “role” was confined to handing [REDACTED] papers, from which [REDACTED] inferred that Mr Al Hassan was present in the earlier interviews with Adama and Khoubaib.¹⁵⁰⁴ The ultimate decision in that incident was issued [REDACTED] and Houka Houka with no reference to Islamic Police investigations.¹⁵⁰⁵ The Chamber also cannot conclude that [REDACTED] evidence was based on true memory recall, as opposed to deductions on the basis of videos, documents, and evidence he read in his own case.¹⁵⁰⁶

398. No weight can be placed on the evidence of P-0114, who acknowledged the possibility that the person he saw conducting an interrogation was not Mr Al Hassan.¹⁵⁰⁷

399. As noted above in Section 8.3, the contents of reports simply reflected information provided by the local population.¹⁵⁰⁸ The Prosecution misconstrued the contents of the 12 June 2012 report.¹⁵⁰⁹ This document was allegedly signed by Adama and “El Hassan” in their capacity as witnesses rather than police officers. The phrase, asking the Tribunal to deal with the respondent harshly is written in the singular rather than the plural.¹⁵¹⁰ It is not plausible that the two signatories would have used the singular. The only reasonable interpretation of this document is that this phrase should be attributed to the plaintiff. This is consistent with the use of the “first person” to record the accounts of other complainants.¹⁵¹¹ [REDACTED] also testified that when an individual “witnesses” a debt document, they do so in their independent capacity as Muslims of good standing: they do not prosecute the debt themselves.¹⁵¹² This is similar to domestic practices allowing for certain professions to act as signatories for official documents (i.e. passport photographs). The Islamic police stamp is also upside down in the original, which indicates that this document was not stamped but placed on top of a stamped document such

¹⁵⁰⁴ [REDACTED]

¹⁵⁰⁵ [REDACTED]

¹⁵⁰⁶ [REDACTED]

¹⁵⁰⁷ **P-0114**: T-160, p. 71, line 23 – p. 72, line 6; p. 74, lines 3-4; p. 77, lines 7-10; p. 78, lines 18-25, p. 79, line 20 – p. 80, line 1 (Conf).

¹⁵⁰⁸ Original: [MLI-OTP-0001-7553](#); Translation (ENG): [MLI-OTP-0052-0105](#); Original: [MLI-OTP-0001-7552](#); Translation (ENG): [MLI-OTP-0034-0179](#); Original: [MLI-OTP-0001-7555](#); Translation (ENG): [MLI-OTP-0068-2931](#) at 2931-2932; Original: [MLI-OTP-0001-7513](#); Translation (ENG): [MLI-OTP-0069-5680](#); Original: [MLI-OTP-0001-7514](#); Translation (ENG): [MLI-OTP-0034-0169](#); Original: [MLI-OTP-0055-1072](#); Translation (ENG): [MLI-OTP-0054-0306](#) at 0307; Original: [MLI-OTP-0001-7560](#); Translation (ENG): [MLI-OTP-0052-0031](#); Original: [MLI-OTP-0001-7542](#); Translation (ENG) [MLI-OTP-0034-0175](#) at 0176; Original: [MLI-OTP-0001-7538](#); Translation (ENG) [MLI-OTP-0034-0173](#) at 0174; Original: [MLI-OTP-0001-7528](#); Translation (ENG) [MLI-OTP-0077-2795](#) at 2797; Original: [MLI-OTP-0001-7525](#); Translation (ENG) [MLI-OTP-0077-2793](#).

¹⁵⁰⁹ [OTP Final Trial Brief](#), para. 159; [MLI-OTP-0001-7546](#); [MLI-OTP-0054-0014](#) at 0015.

¹⁵¹⁰ [REDACTED]

¹⁵¹¹ See *supra* para. 311.

¹⁵¹² [REDACTED]

that the ink bled through.¹⁵¹³ The Prosecution has not established that this document is an official police report as compared to a debt complaint submitted by an individual directly to the Tribunal.¹⁵¹⁴

400. P-0582 also gave evidence that it was the complainants themselves that brought their dossiers to the Tribunal.¹⁵¹⁵ In such cases, the Islamic Police acted as a neutral records mechanism. To impute responsibility to the Islamic Police for judgments would be the same as imputing responsibility to ICC court records officers for ICC judgments.

8.9.4 Mr Al Hassan did not make a culpable contribution to the arrest of individuals or their appearance before the Tribunal

401. Mr Al Hassan's alleged role in arrests or the appearance of persons before the Tribunal was administrative in nature and did not have a measurable impact on charged criminal incidents.

402. The only arrest attributed allegedly to Mr Al Hassan concerns the first arrest of Dédéou Maiga. Not only should the Chamber not rely on the statements of Mr Al Hassan, but their contents do not support the Prosecution's case. The first arrest of Dédéou Maiga occurred because the local population tried to track him down.¹⁵¹⁶ Mr Al Hassan's presence was entirely accidental and superfluous: Adama was bringing Mr Al Hassan to work when they encountered locals complaining about the theft.¹⁵¹⁷ After he escaped from prison, Dédéou Maiga was apprehended by members of the local population.¹⁵¹⁸

403. Mr Al Hassan also played an entirely negligible administrative role concerning the transportation of persons to and from the Tribunal. The Prosecution did not adduce evidence that Mr Al Hassan was armed on such occasions or that the individuals he accompanied were in any way restrained. P-0065 testified that when he saw Mr Al Hassan with Adama at the Tribunal, he was interpreting for Adama – not performing a “security” role. There is no evidence that Mr Al Hassan performed a transport or security function in relation to any charged incident. ██████ also testified that Islamic Police members played this role¹⁵¹⁹ and did so in a neutral action akin to the security guards in the ICC courtroom.¹⁵²⁰ P-0582 stated that

¹⁵¹³ The Defence was directed to raise this in pleadings rather than with ██████ See ██████

¹⁵¹⁴ ██████

¹⁵¹⁵ P-0582: [MLI-OTP-0062-3773-R02](#) at 3786-3787, lines 409-468.

¹⁵¹⁶ P-0398: [MLI-OTP-0051-0658](#) at 0678, lines 624-628.

¹⁵¹⁷ P-0398: [MLI-OTP-0051-0658](#) at 0677, lines 622-625.

¹⁵¹⁸ [MLI-OTP-0012-2060](#); P-0654: T-134, p. 45, line 25 – p. 48, line 12 (Conf).

¹⁵¹⁹ ██████

¹⁵²⁰ ██████

when the Islamic Police accompanied individuals to the Islamic Tribunal it was similar to a transport service “*pour faciliter le déplacement*”.¹⁵²¹

404. Moreover, although the Islamic Police assisted plaintiffs and respondents by locating potential witnesses and providing transport, individuals were not compelled to appear before the Tribunal.¹⁵²² The Islamic Police were not involved in summons issued by the Tribunal.¹⁵²³

8.9.5 *Mr Al Hassan made no culpable contributions to the implementation of penalties related to charged incidents*

405. As set out above, Article 8(2)(c)(iv) penalises participation in the passing of unfair sentences or executions. It does not cover personal participation in the implementation of penalties, other than executions. Mr Al Hassan’s alleged presence or participation in the implementation of penalties is irrelevant to this charge. In the alternative, Prosecution did not demonstrate beyond reasonable doubt that Mr Al Hassan was aware of penalties issued in each case or that he was present and made a culpable contribution to the implementation of penalties. This will be developed further in section 9.7.

8.10 Specific arguments related to superior orders/mistake of fact and law/duress

406. Mistake of fact/law focusses on the defendant’s subjective belief as the mistake negates the subjective element required to establish the defendant’s knowledge or intent.¹⁵²⁴ It is therefore necessary for the Chamber to consider the personal circumstances of the defendant, which include the fact that Mr Al Hassan grew up and studied in Libya and also spent time in Mauritania (two countries where *Shari’a* is applied as part of penal law);¹⁵²⁵ the application of *Shari’a* punishments in Touareg communities before 2012;¹⁵²⁶ the fact that Mali’s referral of the situation to the ICC Prosecution made no mention of *Shari’a* punishments nor did any contemporaneous Security Council resolutions;¹⁵²⁷ the typically vague language used in 2012

¹⁵²¹ **P-0582**: [MLI-OTP-0062-3773-R02](#) at 3786-3787, lines 409-468.

¹⁵²² [REDACTED]

¹⁵²³ [REDACTED]

¹⁵²⁴ M. Milanovic, “[Mistakes of Fact When Using Lethal Force in International Law: Part I](#)”, EJIL Talk!, 14 January 2020.

¹⁵²⁵ For relevant provisions in Libyan and Mauritanian law, see [Defence Trial Brief](#), fn. 114, referring to the [Libya Penal Code](#) and Law No. 52 of 1974 on defamation, which sets out the punishment of flogging, Law No. 13 of 1425 on Theft and *haraba* (banditry) (amputation); Article 5, Mauritania’s Constitution of 1991 Penal Code of 1983 under Section IV: Attacks on the Morals of Islam, Articles 306 to 309, Article 341. Rules of evidence are based on *Shari’a* unless otherwise provided for in law, as per Article 363 of Mauritania’s Code of Criminal Procedure of 1983. *Sharia* can also be evidenced in Mauritania’s Personal Status Code of 2001. See [MLI-D28-0004-3004](#) at 3008.

¹⁵²⁶ **D-0605**: T-192, p. 25, lines 19-25 – p. 26, lines 12-16; **D-0511**: [MLI-D28-0006-2629-R01](#) at 2632, paras 15-17; **P-0150**: T-097, p. 37, lines 15-25 (Conf); **D-0202**: T-202, p. 43, line 19 – p. 50, line 22 (Conf); **D-0240**: T-191, p. 48, line 22 – p. 49, line 1 (Conf).

¹⁵²⁷ See [MLI-OTP-0001-1468](#); [MLI-OTP-0001-1924](#); [MLI-D28-0005-4963](#) (corporal punishment was left out of the Security Council resolutions).

or pre-2012 human rights reports or resolutions concerning *Shari'a* punishments;¹⁵²⁸ and the absence of any judicial precedent imposing individual criminal responsibility for applying *Shari'a* or imposing *Shari'a* punishments.

407. The lack of clarity in 2012 as concerns the unlawfulness of *Shari'a* under international criminal law is also underlined by the ICC Prosecutor's position supporting domestic trials in Libya, notwithstanding the Libyan authorities' confirmation that *Shari'a* provisions would apply.¹⁵²⁹ Indeed, it is striking testament to the absence of a critical degree of certainty concerning the unlawfulness of *Shari'a* punishments that in 2016, after reviewing [REDACTED]

[REDACTED]¹⁵³⁰ If the ICC lawyers were unable to reach a clear consensus that *Shari'a* was contrary to Rome Statute obligations at the time of the events, Mr Al Hassan could not be expected to have done so.

408. The circumstances of Mr Al Hassan further include an assessment of the impact of his religious beliefs on his capacity to understand at the time of the events, that international criminal law imposed a positive obligation to disobey orders that conflicted with mandatory directives from God. In order to impartially evaluate Mr Al Hassan's personal responsibility, it is necessary to understand *Shari'a* and the way its tenets are understood by members of the Muslim faith.

409. The obligation to apply such punishments derives from *Shari'a* (God's law).¹⁵³¹ These prohibitions thus come from God and not men or groups.¹⁵³² *Shari'a* is considered by believers to be infallible and immutable – to question *Shari'a* is to question God, or his representatives on earth.¹⁵³³ To question the lawfulness of Quranic prohibitions and *Hudud* punishments is therefore to question God or one's faith.¹⁵³⁴ If the procedures set out in the *Quran* are followed, these punishments are lawful in the eyes of Muslim believers.¹⁵³⁵

¹⁵²⁸ [Defence Final Confirmation Submissions](#), para. 135.

¹⁵²⁹ [Al Senussi OTP Article 19 Response](#), paras 42-44. *See also* [Al Senussi OPCV Observations on Admissibility](#), para. 45 (referring to applicable *Shari'a* provisions).

¹⁵³⁰ [REDACTED]
¹⁵³¹ **D-0605**: T-192, p. 25, lines 19-25 – p. 72, lines 18-25 (Conf). *See also* T-192, p. 26, lines 12-16 (Conf).

¹⁵³² **D-0605**: T-194, p. 72, lines 18-25 (Conf).

¹⁵³³ A. Quraishi, "[What If Sharia Weren't The Enemy?: Rethinking International Women's Rights Advocacy On Islamic Law](#)" (2011) 25(5) Columbia J. Gender & L. 173, 204. *See also* **D-0605**: T-194, p. 76, lines 5-7 (Conf).

¹⁵³⁴ **D-0202**: T-202, p. 43, lines 6-18 (Conf); **D-0605**: T-192, p. 74, lines 16-19 (Conf); T-194, p. 74, lines 15-22 (Conf).

¹⁵³⁵ **D-0202**: T-204, p. 41, line 22 – p. 42, line 12 (Conf).

410. The manner in which such punishments are adjudicated is a matter of *fiqh* (interpretation), which has coalesced into different schools of interpretation (*madhab*). There is no “right” or “wrong” school of interpretation under Islam:¹⁵³⁶ each school of Islam is of equal legitimacy.¹⁵³⁷ The *Malikite* school, which is widely followed in the Sahel region and Timbuktu/North of Mali,¹⁵³⁸ was followed by Ansar Dine¹⁵³⁹ and the Islamic Tribunal,¹⁵⁴⁰ unless another school produced a more favourable outcome for the person appearing before the Tribunal.¹⁵⁴¹

411. Consistent with Islamic law, when Ansar Dine was present in Timbuktu, it was the role of the Ulema to decide which school would be followed and how it would be interpreted.¹⁵⁴² The Ulema during this time were Abu Zeid and the members of the Sharia Committee.¹⁵⁴³ A believer, such as Mr Al Hassan, who was not an Ulema, cannot determine that an interpretation is lawful or manifestly unlawful:¹⁵⁴⁴ he is required to follow and accept the interpretation adopted by his Ulema. This is because once the Ulema decide that a particular interpretation should be applied to a particular community, believers in that community are required to follow that interpretation:¹⁵⁴⁵ for this reason, under *Shari’a*, a “believer would be likely to be absolved of criminal responsibility if he or she had acted out of religious obligation”.¹⁵⁴⁶

412. The question as to whether the authorities have assumed lawful control over an area or city is not relevant to the question as to whether a believer is required to respect judgments issued by such authorities, if based on *Shari’a*. Under *Shari’a*, if such authorities request an individual, who is qualified to be a judge, to accept such a post, then such a person should accept this post and decide the cases in accordance with the provisions of *Shari’a*, even if he does not accept the legitimacy of the appointing authority. Shaybani, one of the most eminent Islamic scholars, says: “If rebels take control of a city and, from among the people of that city,

¹⁵³⁶ F. Muhammadin, “[Islam and International Criminal Law: The Question of Complementarity and Ijtihad](#)”, *Opinio Juris*, 28 November 2022.

¹⁵³⁷ A. Quraishi, “[What If Sharia Weren’t The Enemy?: Rethinking International Women’s Rights Advocacy On Islamic Law](#)” (2011) 25(5) *Columbia J. Gender & L.* 173, 204.

¹⁵³⁸ **P-0643**: T-083, p. 20, line 2 (Conf); **P-0150**: T-096, p. 16, lines 22-24 (Conf).

¹⁵³⁹ **D-0540**: T-183, p. 64, lines 1-20 (Conf).

¹⁵⁴⁰ **P-1050**: Video: [MLI-OTP-0025-0010](#) at 00:04:56:23 to 00:06:11:00; Transcript (FRN): [MLI-OTP-0033-5488](#) at 5492, lines 80-110;

D-0202: T-202, p. 95, lines 18-19 (Conf).

1541

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¹⁵⁴⁴ **P-0150**: T-105, p. 55, line 22 - p. 56, line 14 (Conf).

¹⁵⁴⁵ **D-0605**: T-192, p. 72, lines 18-25 (Conf).

¹⁵⁴⁶ K. Clarke, “Religious and Secular Micro Practices, Fictions of Justice: the International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa”, p. 163.

appoint as a judge someone who does not support them, he shall enforce *Hudud* and *Qisas* and shall settle the disputes between people in accordance with the norms of justice. He has no other option but to do so.”¹⁵⁴⁷ The rationale for this position is that:¹⁵⁴⁸

Deciding disputes in accordance with the norms of justice and protecting the oppressed from oppression are included in the meaning of “enjoining right and forbidding wrong”, which is the obligation of every Muslim. However, for the one who is among the subjects it is not possible to impose his decisions on others. When it became possible for him because of the power of the one who appointed him, he has to decide in accordance with what is obligatory upon him, irrespective of whether the appointing authority is just or unjust. This is because the condition for the validity of appointment is the capability of enforcing decisions, and this condition is fulfilled here.

413. Under the doctrine of “past and closed transactions”, the lawfulness of opinions issued by “rebel” Islamic judges is also not invalidated after the central government recaptures the area: “if such decisions are valid according to one school of Islamic law and invalid according to another school, they will be deemed valid even if the judge (of the central government) belongs to the school that considers them invalid.”¹⁵⁴⁹

414. In line with the above doctrine, ██████ testified that the position in the Islamic Tribunal was imposed on Houka Houka in that “he could not escape” the responsibility.¹⁵⁵⁰ Similarly, for members of the Islamic faith in the community, like Mr Al Hassan, the judgments issued by the Islamic Tribunal, and decisions rendered by an Emir of the Islamic Police or *Hesbah*, appointed by the Ulema were lawful because they were based on *Shari’a*, not despite the fact that they were based on *Shari’a*.

¹⁵⁴⁷ S. Tabassum, “[Combatants, not bandits: the status of rebels in Islamic law](#)” (2011) 93(881) Int’l Rev. Red Cross 1, 14, fn. 76 (“[w]hen rebels appoint a judge who is qualified for the post, his legal position is similar to the judge of the central government”).

¹⁵⁴⁸ S. Tabassum, “[Combatants, not bandits: the status of rebels in Islamic law](#)” (2011) 93(881) Int’l Rev. Red Cross 1, 14, fn. 78.

¹⁵⁴⁹ S. Tabassum, “[Combatants, not bandits: the status of rebels in Islamic law](#)” (2011) 93(881) Int’l Rev. Red Cross 1, 15, fns 83, 84 (“[r]ebels take control of a city and appoint a judge there who settles many disputes. Later on, when the central government recaptures that city and the decisions of that judge are challenged before a judge of *ahl al-’adl*, he will enforce only those decisions which are valid. If such decisions are valid according to one school of Islamic law and invalid according to another school, **they will be deemed valid even if the judge of *ahl al-’adl* belongs to the school that considers them invalid**”). This is known as the doctrine of “past and closed transactions”. There is an interesting example of this doctrine in Pakistani judicial history when some judges of the Supreme Court “rebelled” against the then chief justice Sajjad Ali Shah. It was finally concluded that, after the so-called Judges Case (*Al-Jehad Trust v. Federation of Pakistan*, PLD 1996 SC 324), Justice Shah was not qualified to continue as chief justice because he was not the most senior judge of the Supreme Court. However, the cases decided by Justice Shah as “*de facto* chief justice” were not reopened, on the basis of the doctrine of past and closed transactions. See also Hamid Khan, [Constitutional and Political History of Pakistan](#) (Karachi, OUP 2001), pp. 274–275.

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415. This legal position under Islamic law is reflected in community practices, for example, in Nigeria, even if the community in question do not follow a particular madhab, they would not condemn acts of violence committed pursuant to that different madhab: “the acting “dissidents” were not seen by the related community of believers as culpable because they demonstrated the legal obligation and duty to maintain the integrity of Islam”.¹⁵⁵¹ Similarly, the legitimacy of *Shari’a* punishments was also deeply entrenched in Mr Al Hassan’s milieu within Touareg communities in Northern Mali and Libya.¹⁵⁵² Key non-Touareg notables, such as [REDACTED], gave contemporaneous support for the application of *Shari’a* in Timbuktu.¹⁵⁵³ Significantly, [REDACTED] believed that the President of the High Islamic Council, [REDACTED] had given the green light to Ansar Dine to apply *Shari’a* in Timbuktu,¹⁵⁵⁴ and [REDACTED] continued to be a member of the High Islamic Council while participating actively in the Islamic Tribunal.¹⁵⁵⁵

416. The above considerations should also inform the Chamber’s assessment of join and superior orders. Duress has both an objective and a subjective element. The objective element concerns the existence of the threat while the subjective element requires that “the person does not intend to cause a greater harm than the one sought to be avoided”.¹⁵⁵⁶ The objective element must be assessed by reference to the beliefs of a person in the defendant’s circumstances.¹⁵⁵⁷ The standard for assessing the reasonableness of beliefs or conduct should be assessed “by the standards of a reasonable member of the unsophisticated community to which he belongs.”¹⁵⁵⁸ This assessment must take into account the religious beliefs and traditions of that community,¹⁵⁵⁹ and should not be tainted by prejudicial views as concerns whether such beliefs are “primitive” or “barbaric”.¹⁵⁶⁰ In line with these principles, in *Ongwen*, the Trial Chamber

¹⁵⁵¹ K. Clarke, “Religious and Secular Micro Practices, Fictions of Justice: the International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa”, p. 167.

¹⁵⁵² [MLI-D28-0004-3482](#) at 3485-3486; [MLI-D28-0006-5606](#) at 5672.

¹⁵⁵³ [REDACTED]

¹⁵⁵⁴ [REDACTED]

¹⁵⁵⁵ **D-0553**: [MLI-D28-0005-9325-R01](#) at 9332, para. 39.

¹⁵⁵⁶ *Ongwen AJ*, para. 1424.

¹⁵⁵⁷ *Ongwen AJ*, para. 1424.

¹⁵⁵⁸ D. Nsereko, “[Witchcraft as a Criminal Defence, From Uganda to Canada and Back](#)” (1996) 24(1) Man. L. J. 38, 54, citing *Uganda v. Nambwagere s/o Rovumba*, [1972] Uganda Law Reports 14.

¹⁵⁵⁹ V. Ma, “[Cultural Defense: Limited Admissibility for New Immigrants](#)” (1995) 3 San Diego Just. J. 461, 464. See J. Cohan, “[The Problem of Witchcraft Violence in Africa](#)” (2011) 44(4) Suffolk U. L. Rev. 803, 849, citing *Rex v. Fabiano Kinene & Another*.

¹⁵⁶⁰ Daniel D.N. Nsereko, [Witchcraft as a Criminal Defence, From Uganda to Canada and Back](#), 24 MAN. L.J. 38, 44 (1996), p. 56, citing *Uganda v. Gabriel Ojoba* High Court Crim. Session Case No. 260 of 1975.

correctly took into account the spiritual beliefs of the Acholi community, to which the defendant belonged.¹⁵⁶¹

417. These factors are also relevant to the defence of superior orders. When assessing issues of control and volition in the *Katanga* and *Ngudjolo* cases, Trial Chamber II took account of the role of witch-doctors and “fetishes” in securing the compliance and obedience of soldiers.¹⁵⁶² In the *Fofana and Kondewo* case, the SCSL also relied on the impact of rituals and belief in mystical powers when assessing issues of command and obedience over soldiers who subscribed to such beliefs.¹⁵⁶³

418. As a member of the *Shurta* (Islamic Police), Mr Al Hassan was obliged to follow the orders of the Emir of the Islamic Police, the Emirs of the Emirate of Timbuktu, and the Islamic Tribunal that were applying *Shari'a*.¹⁵⁶⁴

419. Within the Islamic Police structure, nobody, including Al Hassan, could disobey the orders of Adama and Khaled, the respective Emirs of the Police.¹⁵⁶⁵ P-0065 also stated,¹⁵⁶⁶

what is certain is that the orders were something that were sacred. Orders had to be obeyed. Not doing so – or disobeying orders would imply sanctions on Earth and beyond that. And the fact of not obeying orders could weaken the Islamic army. That's the reason why nobody could contradict or disobey orders. They could leave an organisation, but they couldn't refuse to execute an order.

420. He further confirmed that Mr Al Hassan would have approached Adama or Khaled for decisions and that “the question of the emir is something that’s sacred and you cannot bypass the emir in your actions.”¹⁵⁶⁷ P-0065 further indicated that while Al Hassan was in Timbuktu, he was powerless to depart from the system they enforced in the city.¹⁵⁶⁸

421. The Islamic Police were, in turn, obligated to implement *Hudud* punishments.¹⁵⁶⁹ As explained by ██████ “humans do not have the right or do not have any say in these punishments so as soon as the judge pronounces the sentence, the police should execute it.”¹⁵⁷⁰

¹⁵⁶¹ [Ongwen AJ](#), paras 1548-1549.

¹⁵⁶² [Ngudjolo TJ](#), paras 122-123, 164, 170; [Katanga TJ](#), paras 531, 1253, 1258

¹⁵⁶³ [Fofana TJ](#), paras 344-346, 736.

¹⁵⁶⁴ ██████ **D-0605**: T-192, p. 60, line 11 – p. 61, line 10; p. 62, line 22 – p. 63, line 2; p. 72, lines 18-25 (Conf); T-194, p. 22, line 23 – p. 23, line 4; p. 74, line 11 – p. 75, line 3 (Conf); **P-0065**: T-049, p. 71, lines 2-21 (Conf).

¹⁵⁶⁵ **D-0605**: T-193, p. 12, lines 5-18 (Conf).

¹⁵⁶⁶ **P-0065**: T-049, p. 22, lines 15-23 (Conf).

¹⁵⁶⁷ **P-0065**: T-046, p. 63, lines 19-23 (Conf).

¹⁵⁶⁸ **P-0065**: T-046, p. 64, lines 16-24 (Conf).

¹⁵⁶⁹ **D-0202**: T-203, p. 40, lines 15-17 (Conf).

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D-0605 also testified that the Islamic Tribunal was the “supreme authority” and was “above all other structures”, including the Islamic Police,¹⁵⁷¹ and that it was made up of judges¹⁵⁷²

who take decisions, who decide where it concerns the different sentences in Islam, such as marriages, divorces and so on. There is no superior authority than the judges because these are *ulema*, these are erudite scholars who have the required and necessary knowledge in order to decide. And according to *sharia*, they have the word of God. The *ulema* of the religion are competent to take decisions and nobody else can have more prerogatives than them. Here, I'm speaking of the sheikhs and the judges within the tribunal.

422. In sermons, Koutaiba explained that once a complaint for adultery, theft, drinking alcohol had been filed with the police or *Hesbah*, it would be *Haram* (forbidden) to interfere with Allah's right to obtain justice through the application of the *Hadd*: anyone who tried to interfere would be cursed by Allah.¹⁵⁷³ This principle applies even if the victim of a theft, which fulfils the *Hadd* criteria, pardons the thief.¹⁵⁷⁴

423. The specific degree of moral compulsion faced by Mr Al Hassan was further overlaid by the particular emphasis placed on *Shari'a* in the *Quran*, according to which *Shari'a* is viewed as the path to be followed, the law to be obeyed by every Muslim.¹⁵⁷⁵ The norms of *Shari'a* come from the *Quran* and the Sunna and are religious, transcendental, considered as non-derogable and at the top of hierarchy of Islamic norms.¹⁵⁷⁶ They are meant to be the positive law enforceable on Muslims, “an all-embracing body of religious duties, the totality of Allah's commands that regulate the life of every Muslim in all its aspects”.¹⁵⁷⁷

424. Within this belief system, it is inconceivable for a believer who is not an ulema to question the authority and dictates of a *Qādī*. The *Qādī* “in the Islamic tradition occupies a supreme status and is regarded as implementing a divine function on Earth.”¹⁵⁷⁸ Maged explains that, “[g]iven his prestigious social status, and his knowledge of the *Shari'a* jurisprudence, the al-

¹⁵⁷¹ **D-0605**: T-192, p. 60, line 25 – p. 61, line 2 (Conf).

¹⁵⁷² **D-0605**: T-192, p. 72, lines 18-25 (Conf).

¹⁵⁷³ Original: [MLI-OTP-0043-0271](#), Transcript: [MLI-D28-0006-5723](#), Translation (ENG): [MLI-D28-0006-5762](#) at 5771, line 27 – 5772, line 28. **D-0202** identified the speaker as Koutaiba: T-203, p. 28, line 18 – p. 30, line 7 (Conf).

¹⁵⁷⁴ Original: [MLI-OTP-0043-0271](#), Transcript: [MLI-D28-0006-5723](#), Translation (ENG): [MLI-D28-0006-5762](#) at 5772, lines 21-28.

¹⁵⁷⁵ See [MLI-D28-0005-1247](#) at 1456, para. 155; at 1391, para. 140; at 2003-2004, para. 19.

¹⁵⁷⁶ See [MLI-D28-0005-1247](#) at 1351, para. 132; at 1378, para. 69; at 1515-1516, para. 71; at 2028, para. 16; at 1734-1735, paras 52-56.

¹⁵⁷⁷ J. Schacht, *An Introduction to Islamic Law* (Oxford, OUP 1983) p. 1.

¹⁵⁷⁸ A. Maged, “Shari‘ah Sources and Reflections on Integrity” in M. Bergsmo and V. Dittrich (eds), *Integrity in International Justice*, Torkel Opsahl Academic EPublisher (2020), p. 117.

Qadi is perceived as the key institution for the application and preservation of Islamic law.”¹⁵⁷⁹ The *Qāḍī* decides based on the *Quran* and the Hadith and his decisions are believed to thus represent the will of God through the application of Islamic law to the case at issue.¹⁵⁸⁰

425. It is clear from the text of the judgments issued by the Islamic Tribunal that the *Qāḍī* exercised this exalted position vis-à-vis the Islamic Police.¹⁵⁸¹

426. The intense degree of religious obligation within an Islamic legal system multiplies the strong presumption of obedience that underpins police work. As set out in the Defence Trial Brief, the law concerning the defence of superior orders recognises the difficulties faced by police officers, whose duties are predicated on obedience and compliance.¹⁵⁸² WWII case law has, for this reason, exonerated individuals whose roles were confined to the execution of sentences. In the trial of *Lieutenant-General Shigeru Sawada and Three Others*,¹⁵⁸³ the reviewing authority reversed the conviction of Tatsuta, a warden of the Kiangwan Military Prison, on the grounds that he was ordered to execute the individuals. There was no actual or constructive proof that he was aware of the illegality of the order, and apart from the execution, he did not engage in any independent personal mistreatment of the victim.¹⁵⁸⁴

427. These considerations are directly applicable to Mr Al Hassan’s situation in Timbuktu. Mr Al Hassan played no role in the decision to apply *Shari’a* or subsequent decisions concerning how it should be interpreted and applied. The presence of Ansar Dine and AQIM was a fait accompli at the time that he started working with the Islamic Police. Neither Ansar Dine, as a group, nor the local population had the capacity to oppose or expel AQIM.¹⁵⁸⁵ The Islamic Police helped to restore law and order, ensuring that the local population did not take matters into their own hands, triggering ethnic violence and a “settling of scores.”¹⁵⁸⁶ Its work appeared to be directed towards ensuring protection, harmony and positive outcomes for the local population as a whole,¹⁵⁸⁷ which is not a manifestly unlawful result. Notably, local Imams also counselled the local population to obey and cooperate with the groups.¹⁵⁸⁸ Given this backdrop,

¹⁵⁷⁹ A. Maged, “Shari’ah Sources and Reflections on Integrity” in M. Bergsmo and V. Dittrich (eds), [Integrity in International Justice](#), Torkel Opsahl Academic EPublisher (2020), p. 113.

¹⁵⁸⁰ See [MLI-D28-0005-1247](#) at 1376, para. 59; see also [MLI-D28-0006-3046](#); [MLI-D28-0006-2629-R01](#) at 2632; [MLI-D28-0005-9317-R01](#) at 9320; [MLI-D28-0004-8743](#) at 8761.

¹⁵⁸¹ [MLI-OTP-0078-4946](#) at 4947; [MLI-OTP-0001-7577](#) at 7578.

¹⁵⁸² [Defence Trial Brief](#), paras 73-74.

¹⁵⁸³ UNWCC, [Law Reports of Trials of War Criminals, vol. V](#), His Majesty’s Stationery Office (1948), pp. 1-24.

¹⁵⁸⁴ UNWCC, [Law Reports of Trials of War Criminals, vol. V](#), His Majesty’s Stationery Office (1948), p. 8.

¹⁵⁸⁵ **D-0511**: [MLI-D28-0006-2629-R01](#) at 2633.

¹⁵⁸⁶ **P-0654**: T-135, p. 42, lines 15-19 (Conf); T-139, p. 49, lines 24-25 – p.50, lines 1-7 (Conf);

¹⁵⁸⁷ **D-0553**: [MLI-D28-0005-9325-R01](#) at 9330, para.31; **D-0093**: [MLI-D28-0006-4212-R01](#) at 4217, para.30.

¹⁵⁸⁸ **P-0643**: T-083, p.54, lines 15-25 (Conf); Original: [REDACTED] Translation (ENG) [REDACTED]

it was not unreasonable for Mr Al Hassan to obey orders issued in such a context, particularly given that his presence in the Islamic Police and actions contributed to the greater good of the local population.¹⁵⁸⁹ This is confirmed by the wealth of credible evidence attesting to the net positive impact that Mr Al Hassan brought about for the local population.¹⁵⁹⁰

428. While mistake of law, superior orders and duress are separate defences, the existence of duress and a mistake of law serve to buttress a defence of superior orders. Apart from the fact that Mr Al Hassan faced the prospect of eternal damnation should he have disregarded or disobeyed the orders of the Tribunal or his Emir, AQIM also actively pursued and punished any individuals who they viewed as spies or traitors.¹⁵⁹¹ [REDACTED] was publicly flogged (in front of Mr Al Hassan – who clutches his tunic during the flogging)¹⁵⁹² to send a message regarding the consequences of failing to follow AQIM's orders.¹⁵⁹³ P-0099 was imprisoned when it was suspected that he was a spy.¹⁵⁹⁴ Although D-0605 stated that he was able to avoid participating in *Hadd* punishments, he also referred to his age.¹⁵⁹⁵ Whereas [REDACTED] [REDACTED] *Hesbah* member was able to leave the group and return to his village, the person in question was actually a MNLA member, who subsequently worked as a teacher for Ansar Dine.¹⁵⁹⁶

429. Expulsion would also have been tantamount to a death sentence for Mr Al Hassan's family, given that first, the Malian army actively targeted, abused and torture individuals suspected of working for Ansar Dine or AQIM,¹⁵⁹⁷ second, anyone who had been associated with the groups was not allowed access to refugee camps,¹⁵⁹⁸ third, his wife was pregnant, and could not risk the journey to such camps while pregnant or with a young baby.¹⁵⁹⁹ Therefore, the Chamber can reasonably conclude that Mr Al Hassan is excused of criminal responsibility for the charged incidents.

¹⁵⁸⁹ **D-0243:** [MLI-D28-0006-9053-R01](#) at 9058, para. 40-42; **D-0272:** T-182, p. 13, lines 14-19 (Conf); **D-0246:** [MLI-D28-0006-9124-R01](#) at 9127-9131, paras 17, 19-28; at 9132, para. 37.

¹⁵⁹⁰ **P-0150:** T-108, p. 33, lines 22-25; **P-0065:** T-050, p. 18, line 4 – p. 19, line 5; **D-0093:** [MLI-D28-0006-4212-R01](#) at 4217, paras 24-32; **P-0654:** T-133, p. 56, lines 8-12 (Conf); **P-1086:** T-122, p. 45, lines 1-3 – p.47, lines 3-8 (Conf); **D-0533:** [MLI-D28-0005-9325-R01](#) at 9332, para. 39; [MLI-OTP-0060-0369-R01](#) (letter from P-0612 to ICC).

¹⁵⁹¹ **P-0065:** T-049, p. 18, lines 7-14 (Conf).

¹⁵⁹² **P-0065:** T-049, p. 19, lines 10-12 (Conf).

¹⁵⁹³ **P-0065:** T-049, p. 18, lines 15-21 (Conf).

¹⁵⁹⁴ **P-0099:** T-145, p. 41, lines 9-14 – p. 49, lines 9-10 (Conf).

¹⁵⁹⁵ **D-0605:** T-194, p. 75, lines 24-25 – p. 76, line 1 (Conf).

¹⁵⁹⁶ [REDACTED] **P-0641:** T-140, p.16, lines 8-20 (Conf).

¹⁵⁹⁷ Defence Trial Brief, para. 96; **P-1086:** T-122, p. 17, lines 17-25 – p.18, lines 1-7 (Conf).

¹⁵⁹⁸ **P-1086:** T-122, p. 61, lines 19-25 – p.62, lines 1-5 (Conf).

¹⁵⁹⁹ Defence Trial Brief, para. 93.

9 THE PROSECUTION HAS NOT PROVEN THE CHARGES OF TORTURE/INHUMANE ACTS/PERSONAL DIGNITY

430. The incidents under Count 6 relate to Islamic Tribunal punishments, *Ta'zirs*, unsanctioned actions by individual group members, and detention conditions. The allegations concerning the execution of Islamic Tribunal judgments and *Ta'zirs* do not fulfil the elements of torture, inhumane acts, or outrages against personal dignity. The Prosecution's evidence on incidents under this umbrella of counts, including alleged abuses and rape in detention, is neither credible nor capable of belief. Prosecution witnesses have embellished and exaggerated their accounts in ways that fundamentally undermine their credibility as witnesses of truth.

9.1 Incidents related to punishments issued by the Islamic Tribunal

9.1.1 P-0557 and P-0565

431. While it is not disputed that P-0565 and P-0557, who is also known as [REDACTED],¹⁶⁰⁰ were flogged pursuant to an Islamic Tribunal judgment, the Chamber cannot conclude beyond reasonable doubt that the elements of the charged crimes are fulfilled for this incident. On the contrary, this incident transpired in a manner consistent with the pre-2012 application of *Shari'a*. P-0557 and P-0565, [REDACTED], [REDACTED], asked and agreed to be "purified" so that [REDACTED] would be accepted. The evidence also does not demonstrate that P-0565 or P-0557 were detained by the Islamic Police.

432. P-0557 and P-0565 both testified [REDACTED].¹⁶⁰¹ [REDACTED] [REDACTED]¹⁶⁰³ P-0004 testified that P-0557 [REDACTED] and sought the latter's assistance to find a solution to [REDACTED].¹⁶⁰⁴ P-0565 also confirmed that she and P-0557 [REDACTED] [REDACTED] since the Islamists arrived in Timbuktu and that [REDACTED] [REDACTED]¹⁶⁰⁵ She further admitted that she and P-0557 had a friend [REDACTED] [REDACTED] before her judgment.¹⁶⁰⁶

433. Consequently, and consistent with the evidence of several witnesses, P-0557 voluntarily denounced himself and P-0565 to Adama so that [REDACTED]

¹⁶⁰⁰ P-0556: T-053, p. 11, lines 22-23 (Conf).

¹⁶⁰¹ P-0557: T-055, p. 58, lines 2-11 (Conf).

¹⁶⁰² P-0557: T-056, p. 23, lines 15-20 (Conf).

¹⁶⁰³ P-0565: T-052, p. 29, lines 12-15 (Conf); T-052, p. 41, lines 19-20 (Conf).

¹⁶⁰⁴ P-0004: T-166, p. 89, line 10 – p. 90, line 13 (Conf). *See also* Original: [MLI-OTP-0003-0062](#) at 0111, Transcript: [MLI-OTP-0064-0608](#) at 0658.

¹⁶⁰⁵ P-0565: T-051, p. 37, lines 15-18 (Conf).

¹⁶⁰⁶ P-0565: T-051, p. 37, lines 4-6 (Conf).

██████████¹⁶⁰⁷ CDRs confirm contacts on ██████████
 ██████████¹⁶⁰⁸ According to D-0551, *Shari'a* was applied with their consent,¹⁶⁰⁹ and ██████████ testified that ██████████ was not imposed but granted as a positive reward.¹⁶¹⁰

434. Their evidence is corroborated by contemporaneous records. A ██████████ note referring to a woman who was publicly chastened in Timbuktu ██████████ specifically mentions that ██████████

██████████¹⁶¹¹ P-0160 testified that the ██████████ conveyed to him this information.¹⁶¹² P-0004 recorded that P-0557 brought the matter to the Islamists, describing P-0557 as “part of the Islamic police”.¹⁶¹³

435. In contrast, the Prosecution’s accounts of P-0557 and P-0565’s arrest and detention are implausible and marked by inconsistencies and contradictions. The witnesses’ version of their arrest (that they both happened to be outside when the Islamic Police passed by, and both pretended to be related but accidentally gave the wrong names) appears rehearsed and bears all the hallmarks of collusion. While P-0557 claims that “someone” denounced them,¹⁶¹⁴ his inability to specify lacks credibility, particularly as he acknowledged that it was not P-0565’s family.¹⁶¹⁵

436. Regarding their purported detention, the Prosecution failed to prove that either were detained, much less that P-0557 was detained for three days. On the contrary, reliable evidence demonstrates that neither spent any time in detention.

437. P-0582 gave evidence that neither P-0557 nor P-0565 were detained at the BMS. On the contrary, they were taken to the Islamic Tribunal on the day they were punished.¹⁶¹⁶ This is consistent with the testimonies of numerous witness that the Islamic Police did not detain women at the BMS.¹⁶¹⁷ Critically, as ██████████

██████████ was in a position to know if P-0565

¹⁶⁰⁷ **P-0004**: T-166, p. 89, line 10 – p. 90, line 13 (Conf); **P-0641**: T-140, p. 8, line 11 – p. 10, line 20 (Conf); **D-213**: T-197, p. 46, line 9 – p. 54, line 3 (Conf); **D-0551**: T-200, p. 84, line 22 – p. 85, line 10 (Conf).

¹⁶⁰⁸ [MLI-OTP-0031-1093](#), row 2625 13 June 2012.

¹⁶⁰⁹ **D-0551**: T-200, p. 85, lines 5-10 (Conf).

¹⁶¹⁰ ██████████

¹⁶¹¹ ██████████

¹⁶¹² ██████████

¹⁶¹³ **P: 0004**: T-166, P. 89, lines 10-22 (Conf).

¹⁶¹⁴ **P-0557**: T-054, p. 29, line 2 – p. 30, line 19 (Conf); **P-0565**: T-051, p. 16, line 11 – p. 18, line 2 (Conf).

¹⁶¹⁵ **P-0557**: T-056, p. 26, lines 21-25 (Conf).

¹⁶¹⁶ **P-0582**: [MLI-OTP-0062-3897-R01](#) at 3899-3901, lines 51-123.

¹⁶¹⁷ **P-0150**: T-112, p. 35, lines 5-8; p. 40, lines 1-5 (Conf); **P-0114**: T-060, p. 24, lines 16-22 (Conf); **P-0654**: T-134, p. 87, lines 13-22 (Conf).

was detained by the Islamic Police before her judgment. His testimony, ruling out such detentions,¹⁶¹⁸ buttresses the conclusion that P-0565 was never detained or held by the Islamic Police.

438. Even if the Chamber were to accept that P-0557 was detained prior to the punishment he voluntarily sought, P-0557's own evidence demonstrates that he could only have been held for one night. First, he testified to having been arrested at 21:00.¹⁶¹⁹ He also claimed to have seen [REDACTED] the day after his arrest. According to the geolocation of cell-towers pinged by the number attributed to [REDACTED] arrived in Timbuktu on [REDACTED] [REDACTED]¹⁶²⁰ Given that the flogging took place on [REDACTED] and there is no suggestion that P-0557 was detained after the flogging, the only night on which P-0557 could conceivably have been arrested or detained would have been [REDACTED]

439. Incidentally, P-0557 testified to have "truthfully" told a journalist that he was in prison for two nights before the flogging.¹⁶²¹ This is manifestly impossible in view of the incontrovertible CDR evidence placing [REDACTED] in Timbuktu on [REDACTED]. Given the clear and fundamental indicia of unreliability inherent in P-0557's testimony, and his links to victim NGOs through [REDACTED],¹⁶²² the Chamber cannot place weight on his evidence concerning actions allegedly taken against third persons either at the time he claimed to have been arrested or other occasions.

440. The evidence also does not support the allegation that P-0565 was detained at the BMS. Apart from P-0565's acknowledgement that she faced difficulties in accurately counting time,¹⁶²³ her evidence proves she was not detained before the flogging. P-0565 testified that she was not arrested the night P-0557 first went to the BMS ([REDACTED]); [REDACTED] [REDACTED] and was taken the next day [REDACTED].¹⁶²⁴ P-0557 also testified that the first time he left the BMS to go to P-0565's house was the day of the judgment.¹⁶²⁵ P-0565, in turn, testified that P-0557 was in the vehicle that collected her the first time she was taken from her house to be questioned.¹⁶²⁶ Notably, none of the contemporaneous media reports mention P-0565 being

¹⁶¹⁸ [REDACTED]

¹⁶¹⁹ P-0557: T-056, p. 12, line 24 – p. 13, line 2 (Conf).

¹⁶²⁰ P-0617: T-080, p. 41, line 12 – p. 42, line 20; [MLI-OTP-0031-1565](#) rows 7935 –7979, relating to target number [REDACTED] which was geolocated in Gao on [REDACTED]

¹⁶²¹ P-0557: T-057, p. 17, line 24 – p. 19, line 21 (Conf); [MLI-OTP-0017-0027](#) (video); [MLI-OTP-0033-5228](#) (transcript) at 5233, lines 126-129.

¹⁶²² P-0557: T-057, p. 27, lines 9-13; p. 28, lines 2-3 (Conf).

¹⁶²³ P-0565: T-053, p. 16, lines 1-6; p. 18, lines 15-18 (Conf).

¹⁶²⁴ P-0565: T-053, p. 5, lines 19-21; p. 6, lines 7-9 (Conf).

¹⁶²⁵ P-0557: T-056, p. 42, line 22 – p. 43, line 4 (Conf).

¹⁶²⁶ P-0565: T-052, p. 34, lines 4-12 (Conf).

detained.¹⁶²⁷ P-0065 had also been told that P-0565 had been “asked” to attend a trial session, but she had not been brought since [REDACTED].¹⁶²⁸ This session was the day before the flogging,¹⁶²⁹ which places [REDACTED].

441. P-0565’s description of the place to which she was taken also corresponds to the Islamic Tribunal and not the BMS. She was unable to describe the inside of the BMS,¹⁶³⁰ and instead described the location as Abaradjou, which is where the Hotel Maison is located.¹⁶³¹ She claimed she saw the “judge” in this location,¹⁶³² and also “Hamed Moussa”,¹⁶³³ who at this point worked for the Tribunal and not *Hesbah*).

442. P-0565 describes going back and forth and seeing a lot of people: her description of being taken to a room for questioning does not correspond to a detention situation.¹⁶³⁴ She was not held overnight.¹⁶³⁵ The unreliable nature of P-0565’s evidence concerning her alleged detention is further underscored by the discrepancies between her account and that of P-0557.¹⁶³⁶ Whereas P-0565 claims she was given no food or access to toilet facilities during the period she was in a “room”, P-0557 testified that he was given food, had a window, and a toilet pot.¹⁶³⁷ The only reasonable explanation between the discrepancies in their accounts is that P-0565’s evidence concerns temporary interviews at the Hotel Maison (Islamic Tribunal), and not detention at the BMS.

443. P-0565 further testified that she was taken directly from the location in Abaradjou to be flogged,¹⁶³⁸ while P-0557 testified that he was taken from the Islamic Tribunal building to be flogged.¹⁶³⁹ P-0565 testified that they were brought to [REDACTED] in the same van,¹⁶⁴⁰ which means they were both taken directly from the Islamic Tribunal to [REDACTED].

444. The Prosecution failed to establish that the Tribunal proceedings were unfair or that P-0565 and P-0557 were [REDACTED]. They were told of the allegations against them,¹⁶⁴¹ as

¹⁶²⁷ **P-0565**: [MLI-D28-0004-3710](#) at 3711; [MLI-D28-0004-3714](#) at 3714.

¹⁶²⁸ **P-0065**: T-049, p. 21, lines 15-24 (Conf).

¹⁶²⁹ **P-0065**: T-049, p. 22, lines 3-14 (Conf).

¹⁶³⁰ **P-0565**: T-051, p. 25, lines 6-7 (Conf).

¹⁶³¹ **P-0565**: T-051, p. 21, line 16 (Conf).

¹⁶³² **P-0565**: T-051, p. 30, line 4 (Conf).

¹⁶³³ **P-0565**: T-051, p. 28, lines 15-17 (Conf).

¹⁶³⁴ **P-0565**: T-053, p. 8, line 25 – p. 9, line 3 (Conf).

¹⁶³⁵ **P-0565**: T-051, p. 21, line 7; p. 23, line 23 (Conf).

¹⁶³⁶ The Defence’s ability to confront P-0565 with discrepancies was impeded through improper objections by the Prosecution. *See* P-0565: T-053, pp. 10-16; p. 18, line 25 - p. 25, line 9 (Conf).

¹⁶³⁷ **P-0557**: T-054, p. 43, lines 3-12 (Conf).

¹⁶³⁸ **P-0565**: T-053, p. 9, lines 11-12 (Conf); T-051, p. 30, lines 1-2 (Conf).

¹⁶³⁹ **P-0557**: T-055, p. 12, lines 12-20 (Conf).

¹⁶⁴⁰ **P-0565**: T-051, p. 38, lines 18-20 (Conf).

¹⁶⁴¹ **P-0557**: T-054, p. 31, lines 1-3, p. 39, lines 23-25 (Conf).

the judge spoke both Arabic and Tamasheq,¹⁶⁴² which were understood by both.¹⁶⁴³ P-0557 testified that his confession to the Islamic Tribunal was true.¹⁶⁴⁴ Given the substantial evidence that he initiated the proceedings, the issue of legal representation is moot, particularly as he conceded that his confession was true and reliable.¹⁶⁴⁵

445. The Prosecution also failed to establish that the judges had weapons. P-0565 testified that she did not recall seeing any armed person in the room with the judge.¹⁶⁴⁶ While the Prosecution has attempted to rely on contemporaneous footage from [REDACTED] not remember whether the persons being filmed were actually working or simply posing [REDACTED]

[REDACTED].¹⁶⁴⁷ [REDACTED] [REDACTED].¹⁶⁴⁸ When considered in light of other evidence concerning acting and the use of weapons as props in [REDACTED],¹⁶⁴⁹ the Chamber cannot reasonably conclude that [REDACTED] [REDACTED] reflected the actual courtroom during the hearings concerning P-0565 and P-0557.

9.1.2 P-0554 and [REDACTED]

446. In respect of the allegations against P-0554, arguments concerning the complaint procedure and judgment are addressed in Section 8.9.2.

447. Regarding Count 6, there is no nexus between this incident and the armed conflict. [REDACTED]

[REDACTED].¹⁶⁵⁰ The Islamists acted in a manner consistent with that of local police before 2012, who had imposed physical punishment on locals conducting immoral activities next to mosques.¹⁶⁵¹

448. In relation to her detention, P-0554 acknowledged that during the night she spent at the BMS, she received three visitors and was offered milk.¹⁶⁵² Her testimony that “everything happened in the same room” does not mean that no sanitary facilities were provided.

¹⁶⁴² P-0565: T-051, p. 36, line 21; P-0577: T-055, p. 11, line 19 (Conf).

¹⁶⁴³ P-0565: T-051, p. 8, line 10 (Conf); P-0557: T-054, p. 8, line 8 (Conf).

¹⁶⁴⁴ P-0557: T-056, p. 39, lines 5-11 (Conf).

¹⁶⁴⁵ P-0557: T-056, p. 40, lines 6-7 (Conf).

¹⁶⁴⁶ P-0565: T-051, p. 30, line 21-21 (Conf).

¹⁶⁴⁷ [REDACTED]

¹⁶⁴⁸ [REDACTED]

¹⁶⁴⁹ See Section 8.7.1.

¹⁶⁵⁰ D-0514: T-208, p. 44, lines 4-17 (Conf). See also D-0551: T-200, p. 77, lines 11-13 (Conf).

¹⁶⁵¹ D-0551: T-200, p. 21, line 20 – p. 23, line 3 (Conf).

¹⁶⁵² P-0554: T-064, p. 22, lines 9-10, 20-21 (Conf).

449. In terms of due process, D-0514 testified that [REDACTED], [REDACTED], was given an opportunity to find witnesses and defend himself, [REDACTED].¹⁶⁵³ P-0554, however, chose to call her [REDACTED] as a witness¹⁶⁵⁴ and acknowledged not having called any further witnesses because the charges were true.¹⁶⁵⁵ She also testified that she did not know of any lawyers in Timbuktu.¹⁶⁵⁶

450. P-0554's evidence on other issues is marked by exaggeration and inaccuracy. For example, though she agreed her statement to investigators was read back to her and that she confirmed its veracity,¹⁶⁵⁷ she later contradicted her statement in her testimony.¹⁶⁵⁸

451. By the same token, the Chamber cannot place weight on P-0554's claims that she was beaten during her arrest, detained after the flogging, or her description of her detention conditions. For example, though she claimed at the time and during cross-examination that she was only held in prison for one night before the judgment was issued,¹⁶⁵⁹ she later testified to having been detained for several additional nights between the judgment and flogging. Given that the Tribunal judgment¹⁶⁶⁰ and the video of her flogging are both dated [REDACTED]¹⁶⁶¹ P-0554's account of being detained for several nights between both is factually impossible.

452. In more contemporaneous media interviews, P-0554 admitted that the Islamists did not know her and that the locals denounced them.¹⁶⁶² She also admitted that a man helped her "prepare" her responses,¹⁶⁶³ and accompanied her¹⁶⁶⁴ to these interviews. This suggests that P-0554's evidence was contaminated through encounters with fixers, the media, and NGOs.¹⁶⁶⁵

453. The reliability of P-0554's evidence is also undermined by the addition to her account of unfounded accusations and embellishments, which were clearly prompted by an attempt to obtain additional assistance or reparations. For example, when she submitted a victim application and request for reparations, she claimed under oath that her allegedly destroyed

¹⁶⁵³ **D-0514**: T-208, p. 44, lines 4-17 (Conf).

¹⁶⁵⁴ **P-0554**: T-065, p. 5, lines 20-25 (Conf).

¹⁶⁵⁵ **P-0554**: T-065, p. 24, lines 16-19 (Conf).

¹⁶⁵⁶ **P-0554**: T-065, p. 9, lines 9-10 (Conf).

¹⁶⁵⁷ **P-0554**: T-065, p. 7, lines 3-7 (Conf).

¹⁶⁵⁸ **P-0554**: T-065, p. 7, line 3 – p. 8, line 19 (Conf).

¹⁶⁵⁹ **P-0554**: T-065, p. 18, line 25 – p. 19, line 2; p. 19, lines 19-25 (Conf).

¹⁶⁶⁰ [MLI-OTP-0068-4779](#) (original); [MLI-OTP-0078-1768](#) (translation).

¹⁶⁶¹ **P-0075**: T-028, p. 84, line 24 – p. 85, line 12 (Conf); [MLI-OTP-0023-0494](#) (original), [MLI-OTP-0025-0105](#) at 0106 (translation).

¹⁶⁶² **P-0554**: T-065, p. 16, line 6 – p. 17, line 13; p. 18, lines 15-20 (Conf). See [MLI-OTP-0080-1688](#) at 1690, lines 11-15.

¹⁶⁶³ **P-0554**: T-065, p. 30, lines 17-22 (Conf).

¹⁶⁶⁴ **P-0554**: T-065, p. 31, lines 10-14 (Conf).

¹⁶⁶⁵ **P-0554**: T-065, p. 27, line 1 – p. 31, line 9 (Conf).

business was worth at least [REDACTED]¹⁶⁶⁶ Her husband, [REDACTED] claimed the Islamists destroyed his business worth [REDACTED]¹⁶⁶⁷ and openly acknowledged that he testified to obtain compensation.¹⁶⁶⁸ He also requested and was granted substantial financial compensation for a range of apparently spurious reasons unconnected to the alleged harm suffered by P-0554 in 2013 or their ability to testify.¹⁶⁶⁹

454. [REDACTED]'s evidence does not constitute independent and reliable support or corroboration of P-0554, given [REDACTED], likelihood of pre-testimony discussions, and [REDACTED] to support a conviction to receive reparations.¹⁶⁷⁰ As discussed in Section 6.8, [REDACTED]'s evidence is highly unreliable and inaccurate. He confirmed his memory and “understanding” of events evolved after his interview with the Prosecution.¹⁶⁷¹ A reasonable inference is that his evidence has “evolved” due to contamination *vis-à-vis* exposure to external influence and information about the case.¹⁶⁷² The clear and inexplicable inconsistencies between his accounts reflects the unreliable nature of his evidence,¹⁶⁷³ which suggest that his account cannot corroborate P-0554's already contradictory accounts.

9.1.3 [REDACTED]

455. The allegations in respect of [REDACTED] concern non-conflict related offences which have no nexus to the armed conflict. The Chamber cannot reach any conclusions concerning the proceedings before the Islamic Tribunal in the absence of evidence adduced on this issue. In respect of the flogging itself, the Chamber cannot reach reliable conclusions about what transpired due to the heavily edited and unreliable nature of the video montage collated by [REDACTED]¹⁶⁷⁴.

9.1.4 *Two Unidentified Persons at Youbatao:*

456. Apart from the presentation of heavily edited and spliced video montages, the Prosecution failed to adduce evidence about the context and circumstances of this incident. The videos are unreliable because they are an edited montage of the events comprised of different clips that have been stitched together using editing software.¹⁶⁷⁵ [REDACTED] recognised several edit points in

¹⁶⁶⁶ P-0554: T-064, p. 45, lines 8-20 (Conf).

¹⁶⁶⁷ [REDACTED]

¹⁶⁶⁸ [REDACTED]

¹⁶⁶⁹ [MLI-OTP-0071-0352](#); [MLI-OTP-0071-0353](#). See also P-0984: T-069, p. 28, line 13 – p. 35, line 6 (Conf).

¹⁶⁷⁰ See *supra* para 182.

¹⁶⁷¹ [REDACTED]

¹⁶⁷² [REDACTED]

¹⁶⁷³ [REDACTED]

¹⁶⁷⁴ See *supra* paras 84-86, and also *infra*, para. 456.

¹⁶⁷⁵ Defence email, 3 December 2020, 15: 46 (Category D objections, pp. 15-21).

the videos,¹⁶⁷⁶ while expert witness P-0075 confirmed from a technical perspective that [REDACTED] [REDACTED] was edited.¹⁶⁷⁷ This means that data is missing (since it was not filmed in a continuous shot) and potentially duplicated (through the stitching process) as reflected by how the “montages” are longer than original clips.¹⁶⁷⁸ [REDACTED] also confirmed that when [REDACTED] created such montages, sequences were not necessarily stitched together in a chronological order.¹⁶⁷⁹ 457. There are insufficient particulars as to the specifics of this incident to satisfy Mr Al Hassan’s right to sufficient notice and an absence of foundational evidence from which reasonable inferences can be drawn. These particulars include the identities of the alleged victims and whether they were group members, the reasons for their arrest, or the way the punishment was determined and executed. The Chamber cannot make any adverse inferences or findings against Mr Al Hassan based on the absence of evidence. The burden of proof falls on the Prosecution, and in its failure to adduce any evidence about this incident or the circumstances of these individuals,¹⁶⁸⁰ the Chamber may not simply assume the absence of a valid Tribunal judgment, of *Hesbah* members during the incident, or of an order directing Mr Al Hassan to execute these punishments. On the contrary, given the similarity to other punishments issued by the Tribunal,¹⁶⁸¹ a reasonable inference is that this punishment was also ordered by the Tribunal.

9.1.5 P-0638

458. The Chamber should place no weight on P-0638’s evidence and should acquit Mr Al Hassan of this charge. P-0638 was never arrested, detained, or flogged in 2012. It is entirely implausible that he would have failed to mention such critical matters when [REDACTED] [REDACTED] in 2012.¹⁶⁸² Rather, it seems that P-0638 followed [REDACTED] [REDACTED] and fabricated a story based loosely on [REDACTED] for the purpose of obtaining material benefits as a witness and victim.

¹⁶⁷⁶ [REDACTED]

¹⁶⁷⁷ P-0075: T-028, p. 48, line 18 – p. 49, line 13 (Conf). See also [MLI-D28-0004-0669](#); [MLI-D28-0004-0679](#); [MLI-D28-0004-0656](#).

¹⁶⁷⁸ [REDACTED]

¹⁶⁷⁹ [REDACTED]

¹⁶⁸⁰ [REDACTED] testified that he was unable to speak with certainty in relation to this incident: [REDACTED]

¹⁶⁸¹ See *supra* section 8.7.1.

¹⁶⁸² P-0065 said that when they interacted in 2012, P-0638 claimed to have been punished for smoking, not alcohol. See T-046, p. 69, line 13 – p. 70, line 1 (Conf).

459. D-0273, ██████████ confirmed that P-0638 was never arrested by Ansar Dine or detained at the BMS, although ██████████ was briefly questioned before release.¹⁶⁸³ P-0638's claim to have been the first victim of *Shari'a* (in April 2012) is controverted by Prosecution evidence that the flogging of ██████████ was the first *Shari'a* punishment applied in 2012 (██████████).¹⁶⁸⁴ P-0150 also said that no punishments were implemented at the beginning (i.e. during the first months) of the group's arrival.¹⁶⁸⁵ Significantly, ██████████ ██████████, ¹⁶⁸⁶ ██████████ was unfamiliar with P-0638's alleged appearance before the Tribunal or P-0638's account that he had received the "first" flogging punishment from the Tribunal.¹⁶⁸⁷ P-1086 described P-0638 as being "irresponsible", "psychologically unstable", and a drug user.¹⁶⁸⁸ P-0638's propensity for dishonesty is further demonstrated by his false account that ██████████¹⁶⁸⁹ and that ██████████ father taught him the *Quran*.¹⁶⁹⁰

9.2 Sanctions issued by *Hesbah*

9.2.1 P-0580 and Family

460. The Chamber must acquit Mr Al Hassan of all charges related to P-0580 and his family given the violations of Mr Al Hassan's fair trial rights and the Prosecution's failure to substantiate the charges with reliable evidence. Regarding fair trial violations, the charges concerning this cluster of incidents were initially confirmed solely based on P-0580's statement and related to acts pertaining to P-0580, ██████████ ██████████. Although the Prosecution subsequently added ██████████ to its list of witnesses, it failed to amend the charges to incorporate the additional incidents pertaining to P-0642 and their family or to otherwise harmonise their contradictory accounts. Meanwhile, the Defence prepared its case based on the confirmed charges and was given no notice of any changes to the Prosecution's case until the Prosecution decided not to call P-0580 on the eve of his testimony. In the absence of any medical proof that P-0580 was psychologically or physically unable to testify, the only reasonable inference is that the Prosecution declined to call P-0580 due to concerns regarding the reliability and veracity of his evidence. It would be unfair to rely on P-0642 in relation to P-0580 given that the Defence was denied the opportunity to test

¹⁶⁸³ D-0243: [MLI-D28-0006-9053-R01](#) at 9057-9058, paras 34-39.

¹⁶⁸⁴ Original: [MLI-OTP-0024-3077](#), Translation (ENG): [MLI-OTP-0049-0036](#).

¹⁶⁸⁵ P-0150: T-098, p. 36, lines 2-5 (Conf); P-0004: T-166, p. 88, lines 23-25 (Conf).

¹⁶⁸⁶ P-0150: T-111, p. 53, lines 2-3 (Conf).

¹⁶⁸⁷ ██████████

¹⁶⁸⁸ P-1086: T-122, p. 31, line 20 – p. 32, line 1 (Conf).

¹⁶⁸⁹ ██████████ confirmed that P-0638 was not a blood relative of ██████████

¹⁶⁹⁰ D-0243: [MLI-D28-0006-9053-R01](#) at 9059, para. 49.

the veracity of P-0580's account and that P-0642's testimony departed from the confirmed charges in several material aspects.

461. The Trial Chamber cannot find the confirmed charges concerning P-0580 to have been proven beyond a reasonable doubt. The evidence adduced at trial does not support the charges. Whereas the confirmed charges alleged that P-0580 was arrested, detained, and beaten by group members in or around Timbuktu, [REDACTED] that the only incident involving P-0580 occurred in [REDACTED].¹⁶⁹¹ Although P-0580 claimed to have been beaten by unidentified individuals working for an unidentified group,¹⁶⁹² he was neither arrested nor detained.¹⁶⁹³ When put to P-0642 in cross-examination that P-0580 was flogged outside Timbuktu, P-0642 confirmed this to be the case.¹⁶⁹⁴

462. Furthermore, [REDACTED] worked near the purported location of P-0580's [REDACTED]. Therefore, he was particularly well-placed to disprove the allegation that Islamists arrested P-0580 for selling [REDACTED] from [REDACTED].¹⁶⁹⁵ [REDACTED] correctly identified P-0580 through MLI-OTP-0080-3497,¹⁶⁹⁶ and unlike P-0642, [REDACTED] had no motive to lie concerning P-0580. In contrast, P-0642's account concerning P-0580's alleged arrest, detention, and flogging was incoherent and based on a mosaic of vague, second-hand rumours from unreliable sources.¹⁶⁹⁷

463. The [REDACTED] incident cannot be attributed to Mr Al Hassan or the groups in Timbuktu. [REDACTED] is geographically distant from Timbuktu, located after [REDACTED] [REDACTED]¹⁶⁹⁸ P-0065, [REDACTED] stated that the group members in [REDACTED] were members of Ansar Dine "in name only" and "all they were doing actually was to fulfil the requests of the tribal leaders", and not the armed groups.¹⁶⁹⁹ [REDACTED] testified that [REDACTED] had its own police station and judges. They settled their affairs locally without any involvement from the Police in Timbuktu.¹⁷⁰⁰

464. P-0642's evidence is fundamentally unreliable and does not support the charges in respect of P-0580's mother and daughter. First, P-0642 gave no evidence that P-0580's mother was detained. Second, she gave no evidence that [REDACTED] was arrested, detained, or whipped

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¹⁶⁹⁷ P-0642: T-156, p. 12, lines 1-3; p. 13, line 20 – p. 14, line 4; p. 14, line 24 – p. 15, line 5 (Conf).

¹⁶⁹⁸ [REDACTED]. See [MLI-OTP-0009-1754](#), as discussed by P-0150: T-092, p. 14, line 16 – p. 15, line 18 (Conf).

¹⁶⁹⁹ P-0065: T-046, p. 65, lines 10-24 (Conf); T-050, p. 27, line 4 – p. 28, line 14, *specifically* p. 27, lines 17-18 (Conf).

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by *Hesbah*. Her contrary account differs in material respects from the charges and cannot be relied upon. Furthermore, it is reasonable for the Chamber to conclude that the allegation concerning the detention of P-0580's daughter was a fabrication based on ██████████ (P-1124), given the shared name. Notably, P-0580 was a member of the same victim association as ██████████.¹⁷⁰¹ P-0642 also made it impossible for the Prosecution to verify P-0580's account ██████████ by testifying that ██████████ would refuse to be examined by a doctor.¹⁷⁰²

465. The Chamber cannot rely on P-0642. P-0642 followed the case in the media,¹⁷⁰³ as had P-0580.¹⁷⁰⁴ P-0580 also appears to have coached P-0642. After learning the Prosecution wished to meet her, P-0580 told P-0642 he was a witness in this case and discussed with her "everything" that happened to them before the interview.¹⁷⁰⁵ This included P-0580 telling P-0642 that "Al Hassan was at the base of everything that happened in 2012."¹⁷⁰⁶ Consequently, despite telling the Prosecution in 2019 that she did not know "Al Hassan",¹⁷⁰⁷ P-0642 claimed for the first time during her testimony that the person "who was on trial today [...] was at the head of the group".¹⁷⁰⁸ The likelihood that P-0642's evidence was a result of influence as opposed to true memory recall is further buttressed by the instances where she defaulted to her statement when unable to answer questions during her testimony.¹⁷⁰⁹

466. In addition, after P-0642 agreed to provide evidence as a witness, the Prosecution ██████████
██████████¹⁷¹⁰ The genuine risk that P-0642's decision to testify against Mr Al Hassan was motivated by a desire to support ██████████
██████████ creates a reasonable doubt in favour of Mr Al Hassan.

467. P-0642's testimony was also littered with factually impossible claims that greatly diminish her credibility as a witness. After first claiming there were no doctors at the hospital,¹⁷¹¹ P-0642 then claimed, upon being confronted with evidence to the contrary,¹⁷¹²

¹⁷⁰¹ **P-0641**: T-139, p. 8, lines 16-17 (Conf).

¹⁷⁰² **P-0642**: T-157, p. 16, lines 11-14 (Conf).

¹⁷⁰³ **P-0642**: T-157, p. 8, lines 22-25 (Conf).

¹⁷⁰⁴ **P-0642**: T-157, p. 15, lines 13-15 (Conf).

¹⁷⁰⁵ **P-0642**: T-157, p. 9, line 1 – p. 12, line 7 (Conf).

¹⁷⁰⁶ **P-0642**: T-157, p. 12, lines 5-7 (Conf).

¹⁷⁰⁷ **P-0642**: T-157, p. 15, lines 16-22 (Conf).

¹⁷⁰⁸ **P-0642**: T-156 p. 11, lines 19-20 (Conf).

¹⁷⁰⁹ **P-0642**: T-156, p. 11, lines 14-15; p. 15, lines 3-5 (Conf).

¹⁷¹⁰ **P-0642**: T-157, p. 59, line 6 – p. 61, line 14 (Conf).

¹⁷¹¹ **P-0642**: T-157, p. 44, lines 2-4 (Conf).

¹⁷¹² **P-0642**: T-157, p. 44, lines 2-15 (Conf). *See also* **D-0315**: T-185, p. 30, lines 4-23; p. 33, lines 7-10 (Conf); **D-0529**: T-189, p. 35, lines 1-15 (Conf).

there were two hospitals in Timbuktu.¹⁷¹³ Notably, there was only one.¹⁷¹⁴ She then gave sworn evidence that she bought treatment for [REDACTED] injuries from Pharmacy Tinariwen,¹⁷¹⁵ even though Pharmacy Tinarariwen opened for the first time after the charged period.¹⁷¹⁶ P-0642 also claimed [REDACTED],¹⁷¹⁷ she had to be told what happened to [REDACTED].¹⁷¹⁸ P-0642 testified P-0580 was detained for several years¹⁷¹⁹ before being flogged, even though the groups were in Timbuktu for less than 11 months. She said P-0580 was flogged sitting down,¹⁷²⁰ even though the evidence demonstrates men were only flogged in the standing position.¹⁷²¹ P-0642 also claimed she could see P-0580 being flogged while sitting down yet simultaneously asserted her eyes were fully covered with a veil.¹⁷²² She also alleged this incident occurred in front of a “destroyed” building that she said was the BMS.¹⁷²³ 468. Her account of being detained at the BMS is also incoherent and inconsistent.¹⁷²⁴ Her claim that Mohamed Moussa slapped her while he was wearing a ring is inconsistent with Islamists’ opposition to jewellery.¹⁷²⁵ Dr Sommerlad also gave expert evidence that the marking on her face was “highly unlikely” to have been caused by the alleged slap.¹⁷²⁶

9.2.2 Incidents based on P-0641’s Evidence (P-1708, P-1710, P-1711, P-1712, P-1721)

469. This cluster of incidents was based almost exclusively on P-0641’s evidence, [REDACTED] who conceded that he testified to help [REDACTED] obtain reparations.¹⁷²⁷ The reliability and probative value of P-0641’s testimony is extremely low. As set out at paragraph 396, the Prosecution tainted his evidence through improperly leading interviews and in-court examinations.¹⁷²⁸ He also provided little to no evidence concerning dates, identities of perpetrators and victims, or circumstances surrounding the incidents. Even if the much lower threshold for confirmation was met, the Prosecution has failed to meet the necessarily demanding threshold for conviction.

¹⁷¹³ P-0642: T-157, p. 48, line 18 – p. 49, line 5 (Conf).

¹⁷¹⁴ D-0093: [MLI-D28-0006-4212-R01](#) at para. 33; P-0004: T-082, p. 82, lines 20-25 (Conf).

¹⁷¹⁵ P-0642: T-0157, p. 22, lines 2 – p. 23, line 16 (Conf), showing [MLI-D28-0005-7858](#) and [MLI-D28-0005-7853](#).

¹⁷¹⁶ D-0093: T-211, p. 9, lines 3-15 (Conf); [MLI-D28-0006-4212-R01](#) at 4218, para. 33; [MLI-D28-0005-7856](#).

¹⁷¹⁷ P-0642: T-156, p. 23, lines 1-3 (Conf).

¹⁷¹⁸ P-0642: T-157, p. 49, line 23 – p. 50, line 22 (Conf).

¹⁷¹⁹ P-0642: T-156, p. 11, lines 8-10 (Conf).

¹⁷²⁰ P-0642: T-157, p. 55, lines 20-24 (Conf).

¹⁷²¹ [REDACTED]

¹⁷²² P-0642: T-157, p. 55, lines 12-19 (Conf).

¹⁷²³ P-0642: T-157, p. 39, lines 19-25 (Conf).

¹⁷²⁴ P-0642: T-157, p. 41, line 19 – p. 42, line 13 (Conf).

¹⁷²⁵ P-0065: T-047, p. 46, line 13 (Conf); P-0638: T-057, p. 67, line 11 (Conf).

¹⁷²⁶ [MLI-D28-0006-2737](#) at 2738. P-0642 refused to be examined in person: [MLI-OTP-0080-4724](#).

¹⁷²⁷ P-0641: T-140, p. 75, lines 6-17 (Conf).

¹⁷²⁸ See *supra*, para. 396.

9.2.2.1 P-1708 [REDACTED]

470. The Prosecution failed to prove that P-1708 was unlawfully restrained by Mohamed Moussa or that any such restraint was imposed as a punishment or for discriminatory purposes. No crime is apparent from the evidence and no connection with Mr Al Hassan was proven. P-0641 testified that when Mohamed Moussa heard a commotion at the mosque, he brought P-1708 to the BMS so that he would “calm down”.¹⁷²⁹ It appears that P-0641 spoke to “Hamed Moussa” before he was locked up.¹⁷³⁰ The Prosecution did not ask P-0641 if he saw P-1708 being locked up or if he just assumed it took place, nor did the Prosecution ask him to specify the duration of detention. Furthermore, this action by Mohamed Moussa cannot be attributed to Ansar Dine, which, as a group, did not lock up mentally unstable persons.¹⁷³¹ There is also no indication that anyone other than Mohamed Moussa was aware of what transpired.

9.2.2.2 P-1710 and P-1711

471. The elements of Article 8(2)(c)(iv) are not satisfied for this incident. The offence for which the two women were detained was neither criminal nor conflict-related, nor did they receive or serve any serious penalty. The detention imposed, which took place in a single day, was not sufficiently severe to qualify as a war crime or crime against humanity.¹⁷³²

472. P-0641’s testimony, the sole evidence for this incident, is not sufficiently clear and coherent to serve as the basis for a conviction. There is no evidence that P-0641 witnessed P-1710 and P-1711’s arrests or clarity as to when he saw them held at the BMS. Though P-0641 uses the term “we”,¹⁷³³ it is unclear to whom this refers or who relayed to him the information. The Prosecution also did not ask any questions concerning the conditions in the ATM room where the detention allegedly occurred.

473. P-0641’s testimony changes in respect to whether he was the “unbearded one” who spoke to Mohamed Moussa or if it was another cousin.¹⁷³⁴ Additionally, he does not appear to have been present when the relatives spoke to Mohamed Moussa about the girls’ release,¹⁷³⁵ and the manner and timeframe by which he learned about their conversations is unclear. There is also

¹⁷²⁹ **P-0641**: T-138, p. 79, lines 11-17 (Conf).

¹⁷³⁰ **P-0641**: T-138, p. 79, line 16, showing the language is conditional: “then we’ll lock him up”; p. 80, lines 7-9 (Conf).

¹⁷³¹ **P-0638**: T-059, p. 18, lines 13-19 (Conf).

¹⁷³² See *supra* para. 134, fns. 406, 407.

¹⁷³³ **P-0641**: T-138, p. 39, lines 7-18 (Conf).

¹⁷³⁴ **P-0641**: T-138, p. 70, lines 8-9; p. 72, lines 10-11 (Conf).

¹⁷³⁵ **P-0641**: T-138, p. 72, lines 6-11 (Conf).

no indication that anyone other than Mohamed Moussa participated in this incident or was aware about what transpired, which means it cannot be attributed to the groups or any alleged common purpose.

9.2.2.3 P-1712

474. The allegation concerning P-1712 is based on unreliable, inconsistent, second-hand hearsay. Further, the evidence – which has the same evidential value as a rumour – is insufficient to warrant a conviction. P-0641 did not witness these events himself nor did he see P-1712 [REDACTED] at the BMS. The Prosecution did not ask P-0641 if he knew the source of P-1713’s information or circumstances surrounding [REDACTED] detention, nor was he asked to provide context concerning the circumstances under which [REDACTED] conveyed to him this information. There is no indication that P-1713 witnessed [REDACTED] arrest. P-0641 did not identify the alleged female victim and only provided a nickname [REDACTED] giving rise to the strong possibility that this account might be duplicative of other charged incidents. In other words, P-1712 could be the same person as other anonymous victims or other Prosecution witnesses that claimed to have been detained in similar circumstances.

475. P-0641 also failed to provide dates or information concerning the alleged perpetrators. He gave conflicting evidence as to whether P-1712 was taken “next to justice” or next to the BMS,¹⁷³⁶ and whether she was detained or only threatened with detention.¹⁷³⁷ The language he used (“they threatened to lock her up”) suggests P-1712 was held pending an investigation and not as a punishment.¹⁷³⁸

476. P-0641’s evidence in respect of this incident cannot substantiate a conviction. The Chamber, guided by the principle of *in dubio pro reo*, must acquit because there is reasonable doubt concerning if, when, where, why, and by whom this anonymous victim was held. The onus is on the Prosecution prove this incident, and in the absence of having done so, the Chamber cannot simply “fill in” evidential gaps to satisfy elements of the offence. It is also manifestly contrary to Mr Al Hassan’s fair trial rights to convict him based on evidence that was so lacking in detail that it was impossible to meaningfully investigate or contest the charge.

9.2.2.4 P-1721

¹⁷³⁶ P-0641: T-138, p. 75, lines 8-14 (Conf).

¹⁷³⁷ P-0641: T-138, p. 76, line 7 (Conf).

¹⁷³⁸ P-0641: T-138, p. 76, lines 5-8 (Conf).

477. P-1721 is another anonymous victim whose incident is based on rumour and hearsay. Notably, the Pre-Trial Chamber refused to confirm facts concerning P-1721's alleged detention at the BMS.¹⁷³⁹ The evidence led at trial through P-0099 and P-0641 was unreliable, contradictory, and did not substantiate the confirmed facts and circumstances. P-0099's testimonial evidence does not correlate to the confirmed charge, which was that Mohamed Moussa entered a [REDACTED] house and hit her in front of P-0099. Under oath, P-0099 provided an entirely different account for his dispute with Mohamed Moussa. He described Moussa as yelling at unidentified persons on the street¹⁷⁴⁰ and explicitly stated that he did not see any women being hit.¹⁷⁴¹

478. P-0641 was not present when P-1721 was allegedly arrested and did not disclose the source of his information regarding the arrest.¹⁷⁴² There is no evidence suggesting he saw P-1721 at the BMS or that he witnessed any interactions he described as having taken place between P-0099 and unidentified persons in respect of P-1721.¹⁷⁴³ The Chamber cannot rely on P-0641's second-hand hearsay, which originated from P-0099, but who has now provided an entirely different account under oath. Given that the Pre-Trial Chamber found that P-0641's evidence concerning this incident did not satisfy the much lower threshold of substantial grounds to believe, his evidence cannot now be relied upon as the exclusive basis for conviction for this incident.

9.2.2.5 The man named [REDACTED]

479. The Prosecution's disclosure was materially deficient regarding this incident in advance of trial, rendering the Defence investigation impossible. Apart from the nickname, the Defence received no information regarding Foma's name, ethnicity, or the date and circumstances of the incident. The Defence was also unable to investigate through cross-examination. P-0641, [REDACTED] testified that he did not know anyone called [REDACTED] and was unaware of any incidents between [REDACTED] and the Islamists.¹⁷⁴⁴ Convicting Mr Al Hassan for this incident would violate Article 67(1)(a) of the Statute. In the absence of a specific date (other than it was "before Ramadan"), it is impossible to conclude – and there is no evidence – that

¹⁷³⁹ [PTC Decision Amending the Charges](#), para. 65.

¹⁷⁴⁰ **P-0099**: T-145, p. 40, lines 17-23 (Conf).

¹⁷⁴¹ **P-0099**: T-145, p. 40, lines 2-4 (Conf).

¹⁷⁴² **P-0641**: T-138, p. 32, lines 12-16 (Conf).

¹⁷⁴³ **P-0641**: T-138, p. 32, lines 24-25 (Conf).

¹⁷⁴⁴ **P-0641**: T-140, p. 13, lines 18-24 (Conf).

the incident occurred during the charged period. The existence of doubt as to the date must be interpreted to Mr Al Hassan's benefit.

480. The Prosecution elicited evidence concerning ██████████ from P-0603 through a leading question.¹⁷⁴⁵ There is no indication that P-0603 witnessed this incident. She also did not provide the source of her information, nor did she explain why she believed ██████████ was the flogger given that when asked for the name, P-0603 testified that "[w]e didn't know the name of the people [...] this is somebody whose name was asked for, but we didn't even know it".¹⁷⁴⁶ P-0603 also provided no information concerning the circumstances of this incident; it is unclear whether she was present or if anyone heard and understood what was said at the time. The Chamber cannot conclude the interaction was a punishment related to flogging, nor can it be reliably attributed to any particular group, especially given P-0603's inability to explain how or why she attributed this act to ██████████ who was "not nasty".¹⁷⁴⁷ In the absence of particulars concerning ██████████ identity (including ethnicity or possible group association), it is impossible to discount the possibility that P-0603 is recounting another event about which she heard through rumour or video (e.g. the public flogging of ██████████ for theft).

481. There is no demonstrated linkage between this poorly pleaded and unproved incident and the Islamic Police or Mr Al Hassan. ██████████ ██████████.¹⁷⁴⁸ *Hesbah* was also responsible for enforcing rulings concerning smoking.¹⁷⁴⁹

9.3 Detention related conduct

482. The Defence has addressed the credibility and reliability of the allegations concerning P-1134, P-0636, and P-0547 in the section concerning forced marriage and gender-based violence.

9.4 The evidence does not fulfil the elements of the crime

9.4.1 *Islamic Law was not applied with the intent to cause severe pain and suffering or disproportionate humiliation*

483. The Prosecution has not discharged its burden of demonstrating beyond reasonable doubt that severe pain and suffering were inflicted intentionally as part of the application of *Shari'a*.

¹⁷⁴⁵ ██████████

¹⁷⁴⁶ ██████████

¹⁷⁴⁷ ██████████

¹⁷⁴⁸ ██████████

¹⁷⁴⁹ [MLI-OTP-0024-0015](#) at 0039, discussing *Hesbah*'s role in eliminating alcohol and tobacco. See also **P-0654**: T-128, p. 57, lines 21-22; T-134, p. 21, lines 21-23 (Conf).

Shari'a punishments flow from Islamic penology, and the main goal “is to secure human welfare, maintain peace and to establish a righteous society”¹⁷⁵⁰ through deterrence and retribution (*al-rad' wa'l-zajr*).¹⁷⁵¹ Hence, the purpose of *Hudud* punishments is not to cause severe suffering,¹⁷⁵² but rather to ensure justice through deterrence, rehabilitation,¹⁷⁵³ public expiation (*kaffārah*),¹⁷⁵⁴ or atonement as well as to protect society against mischief and uphold its basic interests and standards of justice.¹⁷⁵⁵ This is reflected in the Quranic instruction that the punishment of lashing for adultery (*Zina*) be carried out publicly so that its enforcement is witnessed and understood by society as a certain consequence of a particular crime.¹⁷⁵⁶ This reinforces its deterrent effect, which is a legitimate purpose of punishment.

484. Islamic scholars have also observed that, in practice, the implementation of such punishments have a positive impact on safety and is believed to reduce crime rates.¹⁷⁵⁷ Once punished, the individual is “cleansed” of all wrongdoing in the eyes of God¹⁷⁵⁸ and of their community.¹⁷⁵⁹ In the case of *Zina*, the *Hadd* aims to purify the person and allows them to be accepted by their community and potentially marry. Therefore, it protects from further social disapprobation or exclusion.¹⁷⁶⁰ Non-Islamic courts have viewed banishment from the community as a more severe penalty than flogging. For example, the Columbian Constitutional Court emphasised the importance of considering goals of traditional sentences encompassing corporal punishment and ensuring that one view of suffering in a pluralistic society is not privileged to the detriment of others. It concluded that “whipping” within the framework of traditional justice was a “lawful sanction” because the purpose was directed towards restoring community order, purifying the subject, and thus liberating them.¹⁷⁶¹ Importantly, the Court

¹⁷⁵⁰ S. Ramazan et al., “[Punishment from Islamic Perspectives](#)”, 9(1) *FWU J. of Soc. Sci.* 53 (2015), p. 54.

¹⁷⁵¹ M.H. Kamali, *Crime and Punishment in Islamic Law: A Fresh Interpretation*, OUP (2019), p. 17.

¹⁷⁵² R. Peters, *Crime and Punishment in Islamic Law*, CUP (2005), pp. 30-1.

¹⁷⁵³ [REDACTED] (Conf).

¹⁷⁵⁴ M.H. Kamali, *Crime and Punishment in Islamic Law: A Fresh Interpretation*, OUP (2019), p. 178 (“*hudud* penalties act as a ‘concealer of sin’ (*kaffārah*) for the offender and absolves him of the torment of the hereafter”).

¹⁷⁵⁵ S. Ramazan et al., “[Punishment from Islamic Perspectives](#)”, 9(1) *FWU J. of Soc. Sci.* 53 (2015), p. 55.

¹⁷⁵⁶ M.H. Kamali, *Crime and Punishment in Islamic Law: A Fresh Interpretation*, OUP (2019), pp. 177-178.

¹⁷⁵⁷ M.H. Kamali, *Crime and Punishment in Islamic Law: A Fresh Interpretation*, OUP (2019), p. 293.

¹⁷⁵⁸ [REDACTED] [MLI-D28-0006-5908](#) at 5914, lines 8-13.

¹⁷⁵⁹ **P-0150**: T-105, p. 43, line 23 – p. 44, line 6 (Conf); **D-0111**: T-202, p. 50, lines 1-22 (Conf). *See also* p. 45, line 19 – p. 46, line 2 (Conf); **D-0551**: T-200, p. 85, lines 2-10 (Conf).

¹⁷⁶⁰ **P-0150**: T-097, p. 37, line 6 – p. 38, line 3 (Conf); **D-0202**: T-202, p. 49, line 23 – p. 50, line 1-22 (Conf).

¹⁷⁶¹ Corte Constitucional de Colombia, [Sentencia No. T-523/97](#) (1997) (“in a society that calls itself pluralistic, no vision of the world should take precedence, much less try to impose itself; and in the specific case of the worldview of aboriginal groups [...] the utmost respect is required”).

also held that pain or suffering that is the consequence of legitimate sanctions is not considered torture.¹⁷⁶² This rationale also applies to *Hudud* punishments.

485. *Shari'a* was applied in Timbuktu in 2012 to further justice, security, and community well-being.¹⁷⁶³ [REDACTED] gave evidence that the *Hadd* was applied correctly, in accordance with Islamic texts,¹⁷⁶⁴ and that its imposition produced less severe or better consequences for individuals than the alternative, which was the social exclusion normally resulting as a traditional community reaction.¹⁷⁶⁵ Individuals such as P-0557, P-0565, and Dédéou Maiga accepted the application of *Shari'a* to avoid societal stigma or to be purified.¹⁷⁶⁶ Strict procedural requirements were applied to prevent disproportionate suffering, including rules on how floggings were conducted.¹⁷⁶⁷ These rules were passed down through centuries of Islamic law and scholarship. [REDACTED] who was present at multiple punishments to ensure consistency with *Shari'a*,¹⁷⁶⁸ testified that he “did not see anything in violation with the rules as prescribed in terms of how to carry out the beating.”¹⁷⁶⁹ Punishments took place publicly to ensure deterrence¹⁷⁷⁰ and judgments were read out to promote legality.¹⁷⁷¹ The local population were not required to attend the punishments¹⁷⁷² and the faces of P-0565 and P-0557 were covered precisely to avoid disproportionate humiliation.¹⁷⁷³

486. Steps were taken to avoid risks of injury and minimise pain beyond the degree inherent in lawful sanctions. [REDACTED] testified that when [REDACTED] flogged P-0565, he “did not flog her hard”,¹⁷⁷⁴

¹⁷⁶² Corte Constitucional de Colombia, *Sentencia No. T-523/97* (1997) (“[p]ain or suffering that is the sole consequence of legitimate sanctions, or that is inherent or incidental to them, is not considered torture [...] the European Court of Human Rights has established that not all corporal punishment constitutes torture and that for it to acquire such an entity, the suffering produced must be serious and cruel. The intensity, then, should be analysed in light of the circumstances of the case, such as the length of the sentence, its effects on the physical and moral integrity of the convicted person, their sex, age or health conditions, and even the social context in which it is practiced”).

¹⁷⁶³ Original: [MLI-OTP-0043-0272](#); Transcript: [MLI-D28-0006-5900](#); Translation (ENG): [MLI-D28-0006-5908](#) at 5914, lines 9-24. See also **P-0605**: T-044, p. 67, lines 23-24; p. 71, lines 5-7 (Conf); T-046, p. 64, lines 1-15 (Conf); T-050, p. 56, lines 5-19 (Conf).

¹⁷⁶⁴ [REDACTED]

¹⁷⁶⁵ [REDACTED]

¹⁷⁶⁶ For **P-0557** and P-0565, see *supra* paras 431- 434. **P-0654**: T-128, p. 83, line 22 – p. 84, line 7 (Conf); [MLI-OTP-0069-1658](#) at 1830; **P-0160**: T-067, p. 42, line 4 – p. 43, line 4 (Conf); Original: [REDACTED] Transcript: [REDACTED]; Original: [REDACTED], Transcript: [REDACTED] at 5974.

¹⁷⁶⁷ [REDACTED]

¹⁷⁶⁸ [REDACTED]

¹⁷⁶⁹ [REDACTED]

¹⁷⁷⁰ [REDACTED]

¹⁷⁷¹ [REDACTED]

¹⁷⁷² **P-0150**: T-110, p. 5, lines 15-17 (Conf).

¹⁷⁷³ **P-0565**: T-052, p. 42, lines 2-7 (Conf). According to [REDACTED], Adama tried to prevent [REDACTED] from filming the flogging, but she was overruled by Radwan and Koutaiba: [REDACTED]

¹⁷⁷⁴ [REDACTED]

stating that he “deliberately did not use a severe beating because [he] didn’t think that the ultimate aim of *Hadd* punishment is to harm, but it is to -- it is to pay the penalty for the crime.”¹⁷⁷⁵ According to contemporaneous media reports, P-0565 did not appear to feel the flogs until the end.¹⁷⁷⁶ Dr Sommerlad gave expert evidence that the type of flogging technique used with P-0565 is unlikely to cause any lasting injury or scarring, or injuries other than [REDACTED] he flogged P-0557 25 times,¹⁷⁷⁸ which suggests that P-0557 did not react in a way that left an impression. Also, P-0557 and P-0565 were properly examined by qualified physicians from the hospital of Timbuktu¹⁷⁷⁹ and were immediately discharged without any specific medical treatment apart from paracetamol,¹⁷⁸⁰ which supports the fact that they did not incur severe injuries.

487. According to [REDACTED], individuals were only flogged if they were fully clothed.¹⁷⁸¹ P-0065 testified that he did not remember seeing anyone bleed during the floggings he witnessed.¹⁷⁸² The video footage of P-0554 suggests that no humiliation was intended by the punishment imposed. It shows that P-0554 chose not to wear clothes under her scarf, which resulted in her inadvertent exposure. As soon as her skin was exposed, Khaled stopped the process until P-0554 could be covered with thick clothes,¹⁷⁸³ demonstrating an absence of intention for the punishment to be unduly painful or humiliating. P-0065, [REDACTED] testified that the marks she subsequently showed to [REDACTED] were likely to have been caused by skin products.¹⁷⁸⁴ P-0065 [REDACTED] testified that the red patches [REDACTED]’s shirt when he removed his jumper could have been paint,¹⁷⁸⁵ while [REDACTED] testified that [REDACTED] was flogged by a *Hesbah* member in a manner fully compliant with *Shari’a*.¹⁷⁸⁶

488. Videos of the two men flogged at Youbatao demonstrate that the person carrying out the punishment followed the Islamic requirement of holding his arm at the requisite angle to lessen

¹⁷⁷⁵ [REDACTED]

¹⁷⁷⁶ Original: [MLI-OTP-0024-3077](#), Translation (ENG): [MLI-OTP-0049-0036](#) at 0038.

¹⁷⁷⁷ **D-0500**: T-177, p. 16, line 24 – p. 17, line 6 (Conf).

¹⁷⁷⁸ [REDACTED]

¹⁷⁷⁹ [MLI-OTP-0028-0992](#).

¹⁷⁸⁰ **D-0565**: T-051, p. 43, lines 12-17 (Conf); **P-0557**: T-054, p. 31, lines 7-8 (Conf).

¹⁷⁸¹ [REDACTED]

¹⁷⁸² **P-0065**: T-047, p. 49, lines 7-8 (Conf).

¹⁷⁸³ **P-0150**: T-110, p. 10, line 15 – p. 11, line 19 (Conf). *See also* **P-0065**: T-049, p. 7, lines 23-25 (Conf).

¹⁷⁸⁴ **P-0065**: T-047, p. 49, lines 5-7 (Conf). **P-0554** confirmed she sold ointments: T-065, p. 37, lines 3-7. *See also* [MLI-D28-0004-2854](#).

¹⁷⁸⁵ **P-0065**: T-042, p. 14, line 19 – p. 15, line 6 (Conf).

¹⁷⁸⁶ [REDACTED]

9.4.2 *The implementation of authorised Hudud and Ta'zir punishments were lawful sanctions*

493. In defining torture as a crime against humanity, the Elements of Crimes carves out a specific exception for pain or suffering that arises from, and is inherent or incidental to, lawful sanctions.¹⁷⁹⁶ This exception also applies to charges of other inhumane acts and lesser offences,¹⁷⁹⁷ as well as to the war crimes of torture and cruel treatment.¹⁷⁹⁸ As for the latter, the necessary criteria of “unlawfulness” need not be spelled out for each war crime. This caveat was intended to operate as a “place marker that refers back to relevant provisions of international humanitarian law”.¹⁷⁹⁹ The definition of torture in Article 8 was based on the Convention against Torture (CAT) definition.¹⁸⁰⁰ Since the lawful sanctions exception applies to both the CAT definition and the war crimes of torture and cruel treatment under IHL,¹⁸⁰¹ it necessarily applies to the offences prescribed by Article 8.

494. The lawful sanctions exception arises from the simple reality that criminal punishments necessarily entail pain, suffering, and humiliation as part of deterrence. The degree of pain and suffering also increases depending on societal disapproval for the offence in question. The application of *Shari'a* in Timbuktu in 2012 falls squarely within this exception. The Islamic Tribunal and associated organs issued punishments in accordance with the laws promulgated by the Emirate, which were themselves compliant with centuries of established Islamic law and legal scholarship. These laws were not manifestly unlawful and would not have been manifestly unlawful to Mr Al Hassan, who grew up with the application of these laws. In 2012, the application of these laws also did not meet the threshold for individual criminal responsibility.

495. The term “lawful” in “lawful sanctions” must be given its plain meaning: i.e. to be in accordance with the law. In the absence of any express qualification to the term, its scope encompasses laws adopted and promulgated by NSAs where they have established judicial processes. As set out in paragraphs 338-340 above, IHL affords NSAs the power to conduct legal proceedings as part of the duty of responsible command. IHL also does not prohibit any

¹⁷⁹⁶ [ICC Elements of Crimes](#), Art. 7(1)(f), para. 3.

¹⁷⁹⁷ A. Cassese, “Prohibition of Torture and Inhuman or Degrading Treatment or Punishment” in R.J. MacDonald et al. (eds), *The European System for the Protection of Human Rights*, Martinus Nijhoff, 1993, p. 229.

¹⁷⁹⁸ [ICC Elements of Crimes](#), “General Introduction”, para. 6. See also K. Dormann, [War Crimes under the Rome Statute of the ICC](#), 2003, p. 355.

¹⁷⁹⁹ K. Dormann, [War Crimes under the Rome Statute of the ICC](#), 2003, p. 355.

¹⁸⁰⁰ K. Dormann, [War Crimes under the Rome Statute of the ICC](#), 2003, pp. 366-369.

¹⁸⁰¹ UN General Assembly, *1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. [A/RES/39/46](#), 1465 UNTS 85, Art. 1 (“[i]t does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”); K. Dormann, [War Crimes under the Rome Statute of the ICC](#), 2003, pp. 366-369.

specific types of punishment that can be imposed pursuant to such trials.¹⁸⁰² It follows that any sanctions ordered and imposed by NSA-conducted proceedings are “lawful” unless specific grounds exist to find otherwise. This interpretation ensures equality of belligerents in a NIAC and consistency with interpretation of Article 8(2)(c)(iv).¹⁸⁰³

496. Through this lens, laws and lawful sanctions are determined by reference to¹⁸⁰⁴

a body of regularized procedures and normative standards that is considered justiciable – i.e. susceptible of being enforced by a judicial authority – in a given group and contributes to the creation and prevention of disputes, as well as to their settlement through an argumentative discourse coupled with the threat of force.

Lawfulness is satisfied by sanctions deriving from laws that are (i) accessible, (ii) “possess a degree of precision that allows for sufficient predictability and foreseeability of a potential restriction of a right” and (iii) provide a general “adequate and effective protection against arbitrariness”.¹⁸⁰⁵ The *Hadd* and *Ta’zir* sanctions issued by the Islamic Tribunal in Timbuktu, *Hesbah*, and the Islamic Police complied with these criteria.¹⁸⁰⁶ Multiple witnesses from Timbuktu testified they considered the punishments imposed by the Tribunal to be lawfully mandated by the *Quran* and incapable of being contradicted by devout Muslims, even if they were not personally in favour of them.¹⁸⁰⁷

497. This interpretation of “lawful sanctions” is consistent with the language of the Rome Statute, the principle of *in dubio pro reo* requiring interpretation in a manner favourable to the accused where any doubt exists,¹⁸⁰⁸ and the requirements of legal pluralism. The importance of legal pluralism in ICC framework is underscored by the willingness of states to compromise on the death penalty during the drafting process to encourage ratification by states that continue to employ it as a lawful sanction.¹⁸⁰⁹ Cognisant of cultural diversity, states did not impose any additional qualifications pertaining to the phrase “lawful” in lawful sanctions, i.e. by reference

¹⁸⁰² See *supra* para. 331.

¹⁸⁰³ See *supra* paras 336-339.

¹⁸⁰⁴ B. de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, 3rd ed., CUP (2020), pp. 106–107.

¹⁸⁰⁵ E. Heffes, “[Detention in Non-International Armed Conflicts: From Prohibitions to Restrictions and Acceptance](#)”, CUP (2022) p. 183.

¹⁸⁰⁶ See *supra*, sections 8.7.1 and 8.7.2.

¹⁸⁰⁷ **D-0202**: T-204, p. 34, lines 8-9 (Conf); **D-0605**: T-192, p. 26, lines 2-16 (Conf); T-195, p. 32, lines 9-13; p. 82, lines 1-5 (Conf). See also **P-0150**: T-108, p. 46, line 14 – p. 47, line 8 (Conf); **D-0272**: T-182, p. 26, lines 14-21 (Conf); **D-0240**: T-191, p. 47, lines 3-7 (Conf); **D-0213**: T-197, p. 10, line 7 – p. 11, line 6 (Conf).

¹⁸⁰⁸ [Akayesu TJ](#), para. 501.

¹⁸⁰⁹ J. Almqvist, “[Complementarity and Human Rights: A Litmus Test for the International Criminal Court](#)” 30 *Loy. L.A. Int’l & Comp. L. Rev* (2008) 335, 341.

to either domestic or international law. This outcome followed the expressions of concern by Arab States that the inclusion of such qualifications could prohibit certain forms of punishment in Islamic law,¹⁸¹⁰ and reflects the states' understanding that including *Hadd* and *Ta'zir* punishments within the scope of ICC crimes would alienate the Court from parts of the Muslim world. Since Islam is the second most popular religion in the world, such an outcome would frustrate the overarching goal of universalising the Rome Statute.¹⁸¹¹

498. The preference for pluralism is further entrenched in the express stipulation that Article 7 only prohibits “conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.” This language was inserted to ease concerns of Asian and Arab states regarding cultural relativism and potential penalisation of acceptable country-specific practices.¹⁸¹² The phrase “international law” underscores the compromise, i.e. that a mere breach of human rights law does not trigger the operation of this Article.¹⁸¹³ Instead, it is necessary to demonstrate uniform practice among principal legal systems to prohibit and impose individual criminal responsibility for such conduct. Indeed, the existence of human rights judgments deprecating certain state conduct is evidence that the threshold for establishing a general principle of law has not yet been reached. The very fact that states have continued to engage in the conduct in question militates against the existence of an established rule practised uniformly in most states in all major legal systems.¹⁸¹⁴

499. In 2012, there existed no uniform and consistent domestic or international legislation prohibiting either the imposition of *Hadd* or *Ta'zir* punishments or imposing individual criminal responsibility in connection with the implementation of such punishments. Islamic law, which is one of the three major legal systems in the world,¹⁸¹⁵ expressly permits the imposition of *Hadd* and *Ta'zir* punishments. There is no clear and consistent practice or *opinio juris* in 2012 prohibiting corporal punishment. It is not prohibited under IHL¹⁸¹⁶ and it is

¹⁸¹⁰ M. Badar, [The International Criminal Court, Islamic Legal Tradition, and the Arab World: Quo Vadis?](#) ICC Forum, 2022.

¹⁸¹¹ M. Badar, [The International Criminal Court, Islamic Legal Tradition, and the Arab World: Quo Vadis?](#) ICC Forum, 2022.

¹⁸¹² D. Robinson, “The Elements of Crimes Against Humanity” in R Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers (2001), pp. 67-69, 71. See also K. Kittichaisaree, “Crimes Against Humanity” in *International Criminal Law*, OUP (2001).

¹⁸¹³ D. Robinson, “Defining Crimes against Humanity at the Rome Conference”, 93(1) *Am. J. Int'l L.* 43, (1999) 53 (“[a]ll delegations agreed that the court’s jurisdiction relates to serious violations of **international criminal law, not international human rights law**”) (emphasis added).

¹⁸¹⁴ [ICC Appellate Decision on Extraordinary Review](#), paras 27-32.

¹⁸¹⁵ M. E. Badar, “[Islamic Law \(Shari'a\) and the Jurisdiction of the International Criminal Court](#)” (2011) 24 *Leiden J. Int'l L.* 411, 412-13.

¹⁸¹⁶ See *supra* para. 332.

considered a “grey area” in international law.¹⁸¹⁷ Severity of punishment does not warrant a finding that the punishment is unlawful, as demonstrated by the continued lawfulness of the death penalty. Any ambiguity in uniform legal practice must be resolved in favour of Mr Al Hassan.

500. Corporal punishment is legal in many states whose penal legal systems are based on *Shari’a*, such as Brunei, Indonesia (Aceh Special Region), Iran, Libya, Malaysia, Maldives, Mauritania, Nigeria, Pakistan, Qatar, Saudi Arabia, UAE, and Yemen,¹⁸¹⁸ as well as non-Islamic countries like Singapore.¹⁸¹⁹ Domestic courts have rejected human rights challenges to such punishments.¹⁸²⁰ There also exists widespread state practice of imposing severe sanctions for the sale and consumption of “illicit” items such as drugs and alcohol.¹⁸²¹

501. State practice in 2012 reflects that *Shari’a* was compatible with the international legal prohibition on torture. Libya, Saudi Arabia, and Sudan all acceded to the Convention against Torture without any reservations even though their *Shari’a*-based legal systems allow such punishments as amputation or execution by stoning.¹⁸²² The rationale for their unqualified accession appears to signify that since *Shari’a* penalties are based on God’s law, they cannot be regarded as cruel, inhuman, or degrading.¹⁸²³

502. Human rights law does not invalidate the conclusion that there did not exist uniform and consistent practice penalising the imposition of *Hudud* or *Ta’zirs* in 2012. Article 21(3) requires the Court apply the Statute in a manner that does not violate human rights; it does not

¹⁸¹⁷ A. Karapetyan, “[A Recurring Phenomenon: The Lawful Sanctions Clause in the Definition of Torture and the Question of Judicial Corporal Punishment Under International Human Rights Law](#)” (2016) 36 Polish Yearbook of International Law 137, p. 146.

¹⁸¹⁸ M.H. Kamali, *Crime and Punishment in Islamic Law: A Fresh Interpretation* (Oxford: OUP 2019), pp. 278-279 (**Aceh Special Region, Indonesia**); pp. 288-294 (**Saudi Arabia**); pp. 295- 300 (**Pakistan**); pp. 306-309 (**Iran**); pp. 311- 314 (**Nigeria**); pp. 315-320 (**Sudan**); pp. 321-323 (**Mauritania**); pp. 323-325 (**Maldives**); pp. 325-328 (**Yemen**); pp. 329-330 (**Libya**); pp. 330-332 (**UAE**); pp. 332-333 (**Qatar**); pp 284-287 (**Brunei**). See also Straits Times, “[Brunei implements Islamic law: Facts about syariah around the world](#)”, 3 April 2019 (referring to the implementation of *Shari’a* in Brunei, Pakistan, Sudan, Afghanistan, Saudi Arabia, Nigeria, Indonesia, Syria, Iraq, and Qatar). See also [MLI-D28-0004-2968](#) concerning the active application of *Shari’a* in Mauritania in relation to an apostasy case.

¹⁸¹⁹ F. Bahrapour, “[The caning of Michael Fay: Can Singapore’s punishment withstand the scrutiny of International law?](#)” (1995) 10(3) Am. U. Int’l L. Rev 1075-1108.

¹⁸²⁰ M.H. Kamali, *Crime and Punishment in Islamic Law: A Fresh Interpretation* (Oxford: OUP 2019), p. 282 (referencing a 2015 Indonesian Supreme Court decision rejecting challenge to Aceh’s Islamic punishments); p. 304 (referencing a December 2010 court judgment ordering the government to repeal legislation seeking to modify the *hudud* laws for *Zina* offences).

¹⁸²¹ M.H. Kamali, *Crime and Punishment in Islamic Law: A Fresh Interpretation* (Oxford: OUP 2019), p. 276. Similar punishments apply in **India** (Gujarat Act No. 29 of 2011); **Ghana**, Armed Forces Act 1962, Art. 15 (applying the death penalty for the offence of being drunk while on watch in the presence or vicinity of the enemy. Arts. 62 and 63 of the penal code also stipulate robbery is subject to multiple amputations, including the right hand and the left foot).

¹⁸²² R. Peters, *Crime and Punishment in Islamic Law*, CUP (2005), p. 175.

¹⁸²³ R. Peters, *Crime and Punishment in Islamic Law*, CUP (2005), p. 175.

require or even allow the Court to transpose interpretations formulated at the international human rights level to individual criminal responsibility.¹⁸²⁴ This is because human rights law is directed at States rather than individuals; the fact that States should refrain from certain conduct does not establish a binding norm that individuals should be criminally sanctioned for such conduct.¹⁸²⁵ Nerlich has highlighted, in respect of the Torture Convention, the dangers of applying human rights provisions in lieu of criminal law or doing so in a piece-meal manner.¹⁸²⁶ 503. The principle of legality further limits human rights interpretation in criminal law.¹⁸²⁷ Bassiouni notes that “ICL criminalizes, while IHRL does not. One of the consequences of this essential distinction is that ICL is at least theoretically bound by principle of legality, which requires its terminology to be more specific, whereas international human rights law, which is not bound by such a requirement, tends to be more general”.¹⁸²⁸ The principle “generally requires that a court may exercise jurisdiction only over an individual who could have reasonably expected to face prosecution under national or international law”.¹⁸²⁹ Changes in legal interpretation cannot be made at the expense of the principle of legality and fair trial preparation; the Chamber must satisfy itself that “such an interpretation is reasonably foreseeable and consistent with the essence of the language in the Statute”.¹⁸³⁰ The principle has been found to be violated where a defendant was convicted through legal reasoning by analogy,¹⁸³¹ a conviction following divergent case law concerning the crime,¹⁸³² or a conviction

¹⁸²⁴ The *ad hoc* international criminal tribunals have adopted a cautious approach towards importing from human rights law, including, in particular, with respect to the definition of “torture”. See e.g. [Kupreškić TJ](#), para. 589; [Kunarac TJ](#), paras 470-471; [Krnojelac TJ](#), para. 181.

¹⁸²⁵ [Vasiljević TJ](#), para. 199 (“for criminal liability to attach, it is not sufficient, however, merely to establish that the act in question was *illegal* under international law, in the sense of being liable to engage the responsibility of a state which breaches that prohibition, nor is it enough to establish that the act in question was a crime under the domestic law of the person who committed the act.”)

¹⁸²⁶ V. Nerlich, “Article 21 (3) of the ICC Statute: Identifying and Applying Internationally Recognized Human Rights” in P. Lobba & T. Mariniello (eds.) *Judicial Dialogue on Human Rights: The Practice of International Criminal Tribunals* (Leiden: Brill Nijhoff, 2017), p. 80.

¹⁸²⁷ V. Suhr, *Rainbow Jurisdiction at the International Criminal Court* (Springer 2022), pp. 84-92 (noting on p. 91 that “the human rights interpretation alone usually cannot be used to broaden the definition of a crime, but only as a supportive argument for a broad definition, provided it is in, line with the provision’s wording and the other general rules of interpretation”). See also L. Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (Cambridge, CUP 2014), p. 114 (pointing out that “assigning article 21(3) a super-legal status that obliges judges to be guided by interpretation in favour of international human rights and norms, including maximum protection for the victim, would seriously undermine the express wording of article 22(2)” and would be unreasonable); A.S. Galand, “[The Systematic Effect of International Human Rights Law on International Criminal Law](#)”, Martin Scheinin (ed.) *Human Rights Norms in ‘Other’ International Courts* (Studies on International Courts and Tribunals) (Cambridge, CUP 2019), pp. 87-113.

¹⁸²⁸ M. Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (Cambridge, CUP 2011), p. 208-209.

¹⁸²⁹ [Al Rahman Appellate Decision on Jurisdiction](#), para. 85.

¹⁸³⁰ [Yekatom et al. Appellate Decision on Scope](#), para. 47.

¹⁸³¹ [ECtHR, Vasiliauskas v. Lithuania](#), paras 179-186.

¹⁸³² [ECtHR, Žaja v. Croatia](#), paras 99-106

in which consensus on individual criminal responsibility was formulated after commission of the crime.¹⁸³³ This Chamber must focus on the status of state practice and *opinio juris* in 2012, when post-Arab spring Islamist-oriented self-determination movements were viewed positively, not 2023.

504. The Chamber's assessment of the legality principle must also consider "factors such as the "flagrantly unlawful nature" of the crimes charged and the circumstances of the accused" as well as whether the "laws were sufficiently clear and accessible to the accused."¹⁸³⁴ This requires a sensitivity to the Western or colonial context of certain secular laws as well as the extent to which modern initiatives to implement Islamic criminal law form part of a "broader quest for dignity and identity and rejection of the colonial legacy"¹⁸³⁵ and the need to afford a margin of appreciation to the cultural contexts and capacities of different communities.¹⁸³⁶ The UN Special Rapporteur on the rights of indigenous peoples, James Anaya, has thus condemned criminalisation of traditional justice practices as undermining legal pluralism and reflecting a biased conception of indigenous justice systems; dialogue, rather than knee-jerk criminalisation, is the preferred response.¹⁸³⁷ In accordance with the right to cultural integrity, "the cultural group concerned should be accorded a certain deference for its own interpretive and decision-making processes in the application of universal human rights norms".¹⁸³⁸ Otherwise, the lack of understanding of these legitimate practices and processes, coupled with criminalisation, re-generates concerns about Western repression.¹⁸³⁹

505. Within nomadic societies in particular, imprisonment may be perceived as a greater harm than other punishments¹⁸⁴⁰ and may cause disproportionate suffering to families dependent on the defendant for survival and who have no social welfare system to mitigate financial hardship. For these reasons, the Indigenous and Tribal Peoples Convention specifies that "account shall be taken of their economic, social and cultural characteristics", and "methods of punishment other than prison shall be given preference."¹⁸⁴¹ Anaya has also emphasised the benefits of abiding cultural practices designed to cleanse the defendant of stigma and facilitate re-

¹⁸³³ [ECtHR, *Contrada v. Italy*](#), paras 64-76.

¹⁸³⁴ [Al Rahman Appellate Decision on Jurisdiction](#), para. 85.

¹⁸³⁵ M.H. Kamali, *Crime and Punishment in Islamic Law: A Fresh Interpretation*, OUP (2019), p. 274.

¹⁸³⁶ O. Ruiz-Chiriboga, "[Indigenous Corporal Punishment In Ecuador And The Prohibition Of Torture And Ill Treatment](#)" 28(4) *Am. U. Int'l L. Rev* 975, p. 995.

¹⁸³⁷ [UN Report on Indigenous Justice](#), paras 52-53.

¹⁸³⁸ S. James Anaya, [International Human Rights and Indigenous Peoples: The Move toward the Multicultural State](#), 21 *Ariz. J. International & Comparative Law* 13 (2004), p. 133.

¹⁸³⁹ [UN Report on Indigenous Justice](#), para. 53.

¹⁸⁴⁰ C. Perafán and L. Azcárate, *Paez, Kogi, Wayúu and Tule Legal Systems*, pp. 82-83, cited in [Colombian Const. Court Judg. T-349/96](#).

¹⁸⁴¹ [UN Report on Indigenous Justice](#), para. 23.

integration into their community.¹⁸⁴² The Columbian Constitutional Court rejected arguments that the use of “stocks”¹⁸⁴³ or 60 lashes of leg whipping¹⁸⁴⁴ constituted cruel and inhumane treatment. Instead, the Court emphasised the short duration of the punishments and their objective of restoring the position of the punished individuals within their communities.

506. These conclusions are directly applicable to *Shari’a*, which seeks to ensure the punished are cleansed and can immediately return to their communities. This is particularly salient in Timbuktu, where defendants from nomadic tribes needed to travel with their animals to ensure their survival and there was no social welfare system to assist families with the negative effects of imprisonment or to help women deal with societal exclusion.

9.4.3 *In the context of war crimes, the conduct was not imposed for a prohibited purpose*

507. The Prosecution failed to establish that the Islamic punishments were imposed for a prohibited purpose, such as “obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.”¹⁸⁴⁵ The definition of torture does not encompass lawful punishments, as per Article 1 CAT. The application of *Hadd* or *Ta’zir* punishments thus falls outside Article 8, unless imposed for a prohibited purpose.¹⁸⁴⁶ Since this was not proven by the Prosecution, Mr Al Hassan must be acquitted of the confirmed charges.

508. Conversely, even if evidence existed concerning a prohibited purpose, it would not lessen or exempt the Prosecution’s duty to establish that the pain inflicted crossed the severity threshold: “[t]he expression “severe pain or suffering” conveys the idea that only acts of substantial gravity may be torture. Neither interrogation by itself, nor minor contempt for the

¹⁸⁴² [UN Report on Indigenous Justice](#), para. 25.

¹⁸⁴³ [Colombian Const. Court Judg. T-349/96](#), Section 2.4.2.2. (“it is a form of corporal punishment that is part of their tradition and that the same community considers valuable due to its high degree of intimidation and its short duration. In addition, despite the physical rigors involved, the penalty is applied in such a way that no damage is done to the integrity of the convicted person [...] it is not a disproportionate and useless punishment, nor does it cause physical or mental damage of any seriousness.”)

¹⁸⁴⁴ [Colombian Const. Court Judg. T-523/97](#), Section 3.3.3 (“[t]he flogging [...] in this case is executed in the lower part of the leg. This punishment [...] is one of the sanctions that the *paeces* use the most. Although it undoubtedly produces affliction, its purpose is not to cause excessive suffering, but to represent the element that will **serve to purify the individual**, lightning. It is therefore a symbolic figure or, in other words, a ritual used by the community to sanction the individual and restore harmony [...] **the Court considers that the suffering that this sentence could cause the actor does not have the levels of seriousness required for it to be considered torture, since the bodily damage it produces is minimal.** Neither could it be considered as a degrading punishment that “rudely humiliates the individual in front of another or in his own internal forum”, because [...] this is a practice normally used among the *paeces* and whose purpose is not to expose the individual to the public “humiliation”, but to recover their place in the community”) (emphasis added).

¹⁸⁴⁵ [ICC Elements of Crimes](#), Article 8(2)(c)(i), para. 2.

¹⁸⁴⁶ [Krnjelac TJ](#), para. 180.

physical integrity of the victim, satisfies this requirement.”¹⁸⁴⁷ As such, Mr Al Hassan must be acquitted of the charges concerning Ibrahim Bin Husayn given the Prosecution’s failure to adduce any evidence concerning the severity of the alleged conduct.

9.5 The Prosecution failed to demonstrate that the incidents were committed as part of a wide-spread or systematic attack or had a nexus to an armed conflict or that the perpetrators and Mr Al Hassan knew this

509. The Prosecution failed to demonstrate the alleged acts of torture or inhumane treatment had a nexus to an armed conflict. The application of *Ta’zirs* derives from the *Quranic* mandate that all believers must take steps to promote virtue and deter immoral conduct.¹⁸⁴⁸ According to the evidence, “[b]efore 2012, there were groups who were trying to do what *Hesbah* did”,¹⁸⁴⁹ even before Ansar Dine arrived in Timbuktu. Punishments were not predicated on military objectives or linked to any armed conflict. *Hesbah* had no jurisdiction over political or military matters.¹⁸⁵⁰ The perpetrators were not “combatants” and the conduct did not take place “in the course of hostilities”. Further, the alleged victims were not arrested, detained, or prosecuted in connection with penal offences related to the armed conflict. They did not belong to an “opposing party” and were not affected by the armed conflict.

510. Alleged and isolated acts of rape directly contravened the official policy governing duties and obligations of the alleged perpetrators. Such incidents are best described as “parasitical criminality that opportunistically uses the cover of the armed conflict” and which “does not, in principle, satisfy the requirement of nexus”.¹⁸⁵¹ The fact scenario falls squarely within those considered by the US 11th Circuit Court of Appeals in *Sinaltrainal*, wherein the nexus element was not satisfied in respect of allegations that corporations had hired paramilitaries to torture and murder leaders of trade unions. The Court cautioned against broadening the scope of the nexus element to encompass crimes that had merely been “enabled” by the armed conflict. It further distinguished between crimes where the armed conflict provided the background to the commission of crimes as opposed to those where the conflict had precipitated their commission.¹⁸⁵² Similarly, in *In re Xe Services Alien Tort Litigation*, the US District Court expressed concern that an overbroad or amorphous definition of the nexus requirement could

¹⁸⁴⁷ [Krnjelac TJ](#), para. 181.

¹⁸⁴⁸ Video: [MLI-OTP-0043-0271](#); Transcript: [MLI-D28-0006-5723](#); Translation (ENG): [MLI-D28-0006-5762](#) at 5764, lines 5-6, 16-18.

¹⁸⁴⁹ [REDACTED] See also [MLI-D28-0006-3131](#).

¹⁸⁵⁰ Original: [MLI-OTP-0043-0272](#); Transcript: [MLI-D28-0006-5900](#); Translation (ENG): [MLI-D28-0006-5908](#) at 5912, lines 9-14.

¹⁸⁵¹ G. Mettraux, *International Crimes and the Ad Hoc Tribunals*, OUP (2006), p. 43.

¹⁸⁵² [Sinaltrainal v. Coca-Cola](#), 578 F.3d 1252 (11th Cir. 2009), p. 26.

have significant jurisdictional consequences. Therefore, it rejected arguments that taking advantage of civil disorder or being shaped by the conflict were sufficient to satisfy the nexus requirement. The drunken, unsanctioned acts of guards or soldiers committed for reasons unconnected to the conflict do not satisfy the nexus element.¹⁸⁵³

9.6 The Prosecution failed to demonstrate that the charged incidents were committed pursuant to the charged common plan

511. As set out in Sections 2 and 3, the Prosecution failed to demonstrate that alleged beatings in streets or houses or alleged mistreatment in detention were committed by members of either Ansar Dine or AQIM, or that the perpetrators were acting pursuant to the charged common plan.

512. The description of the charged incidents does not correspond to the rules established by Abu Zeid as the Emir of Timbuktu or ██████████ Abu Zeid issued instructions that Islamic Police and *Hesbah* members were to avoid using force with the local population and were prohibited from entering houses.¹⁸⁵⁴ The group actively enforced these instructions, punishing individuals who contravened them,¹⁸⁵⁵ apologising to and compensating victims, and issuing written and verbal directives to clarify such conduct was forbidden.¹⁸⁵⁶ Even if the Chamber were to accept P-0642's incoherent and unreliable account, her own evidence indicates that Mohamed Moussa had violated the group's orders by entering her house.¹⁸⁵⁷

513. According to the rules ██████████ for *Ta'zirs*, the preferred approach concerning the application of "moral rules" was to provide guidance with soft words,¹⁸⁵⁸ and warnings if necessary, rather than detention or physical punishments.¹⁸⁵⁹ When Mohamed Moussa became Emir of *Hesbah*, ██████████ women were not detained for longer than 24 hours.¹⁸⁶⁰ According to Mohamed Moussa, these instances of detention arose when women were found late at night and their family members collected them the next morning.¹⁸⁶¹ As set out in section paragraph 145 as well as Section 7.5, apart from the Bocar case, the leaders

¹⁸⁵³ [In re Xe Services Alien Tort Litigation](#), 665 F. Supp. 2d 569 (2009), pp. 590-591.

¹⁸⁵⁴ Original (AR): [MLI-OTP-0002-0017](#), Translation (ENG): [MLI-OTP-0077-2186](#). See also **P-0150**: T-113, p. 29, lines 10-17 (Conf); **D-0529**: T-189, p. 16, lines 10-20 (Conf).

¹⁸⁵⁵ **D-0529**: T-189, p. 16, line 22 – p. 17, line 21 (Conf); [MLI-D28-0006-3048](#) at 3049, para. 9; **P-0150**: T-104, p. 42, lines 8-12 (Conf).

¹⁸⁵⁶ Original: [MLI-OTP-0001-7515](#); Translation (ENG): [MLI-OTP-0052-0019](#). See also **P-0114**: [MLI-OTP-0028-0126](#) at 0128; **P-0150**: T-094, p. 72, lines 7-19; p. 74, lines 2-4 (Conf).

¹⁸⁵⁷ **P-0642**: T-157, p. 56, line 21 – p. 58, line 6 (Conf).

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were not aware of any specific instances of rape or sexual assault. The Prosecution's allegations that detainees were not provided food or sanitary facilities is controverted by reliable evidence.¹⁸⁶² Since *Shari'a* dictates that prayer cannot be conducted in an unhygienic environment,¹⁸⁶³ the allegation that detainees were denied sanitary facilities is inconsistent with the charged common plan and cannot be considered to have been a virtually certain consequence of its execution. Similarly, the imposition of punishment against mentally incapacitated individuals was not consistent with the policy and practice of the groups.¹⁸⁶⁴

514. In any case, Mohamed Moussa's actions cannot be imputed to Ansar Dine, AQIM, or the Islamic Police. He was initially an MNLA member¹⁸⁶⁵ and, as explained by [REDACTED], acted in accordance with motives related to his tribe and personal convictions.¹⁸⁶⁶ There is a substantial body of evidence that incidents against the local population were committed by former MLNA members who, like Mohamed Moussa, started working Ansar Dine and *Hesbah* after the MNLA left the airport.¹⁸⁶⁷ These individuals were undisciplined and acted outside Ansar Dine or AQIM's organisational policies and directives.¹⁸⁶⁸ The leaders in Timbuktu also disapproved of Mohamed Moussa's actions. When the issues of womens' arrests and detention were brought to the leaders' attention, Abu Zeid initiated an investigation and provided further instructions, which lead to an improvement.¹⁸⁶⁹ The representatives of the local population were satisfied with Abu Zeid's responses.¹⁸⁷⁰

9.7 The Prosecution has not demonstrated that Mr Al Hassan made culpable contributions to the charged incidents

9.7.1 Hudud punishments

515. There is no evidence that Mr Al Hassan was aware of the occurrence of each flogging and punishment or that their occurrence was a virtually certain consequence of the execution of the alleged common plan. In terms of actual knowledge, in a November 2012 interview, Mr Al Hassan appeared to be aware of only a handful of floggings.¹⁸⁷¹ When interviewed by the

¹⁸⁶² [REDACTED]; P-0603: T-127, p.22, lines 18-19 (Conf).

¹⁸⁶³ P-0150: T-111, p. 64, lines 3-4 (Conf).

¹⁸⁶⁴ [REDACTED].

¹⁸⁶⁵ [REDACTED].

¹⁸⁶⁶ [REDACTED].

¹⁸⁶⁷ D-0551: T-200, p. 82, lines 5-10 (Conf).

¹⁸⁶⁸ [REDACTED].

¹⁸⁶⁹ [REDACTED].

¹⁸⁷⁰ [REDACTED].

¹⁸⁷¹ Video: [REDACTED] Transcript: [REDACTED] Translation (ENG): [REDACTED]

Prosecution, he was unaware that the woman ██████████ had allegedly been flogged,¹⁸⁷² nor was he aware of the floggings concerning P-0554 or ██████████.¹⁸⁷³ Mr Al Hassan could not have reliably predicted their occurrence given that the Islamic Tribunal generally avoided the *Hadd*,¹⁸⁷⁴ particularly for theft, as reflected by the fact that the *Hadd* was not ordered before,¹⁸⁷⁵ or after this case.¹⁸⁷⁶

516. Mr Al Hassan was not present during several charged incidents, such as the amputation of Dédéou Maiga,¹⁸⁷⁷ or the flogging of P-0554 and ██████████. His presence at the flogging of three couples in late November 2012 has not been established by reliable evidence.¹⁸⁷⁸

517. The Prosecution's assertion that as a member of the Police, Mr Al Hassan made a general contribution through "security measures" is also controverted by the fact that Talha and his security officers, were responsible for ensuring security at flogging events.¹⁸⁷⁹

518. The Prosecution also failed to establish that Mr Al Hassan's alleged presence at certain floggings played a substantial role or had any effect whatsoever on the realisation of the floggings, as demonstrated by the following:

9.7.1.1 P-0565 and P-0557

519. The Prosecution failed to demonstrate that Mr Al Hassan contributed to or participated in the realisation of these charged offences. There is no evidence that Mr Al Hassan played any role in their arrest or their questioning at the BMS or Islamic Tribunal. Neither P-0565 nor P-0557 identified Mr Al Hassan as someone they saw during their questioning or detention. Given that P-0557 was brought to the BMS after hours (i.e. at 9pm), there is no proof Mr Al Hassan even knew of his arrest. Nor is there any evidence that Mr Al Hassan was present at the Islamic Tribunal or played any role whatsoever during the judgment process.

520. Mr Al Hassan's alleged presence at the flogging had no impact on the execution of this incident. Physical proximity to an event is irrelevant in the absence of concrete proof that the

¹⁸⁷² **P-0398**: [MLI-OTP-0062-1058](#) at 1063, lines 146-155.

¹⁸⁷³ **P-0398**: [MLI-OTP-0062-1194](#) at 1212, lines 581-595; [MLI-OTP-0062-1218](#) at 1222-1224, lines 132-177; at 1225-1226, lines 233-243; at 1228-1229, lines 336-351; at 1237, lines 614-623.

¹⁸⁷⁴ See *supra* paras. 51, 371, 374, and 380. See also Section 9.4.2.

¹⁸⁷⁵ See *e.g.* Incidents 9, 10, 14, 36, 37, 38 and 40.

¹⁸⁷⁶ See *e.g.* Incidents 16, 21, 24, 27, 35.

¹⁸⁷⁷ P-0638 and P-0654, who were both present, did not identify Mr Al Hassan as being present. See **P-0638**: T-058, p. 62, lines 20-25 – p. 63, lines 1-7 (Conf); **P-0654**: T-128, p. 67, line 1 – p. 68, line 6 (Conf); T-131, p. 42, line 23 – p. 46, line 25 (Conf); T-134, p. 37, line 4 – p. 41, line 9 (Conf).

¹⁸⁷⁸ See *supra* para. 299 and Section 9.7.

¹⁸⁷⁹ **P-0065**: T-049, p. 13, lines 2-3 (Conf).

person's presence had a "significant legitimising or encouraging effect on the principals".¹⁸⁸⁰ Mr Al Hassan exercised no authority over the persons conducting the flogging; he made no statements and engaged in no acts of encouragement or support to the actions that fell under the control of [REDACTED] and other sections.

521. [REDACTED] oversaw the execution of the flogging and ensured through his presence that it was carried out in a manner consistent with *Shari'a*.¹⁸⁸¹ Koutaiba and Radwan oversaw assignment of this task to individuals;¹⁸⁸² Mr Al Hassan played no role in such matters. P-0065 confirmed that the Security Section, not the Islamic police, were responsible for security during this event.¹⁸⁸³ Mr Al Hassan did not have a weapon or any means of ensuring security at this event. There is also no proof he was present the entire time; he does not appear in footage towards the end.¹⁸⁸⁴ In other shots, he can be seen passively sitting on the ground, off to the side¹⁸⁸⁵ (i.e. not acting as a security cordon). The Chamber can draw no reliable inferences concerning Mr Al Hassan's role at the event based on heavily edited clips that have been compiled out of sequence.¹⁸⁸⁶

522. At this point in time, Mr Al Hassan's role at the Police was clerical/linguistic,¹⁸⁸⁷ and the Prosecution has not established Mr Al Hassan was present in a non-administrative capacity. If mere presence suffices, then all the Timbuktu notables who chose to attend, such as the Grand Imam Essayouti, would also be culpable:¹⁸⁸⁸ Such an outcome is clearly incompatible with the limits of individual criminal responsibility within the Rome Statute framework. Mr Al Hassan also played no role in the organisation or execution of their marriage.

523. With respect to the flogging of the two individuals at Youbatao, the persons executing the flogging did so under the orders of the *Qādī*, in accordance with rules established by the Emir, based on the *Quran*. The Prosecution has not established that Mr Al Hassan played a role in

¹⁸⁸⁰ [Furundžija TJ](#), para. 232; [Akayesu TJ](#), para. 484; [Bagilishema TJ](#), paras 34-35; [Semanza TJ](#), para. 358. [Katanga TJ](#), para. 1636 ("[a]s regards the Defence argument concerning remoteness of the Accused to the crimes committed, **proximity to the crime is not, in the Chamber's opinion, a relevant criterion**. Indeed, in international criminal law the prime focus of investigations and prosecutions is those who, whilst physically, structurally or causally remote from the physical perpetrators of the crimes, indirectly committed them or facilitated their commission by virtue of the position they held, however remote") (emphasis added).

¹⁸⁸¹ [REDACTED]

¹⁸⁸² P-0065: T-040, p. 11, lines 15-19 (Conf).

¹⁸⁸³ P-0065: T-049, p. 25, lines 13-23 (Conf).

¹⁸⁸⁴ [REDACTED]

¹⁸⁸⁵ Video: [REDACTED]

¹⁸⁸⁶ [REDACTED]

¹⁸⁸⁷ See *supra* paras 75, 89, 92, 394 and Section 8.9.2.

¹⁸⁸⁸ [REDACTED]

the arrest of these individuals. *Hesbah* was responsible for enforcing the rules concerning drinking in public and the Islamic Tribunal was responsible for deciding the punishment.¹⁸⁸⁹ This incident, dated 8 July 2012, occurred when Adama was Emir of the Islamic Police. Apart from the fact that the Islamic Police were suborned to the Tribunal, Mr Al Hassan was further suborned to Adam¹⁸⁹⁰ as well as to higher-ranking members of the Islamic Police and any AQIM members, including Abu Jaber and Abu Zhar. In video [REDACTED] identified Abou Jaber [Jabar], an Arab AQIM member from Gao with close-ties Abou Zeid,¹⁸⁹¹ as the person who was responsible for counting the flogs.¹⁸⁹² The person who counted the flogs was responsible for ensuring that the *Hadd* was executed in accordance with the Tribunal's judgment.¹⁸⁹³ Within the Islamic Police itself, Abu Dhar decided and coordinated who should implement the *Hadd*.¹⁸⁹⁴ He was also present during the flogging. As affirmed by D-0605, Abou Dhar ranked higher than Mr Al Hassan and could exercise Adam's powers in his absence.¹⁸⁹⁵ P-0065 also stated that while he was unsure of the hierarchy between Mr Al Hassan and Abu Dhar,¹⁸⁹⁶ Abu Dhar had the power to act independently of Mr Al Hassan and had more influence in relation to AQIM. The security officers who were present, were under the control of Talha,¹⁸⁹⁷ and exercised more authority than the Islamic Police.¹⁸⁹⁸ Mr Al Hassan thus had no power to influence the way this punishment was executed or to frustrate its occurrence. He would have been punished for disobeying orders,¹⁸⁹⁹ and replaced by someone else.¹⁹⁰⁰

¹⁸⁸⁹ [MLI-OTP-0024-0015](#) at 0035 (discussing *Hesbah*'s role in peaceably promoting virtue); at 0036 (discussing *Hesbah*'s enforcement of the alcohol ban); p. 0039 (discussing *Hesbah*'s role in eliminating alcohol and tobacco); at 0042-43 (discussing the judges' reliance on their own investigations in issuing their rulings); at 0047 (discussing the role of the Tribunal and the judges' discretion).

¹⁸⁹⁰ **P-0065**: T-040, p. 55, lines 11-16, 20-22 (Conf); T-046, p. 63, lines 19-23 (Conf); **P-0654**: T-128, p. 19, lines 22-25 (Conf); p. 36, lines 7-13; T-131, p. 34, lines 17-18 (Conf).

¹⁸⁹¹ [REDACTED]

¹⁸⁹² [REDACTED]

¹⁸⁹³ [REDACTED]

¹⁸⁹⁴ **D-0202**: T-203, p. 40, lines 11-14 (Conf).

¹⁸⁹⁵ **D-0605**: T-192, p. 83, line 25 – p. 84, line 7 (Conf) (*see specifically* p. 84, lines 1-4).

¹⁸⁹⁶ **P-0065**: T-040, p. 54, lines 10-17 (Conf); **P-0529**: T-189, p. 16, line 9 – p. 17, line 21 (Conf).

¹⁸⁹⁷ **P-0065**: T-046, p. 63, lines 8-18 (Conf).

¹⁸⁹⁸ **P-0150**: T-110, p. 24, lines 17-18 (Conf).

¹⁸⁹⁹ **P-0065**: T-049, p. 22, lines 17-23 (Conf).

¹⁹⁰⁰ **P-0150**: T-108, p. 49, lines 20-22 (Conf).

9.7.2 *Ta'zirs/alleged beatings occurring on the street/detention related allegations*

524. The charged incidents of *Ta'zirs* concern the application of “moral” rules, which fell within *Hesbah*’s purview.¹⁹⁰¹ The term “*Ta'zir*” covers a broad range of possibilities, including advice and cautions.¹⁹⁰² Since neither physical punishment nor detention were dispensed as *Ta'zirs* ██████████,¹⁹⁰³ Mr Al Hassan could not have known that such

punishments were a virtually certain consequence of the implementation of the common plan. 525. Mr Al Hassan also did not contribute to the adoption or implementation of such rules. The Islamic Police had no influence over the implementation of *Ta'zirs* in general or by *Hesbah* members. Whereas members of *Hesbah* could issue *Ta'zirs* directly (until November 2012), the Islamic Police could only apply *Ta'zirs* when ordered to do so pursuant to a judgment from the Islamic Tribunal.¹⁹⁰⁴ In such cases, the Islamic Police had no power to influence or refuse such orders. If members of the Islamic Police acted outside the framework of authorised punishments, they would be disciplined.¹⁹⁰⁵ The Islamic Police also did not have any effective control or influence over *Hesbah*. As explained by ██████████, “the *Hesbah* is higher than the security and the police. The *Hesbah* is very senior.”¹⁹⁰⁶

526. The tasks of the Islamic Police were not related to the detention of women.¹⁹⁰⁷ ██████████ testified that even though he frequently visited the Islamic Police at the BMS and the *Gouvernorat*, he never saw or heard about women being detained by the Islamic Police at either location.¹⁹⁰⁸ He also actively investigated whether it might be possible that women could have been detained by the Islamic Police at the BMS without his knowledge, and ruled it out.¹⁹⁰⁹

527. The Prosecution has not established that Mr Al Hassan was aware that the charged incidents of beatings on the street/in houses took place or that he had any means of knowing the conditions of detention that applied at the BMS after the Islamic Police moved to the

¹⁹⁰¹ Original: [MLI-OTP-0001-7193](#); Translation (ENG): [MLI-OTP-0077-2366](#). See also ██████████ ██████████ **P-0654**: T-134, p. 21, lines 17-20 (Conf); **P-0626**: T-141, p. 53, lines 17-19; p. 54, lines 4-24; **D-0202**: T-203, p. 27, lines 12-13; [MLI-D28-0006-5908](#) at 5912, lines 25-29.

¹⁹⁰² **P-0150**: T-110, p. 20, line 9 – p. 21, line 2; T-112, p. 41, lines 5-25 (Conf).

¹⁹⁰³ ██████████.

¹⁹⁰⁴ ██████████ See also [MLI-OTP-0024-0015](#) at 0034.

¹⁹⁰⁵ **P-0654**: T-128, p. 19, lines 22-25 (Conf) (“[Adam] led these institutions for a long time before he was relieved - and that was after a complaint from the population - and Adama had his position in the -- as commissioner taken away from him”); **D-0605**: T-193, p. 5, line 12 – p. 8, line 5 (discussing Adama’s dismissal for arresting women outside the scope of his authority).

¹⁹⁰⁶ ██████████.

¹⁹⁰⁷ **D-0605**: T-194, p. 29, lines 14-21 (“[r]arely did we see women, rapists or thieves or highway robbers cutting off roads. So the police did not deal with women a lot.”)

¹⁹⁰⁸ ██████████

¹⁹⁰⁹ ██████████

governorate. Mr Al Hassan was not present at Crisis Committee meetings that discussed such issues. As set out in paragraph 284, in Section 7.6, the leaders took steps to remedy such problems at the very point when Mr Al Hassan could have become aware of them. Crucially, when complaints against members of the groups were brought to his attention, Mr Al Hassan took such steps as were in his power to assist the victims to obtain a remedy, and to bring the perpetrator to account.¹⁹¹⁰

9.8 Mr Al Hassan was acting under superior orders/duress/a mistake of fact or law

528. *Shari'a* punishments are inseparable from *Shari'a*: the *Quran* prescribes both conduct and punishment. For the reasons set out in Paragraph 609 and Section 11.7, Mr Al Hassan should be acquitted of these charges through the defences of superior orders, mistake of fact/law and duress.

529. As set out above, Mr Al Hassan's alleged presence and participation in the execution of punishments was mandated by orders of the Islamic Tribunal, and directives of the Emir of the Islamic Police or other high ranking AQIM members. He was never empowered with the responsibility or power to decide whether a *Hadd* punishment should be ordered or how it should be implemented: he was neither a member of the Tribunal that issued the judgment nor the person who counted and supervised the flogs. Once a complaint was filed, the Police had no choice but to refer it to the Tribunal.¹⁹¹¹ The sole area of discretion afforded to the Islamic Police under *Shari'a* was to dissuade locals from filing a complaint through mediation and reconciliation, which he did.¹⁹¹² He also helped locals avoid more serious penalties by assisting them to find witnesses.¹⁹¹³

530. The arguments set out above concerning the fact that *Shari'a* punishments are lawful sanctions must also inform the Chamber's assessment as to whether Mr Al Hassan could have appreciated that such sanctions were manifestly unlawful. The likelihood that someone in Mr Al Hassan's would not have known of the manifest unlawfulness of such punishments is further buttressed by the evidence of both D-0605 [REDACTED] who were unaware that the application of *Shari'a* violated international law or constituted torture.¹⁹¹⁴ As explained by D-0202, as a Muslim believer, it is not possible to disagree with

¹⁹¹⁰ **D-0544**: T-196, p. 30, lines 16-22. **D-0605**: T-195, p. 20, line 22 – p. 21, line 1 (Conf); **D-0514**: T-209, p. 17, line 21 – p. 18, line 2 (Conf); **D-0312**: [MLI-D28-0006-5584-R01](#) at 5591-5592, lines 33-5.

¹⁹¹¹ See *supra* para.422.

¹⁹¹² **D-0272**: T-182, p. 51, lines 6-18 (Conf).

¹⁹¹³ **D-0202**: T-203, p. 5, lines 4-15 (Conf);

¹⁹¹⁴ **D-0605**: T-195, p. 82, lines 1-5 (Conf); [REDACTED]

the prohibitions imposed by Islam.¹⁹¹⁵ According to P-0150, locals attended the punishments “as if they were in agreement” with them.¹⁹¹⁶ They also publicly expressed their support for the application of *Shari’a* punishments in contemporaneous interviews.¹⁹¹⁷ Floggings and beatings occurred in tribal communities before 2012, either through rulings issued by the *Qādi* or by family members enforcing the prohibition on *Zina*.¹⁹¹⁸ Before 2012, there were groups performing similar functions to *Hesbah*,¹⁹¹⁹ including the Malian police in Timbuktu.¹⁹²⁰

531. In terms of the application of the dress code, apart from the fact that this fell outside Mr Al Hassan’s role and responsibilities, the requirements were consistent with first, the dress worn by local women in Timbuktu before 2012,¹⁹²¹ and second, community initiatives pre-dating the arrival of Ansar Dine to require local women to dress in a manner that was consistent with traditional values.¹⁹²² As set out above, Mr Al Hassan also demonstrated through his actions that he did not support or contribute to Mohamed Moussa’s imposition of the *Ta’zirs* of beating or detention.¹⁹²³

10 THE PROSECUTION HAS FAILED TO PROVE THE CHARGE OF ATTACKS AGAINST PROTECTED OBJECTS

10.1 The allegations fall outside the scope of the charges

532. The Chamber must exclude any incidents not confirmed by the Pre-Trial Chamber, namely, the Monument des Martyrs and the Al Farouk Monument.

10.2 The evidence does not fulfil the elements of the crime

533. Mr Al Hassan should be acquitted of these charges given the Prosecution’s failure to satisfy a core element of the charged offences, which is the existence of an attack directed against buildings dedicated to religion. The mausolea were not the target of combat action and the process used to level them cannot be equated to an attack. Even if the Chamber were to

¹⁹¹⁵ **D-0202**: T-203, p. 88, lines 1-4 (Conf).

¹⁹¹⁶ **P-0150**: T-093, p. 76, lines 1-7 (Conf).

¹⁹¹⁷ [REDACTED] Video: [REDACTED]; Transcript: [REDACTED]; Translation (ENG): [REDACTED] at 5598, lines 75-81. *See also* Original: [MLI-OTP-0024-3077](#) at 3078, Translation (ENG): [MLI-OTP-0049-0036](#) at 0039; Original: [REDACTED], Translation (ENG): [REDACTED]; **D-0553**: [MLI-D28-0005-9325-R01](#) at 9330, para. 29; **P-0654**: T-133, p. 20, line 8 – p. 21, line 16; p. 50, line 4 – p. 53, line 6 (Conf).

¹⁹¹⁸ **D-0240**: T-191, p. 48, line 18 – p. 49, line 7 (Conf); **D-0605**: T-195, p. 82, lines 7-12 (Conf); **P-0150**: T-097, p. 37, line 6 – p. 38, line 6 (Conf).

¹⁹¹⁹ *See supra* Section 5.2.

¹⁹²⁰ *See supra* Section 5.2.

¹⁹²¹ **P-0565**: T-052, p. 14, lines 2-7 (Conf); **D-0512**: T-181, p. 22, line 17 – p. 23, line 21 (Conf); [MLI-D28-0006-3315](#) at 00:00:17 to 00:01:27.

¹⁹²² **D-0553**: [MLI-D28-0005-9325-R01](#) at 9327, para. 15 – 9328, para. 22. *See also* **D-0315**: T-185, p. 21, lines 3-22 (Conf); **P-0654**: T-133, p. 13, line 19 – p. 15, line 14 (Conf).

¹⁹²³ *See supra* paras 284, 527 and fn 1007.

apply a broader interpretation of the term “attack”, the charges must still be dismissed due to the absence of any temporal or geographic connection with hostilities. Any further broadening of “attack” would improperly transform the provision into a crime against humanity, violating the principle of legality and the clear distinction between Articles 7 and 8.

10.3 The term “attack” must be defined as “combat action”

534. It may be unnecessary for the Chamber to determine the correct legal interpretation of Article 8(2)(e)(iv) given the absence of any probative evidence that Mr Al Hassan was implicated in this charge. Should the Chamber decide to enter findings concerning the elements of this offence, then it must substitute the definition of an “attack” employed by the Pre-Trial Chamber with that used in *Ntaganda*.

535. The *Ntaganda* Appeals Chamber upheld the Trial Chamber’s conclusion that the term “attack” in Article 8(2)(e)(iv) should be defined as “combat action”,¹⁹²⁴ limiting the scope of Article 8(2)(e)(iv) to attacks directed against religious monuments during combat action. The outcome was based on key considerations concerning the applicable sources of law under Article 21(1),¹⁹²⁵ including, inter alia, the lack of a clear Article 8 definition of “attack”, the need to define it within the established framework of international law,¹⁹²⁶ and the demarcation between the narrower definition of “attacks” against the broader term “hostilities”. ICRC commentary supports the definition of “attack” as referring to “combat action”.¹⁹²⁷ This approach is consistent with the views of leading IHL scholars, such as Professors O’Keefe,¹⁹²⁸ Schabas,¹⁹²⁹ Dormann,¹⁹³⁰ and Newton.¹⁹³¹

536. While Judges Bossa and Ibanez disagreed with Judges Hofmański and Morrison on other issues,¹⁹³² neither deviated from the position that an attack requires combat action and a close

¹⁹²⁴ [Ntaganda AJ](#), para. 1164.

¹⁹²⁵ [Ntaganda, Separate opinion of Judges Howard Morrison and Piotr Hofmański](#), paras 8-10, 18, 23, 27, 31.

¹⁹²⁶ [Ntaganda, Separate opinion of Judges Howard Morrison and Piotr Hofmański](#), paras 9-10.

¹⁹²⁷ [Ntaganda, Separate opinion of Judges Howard Morrison and Piotr Hofmański](#), para. 31.

¹⁹²⁸ R. O’Keefe, “[Cultural Property Protection and the Law of War Crimes](#)” (September 2017) 38 NATO Legal Gazette 40, 45 (“[t]he term ‘attacks’, within the meaning of the international law of armed conflict, means ‘acts of violence against the adversary, whether in offence or defence’ [...] ‘attacks’ are acts of warfare against the other side, be it its military forces or persons, objects or places under its control. Even if committed in the context of an armed conflict, **the hands-on razing with pickaxes and a bulldozer of cultural property under one’s own control**, for which the accused in Al-Mahdi was held to bear criminal responsibility, **does not amount to an ‘attack’ against that property**—let alone to ‘directing’ an attack against it”) (emphasis added).

¹⁹²⁹ W. Schabas, “[Al Mahdi Has Been Convicted of a Crime He Did Not Commit](#)” (2017) 49 Case W. Res. J. Int’l L. 75.

¹⁹³⁰ K. Dörmann, “Elements of War Crimes Under the Rome Statute of the International Criminal Court” (CUP 2003), pp. 150-151, 156, 178-179, 350-351.

¹⁹³¹ [Ntaganda, Observations of Prof. Newton](#).

¹⁹³² [Ntaganda, Separate opinion of Judge Bossa](#), paras 8-9.

temporal connection.¹⁹³³ A majority of the Appeals Chamber (Judges Hofmański, Morrison, Bossa, and Ibanez) hence agreed on the need for a “connection to combat action”, overriding the overbroad Al Mahdi definition that previously included acts occurring after a group had taken control of an area and which were absent any temporal nexus to combat action.

537. Notably, none of the bench agreed with Trial Chamber IX’s position that it was possible to draw inspiration from the law of occupation. The broad temporal scope associated with Trial Chamber IX’s definition would also overpower the ICRC’s comment that “attack” in AP I and II is a technical term relating to a specific military operation limited in time and place.¹⁹³⁴

538. The contrary approach, as suggested by Judge Eboe-Osuji, is inconsistent with a plain reading of the provision or applicable Article 21 sources and should not be followed. Judge Eboe-Osuji’s position that the attack element should be defined by reference to Kunarac in respect of the nexus element for war crimes¹⁹³⁵ and that Article 8 war crimes can be assimilated to crimes against humanity¹⁹³⁶ ignores how the Elements of the Crimes specifically sets out the requirements of an attack¹⁹³⁷ and nexus¹⁹³⁸ as separate and distinct elements. Furthermore, the WWII case law relied upon to establish a connection between Articles 7 and 8 is inapposite as it was issued at a time when a nexus to an armed conflict was a necessary element of crimes against humanity.

539. While the Prosecution suggested in its Brief that the Chamber can requalify the charge to Article 8(2)(e)(xii),¹⁹³⁹ this suggestion runs directly counter to its appellate arguments that this provision does not apply to property “belonging to the same party to the conflict as the perpetrator”.¹⁹⁴⁰ It would also be irredeemably prejudicial to provide notice of such a requalification at the end of the trial process, particularly since the Ntaganda Trial Judgment was issued before the start of this trial.

¹⁹³³ [Ntaganda AJ](#), para. 1168.

¹⁹³⁴ [ICRC Commentary on Additional Protocol II](#), para. 4783. The ICRC commentary on AP I draws a distinction between conduct prescribed under a “control” or “occupation” situation as compared to conduct prescribed during an “attack”. See e.g. [Ntaganda, Observations of Prof. Newton](#), para. 8.

¹⁹³⁵ [Ntaganda, Partly concurring opinion of Judge Eboe-Osuji](#), paras 123-127.

¹⁹³⁶ [Ntaganda, Partly concurring opinion of Judge Eboe-Osuji](#), paras 117-120.

¹⁹³⁷ [ICC Elements of Crimes](#), Article 7, para. 3.

¹⁹³⁸ [ICC Elements of Crimes](#), Article 8(2)(c)(i)-1, para. 4.

¹⁹³⁹ [OTP Final Trial Brief](#), para. 442.

¹⁹⁴⁰ [Ntaganda, Separate opinion of Judges Howard Morrison and Piotr Hofmański](#), para. 40. See also ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Sandoz et al., eds 1987), para. 1890. See also [Ntaganda, Observations of Prof. Newton](#), para. 8.

10.4 There was no attack before, during, or after the levelling

540. Irrespective as to whether the Chamber applies the correct, narrow definition of an attack or adopts a broader approach, Mr Al Hassan must be acquitted of this count due to the Prosecution's failure to prove that any "attack", hostilities, or combat action took place in Timbuktu before or during the levelling of the shrines. The charged conduct is alleged to have commenced in July 2012, three months after Ansar Dine and AQIM arrived in Timbuktu. Although the Prosecution attempted to rely on alleged damage to the Monument of the Martyrs and the Al Farouk monument, these monuments do not fall within the scope of the confirmed charges. The Prosecution also failed to demonstrate, to the standard of beyond reasonable doubt, that these monuments sustained damage through intentional conduct in April and May 2012.

541. Neither group engaged in any combat action when they arrived or in the subsequent three months. The MNLA's expulsion from the airport did not involve combat action, nor did it have any connection to the subsequent levelling of the shrines.

542. The means used to level the shrines also did not involve combat action. Military equipment was not used. [REDACTED] had no military standing within the group at that time. The individuals who carried out this action were not necessarily soldiers, as some were preachers from *Hesbah*.¹⁹⁴¹ The Prosecution conceded that the group used methods of persuasion (i.e. sermons),¹⁹⁴² rather than combat or military confrontation. The evidence also demonstrates that journalists and locals continued to access the sites throughout this process and that they were able to freely express their views while doing so.¹⁹⁴³ The only reasonable inference open to the Chamber is that the presence of security was to ensure the protection of persons engaged in the levelling process.

543. There is no evidence the perpetrators possessed an intent to "attack". The objective was not to destroy the saints' graves but to return them to their authentic state by removing structures that were a colonial addition¹⁹⁴⁴ and to facilitate *Shari'a*-compliant visits to the shrines.¹⁹⁴⁵ A difference in interpretation concerning the proper scope of protection does not equate to an attack. P-0104 gave expert evidence that some of the external structures were

¹⁹⁴¹ [REDACTED]

¹⁹⁴² [OTP Final Trial Brief](#), para. 446.

¹⁹⁴³ P-0065: T-048, p. 48, lines 1-6 (Conf).

¹⁹⁴⁴ [REDACTED]

¹⁹⁴⁵ [REDACTED]

inauthentic or caused by natural build-up of refuse and materials at the sites.¹⁹⁴⁶ Notably, when UNESCO “restored” the mausolea to their authentic states, the restored versions did not correspond to the versions that existed in 2012.¹⁹⁴⁷

10.5 The Prosecution has not established a nexus between the levelling of the shrines and an armed conflict

544. Even if the Trial Chamber were to adopt a broader interpretation of “attack”, the nexus element remains unfulfilled.¹⁹⁴⁸ Established ICC jurisprudence requires the armed conflict to “play a substantial role in the perpetrator’s decision, in his ability to commit the crime or in the manner in which the conduct was ultimately committed”¹⁹⁴⁹ and that “a group may be in a position to do things after it has taken power that it was not previously able to do hardly seems an adequate nexus for war crimes law to apply.”¹⁹⁵⁰

545. The levelling of the shrines was not motivated by hostilities, but rather originated amongst certain religious scholars from Timbuktu.¹⁹⁵¹ The impetus for such action also predated the commencement of any hostilities or the arrival of the groups¹⁹⁵² and was approved by religious, not military, leaders.¹⁹⁵³ The levelling was neither a military objective¹⁹⁵⁴ nor achieved through military means. Far from furthering the military objectives of the groups, it had the opposite effect.¹⁹⁵⁵ It also took place after a sensitisation campaign to gain popular support¹⁹⁵⁶ and were implemented by volunteers.¹⁹⁵⁷

10.6 The charged conduct was not a virtually certain consequence of the alleged common purpose

546. The Prosecution did not establish that the perpetrators were acting pursuant to the charged common purpose or that these actions were the virtually certain consequence of the execution

¹⁹⁴⁶ **P-0104**: T-024, p. 66, line 9 – p. 67, line 6; p. 67, line 18 – p. 68, line 11 (Conf); **P-0150**: T-104, p. 10, line 24 – p. 11, line 2 (Conf).

¹⁹⁴⁷ **P-0104**: T-024, p. 86, line 4 – p. 88, line 22 (Conf).

¹⁹⁴⁸ W. Schabas, “[Al Mahdi Has Been Convicted of a Crime He Did Not Commit](#)” (2017) 49 Case W. Res. J. Int’l L. 75, 93.

¹⁹⁴⁹ W. Schabas, “[Al Mahdi Has Been Convicted of a Crime He Did Not Commit](#)” (2017) 49 Case W. Res. J. Int’l L. 75, 94. See also [Bemba TJ](#), para. 142; [Katanga TJ](#), para. 1776; [Abu Garda CoC Decision](#), para. 90; [Katanga et al. Confirmation Decision](#), para. 380.

¹⁹⁵⁰ W. Schabas, “[Al Mahdi Has Been Convicted of a Crime He Did Not Commit](#)” (2017) 49 Case W. Res. J. Int’l L. 75, 97.

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¹⁹⁵⁴ W. Schabas, “[Al Mahdi Has Been Convicted of a Crime He Did Not Commit](#)” (2017) 49 Case W. Res. J. Int’l L. 75, 96.

¹⁹⁵⁵ **P-0150**: T-089, p. 65, lines 5-25 (Conf).

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of such an alleged common purpose. The charged incidents cannot be imputed to AQIM or Ansar Dine as a “group” nor to the Islamic Police as an organ of any group.

547. The idea to level the shrines was promulgated by specific members of the *Shari’a* Committee, who kept the plan secret to deter locals from joining the groups.¹⁹⁵⁸ The evidence is that several high-level members of the groups disagreed with the ideology or timing of the destruction of mausolea, including Emir Abdelmalek Droukdel,¹⁹⁵⁹ and that the decision was taken only after debate.¹⁹⁶⁰ A very short time elapsed between Sheik Abdallah’s decision to level the shrines and its execution.¹⁹⁶¹ It was then executed in “random ways”.¹⁹⁶² It was not the product of concerted action involving any organs (other than *Hesbah*) in their official capacities. The existence of different opinions within the groups demonstrates that this pursuit was not a virtually certain consequence of any alleged plan to apply *Shari’a*. Mr Al Hassan also could not have been aware of such discussions when he started working with the Islamic Police, given that he was not a participant in these meetings.

10.7 The Prosecution has failed to demonstrate that Mr Al Hassan made culpable contributions to these charged incidents

10.7.1 Mr Al Hassan did not participate in either the decision to remove structures on the monuments or the implementation of this decision

548. The decision to remove the outer shell of the mausolea was taken at the highest level of the groups. The decision establishing rules of visits to the mausolea was made by the *Shura* Council while the subsequent decision to remove the outer structures of the mausolea was taken by the *Shura* Council.¹⁹⁶³ Mr Al Hassan was not a member of these structures and had no influence or involvement in their decision processes.¹⁹⁶⁴

549. The Prosecution failed to adduce any evidence that Mr Al Hassan was informed of these decisions prior to implementation. On the contrary, ██████ testified that Mr Al Hassan was not involved in such consultations.¹⁹⁶⁵ Even if he learned of them, he did not possess the power to stop implementation of the decisions taken by the hierarchy. ██████

████████████████████ could not have opposed these decisions, as he feared he

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would have been killed had he tried.¹⁹⁶⁶ Given [REDACTED] close relationship with the religious leaders in the group, the Chamber cannot place weight on [REDACTED] evidence that Mr Al Hassan allegedly supported this decision. If [REDACTED] feared retribution for expressing disagreement, it was clearly not feasible for Mr Al Hassan to have done so to [REDACTED].
[REDACTED] Mr Al Hassan allegedly shared this view while “lost in the mountains” in 2013.¹⁹⁶⁷ The expression of such an *ex-post facto* opinion is not probative in respect of acts that occurred place several months prior. Neither can the Chamber place any weight on P-0623’s testimony, given the significant doubt that the person she allegedly spoke to (through a fixer/intermediary) was Mr Al Hassan.¹⁹⁶⁸

550. The Prosecution also failed to demonstrate that Mr Al Hassan was aware of the protected nature of the mausolea. Their argument, belatedly raised in the final trial brief, that Mr Al Hassan must have learnt this through courses he attended in 2006 and 2007, can be given no consideration. First, this argument is based exclusively on Mr Al Hassan’s tainted DGSE statements. Second, the Prosecution has not adduced evidence concerning the substance or content of these courses. Third, Mr Al Hassan informed the Prosecution that the course concerned manuscripts and the saints, not the mausolea. He also seemed to have believed that manuscripts, mosques, and libraries were protected,¹⁹⁶⁹ not mausolea.

10.7.2 Mr Al Hassan did not contribute to the the levelling of the shrines/charged incidents

551. The Prosecution has not demonstrated that Mr Al Hassan knowingly and intentionally contributed to the levelling of the shrines. On the contrary, Prosecution witnesses have affirmed that Mr Al Hassan had no authority over this issue, was not involved in the decision to take these measures and did not participate in the measures.

552. [REDACTED],¹⁹⁷⁰ [REDACTED] that *Hesbah* was in charge of matters pertaining to the mausolea,¹⁹⁷¹ whereas “Al Hassan, his assignment made him unconcerned with what happens around the graves because other people were responsible for that.”¹⁹⁷² Although some police were present, they participated in their individual capacity¹⁹⁷³

¹⁹⁶⁶ [REDACTED].

¹⁹⁶⁷ [REDACTED].

¹⁹⁶⁸ P-0623: T-029, p. 33, lines 7-14; T-030, p. 50, lines 12-21 (Conf).

¹⁹⁶⁹ Cf P-0398: [MLI-OTP-0060-1352](#), p.1354, lines 50-66.

¹⁹⁷⁰ [REDACTED].

¹⁹⁷¹ [REDACTED].

¹⁹⁷² [REDACTED].

¹⁹⁷³ P-0605: T-195, p. 16, line 18 – p. 17, line 4 (Conf).

and were subordinated to *Hesbah* for this specific task.¹⁹⁷⁴ Mr Al Hassan neither contributed to their actions nor exercised any influence over the manner in which they were executed.

553. The alleged existence of phone contacts between numbers attributed to Mr Al Hassan and ██████ do not demonstrate the former's involvement in these incidents. First, Prosecution expert P-0617 conceded that the CDRs appear to have several "duplicates", in that contacts were falsely duplicated when the CDRs were created, thus erroneously inflating the number and frequency of contacts.¹⁹⁷⁵ Second, the Prosecution has not established that these phone numbers were used exclusively by ██████ or Mr Al Hassan, or that they were the interlocutors at the time of each contact. On the contrary, ██████ testified that multiple persons used his number,¹⁹⁷⁶ and that the number attributed to Mr Al Hassan was also used by other police officers.¹⁹⁷⁷ Relatives of ██████ and Houka Houka worked as police officers for the Islamic Police.¹⁹⁷⁸ Third, the existence of contacts is not evidence of the content of such contacts.¹⁹⁷⁹ Mr Al Hassan was acquainted with ██████ prior to 2012 and could have been in contact for many reasons. Discussions concerning the mausolea is not the only reasonable inference to be drawn from the contacts. Indeed, given that ██████ specifically testified that Mr Al Hassan was not involved, there is no foundation to attribute any weight to these contacts. Furthermore, the Prosecution failed to put these contacts to ██████ when he testified; his testimony thus cannot be used to support this allegation by the Prosecution. Similarly, no weight can be placed on Mr Al Hassan's statement that it is "possible" he spoke to ██████ on such matters. Possibility is no more than conjecture. To say that it is possible that he spoke about such matters is also to say that it is possible that he did not.

554. ██████ claim that the Islamic Police, along with Security, were involved in putting up barricades is inconsistent with his evidence that individual police officers were subordinated to his authority¹⁹⁸⁰ and that Talha and the Security battalion secured the area while *Hesbah* soldiers provided "light" guarding.¹⁹⁸¹ Other witnesses affirmed that Talha and the Security section were responsible for security at the sites,¹⁹⁸² and that Security was generally responsible

¹⁹⁷⁴ ██████

¹⁹⁷⁵ P-0617: T-081 p. 9, line 17 – p. 10, line 6 (Conf).

¹⁹⁷⁶ ██████

¹⁹⁷⁷ P-0582: [MLI-OTP-0062-3773-R01](#), p. 3782, lines 308-320; D-0272: T-182, p.62, lines 12-15 (Conf).

¹⁹⁷⁸ ██████

¹⁹⁷⁹ Solid inferences cannot be drawn from the existence of contacts between JCE members in the absence of evidence concerning the content of contacts. See [Krstić AJ](#), paras 84-98.

¹⁹⁸⁰ ██████

¹⁹⁸¹ ██████

¹⁹⁸² ██████

for checkpoints and barricades.¹⁹⁸³ In any event, there is no evidence that Mr Al Hassan played any role in security issues pertaining to the mausolea.¹⁹⁸⁴

555. ██████ claim that barricades were erected to stop locals from entering the sites is also controverted by Prosecution evidence demonstrating that locals and journalists continued to freely access sites while the levelling was taking place.¹⁹⁸⁵ Individuals present at the sites, including ██████ ██████ who was present filming the incidents,¹⁹⁸⁷ have confirmed that Mr Al Hassan was not present and played no role in the levelling of the shrines.

556. Although the Prosecution tried to take advantage of an obtuse reference to “Hassan” ██████ ██████, the audio does not actually include the word “Hassan”.¹⁹⁸⁸ The Prosecution had the opportunity to confirm the accuracy of its translation ██████ ██████ but elected not to play this extract of the video.¹⁹⁸⁹ ██████ also testified that he watched the videos and did not identify Mr Al Hassan.¹⁹⁹⁰

557. The video is also a montage, as evidenced by the “skips” in footage. It is not possible to tell if the person who refers to Adama is speaking to a person or into a phone. Since it was not filmed in one continuous shot, it cannot be assumed that the street was blocked the entire time¹⁹⁹¹ or that it would have been necessary for cars passing through to traverse such a blockade. Notably, the Prosecution never posed this question to the persons present. Given that this was never examined at trial, it would be incorrect to convict Mr Al Hassan based on conjectures conjured during the drafting of closing briefs.

558. The Trial Chamber should also disregard the Prosecution’s reliance on Mr Al Hassan’s statements. Apart from the inherently unreliable nature of this body of evidence, the content does not reflect any culpability on Mr Al Hassan. For example, the section in which Mr Al Hassan allegedly stated that the destruction was part of the Police’s regular tasks is based on a significant mistranslation. The interpreter omitted the word “not” from his Arabic response.¹⁹⁹²

¹⁹⁸³ ██████

¹⁹⁸⁴ It is clear ██████ response to Prosecution questioning that he had no personal knowledge of who set up the alleged barricades or who stood by them. *See* ██████

¹⁹⁸⁵ ██████ *See also* ██████, showing local women.

¹⁹⁸⁶ ██████

¹⁹⁸⁷ ██████ [MLI-OTP-0071-0151](#) at 00:00:50:00 to 00:01:25:00; [MLI-D28-0006-3130](#).

¹⁹⁸⁸ Explanatory note for ICC-01/12-01/18-2475-Conf-Corr2, p. 2.

¹⁹⁸⁹ ██████

¹⁹⁹⁰ ██████

¹⁹⁹¹ There are various points where the road does not appear blocked: *see* ██████ (a motorcycle goes by freely). Local women also walk past at 00:04:16:00.

¹⁹⁹² [MLI-OTP-0060-1374](#) at 1381_01 (Corrigendum of [MLI-OTP-0060-1374](#) at 1388)

Mr Al Hassan's reference to waving in greeting at some point also does not amount to encouragement as there is no connection between the wave and the actions undertaken. Furthermore, even if a wave could be considered an act of encouragement in some cases, there is no evidence that was the case here, especially since Mr Al Hassan exercised no authority in relation to either the actions or the persons identified as being present (Talha and ██████████).¹⁹⁹³

10.8 Positive defences: mistake of fact/law, superior orders, and duress

559. If the Chamber finds that Mr Al Hassan had no knowledge and made no contribution to the charged incidents under Count 7, it need not assess positive defences at this time. After all, Mr Al Hassan's mere membership of the Islamic Police at the time these incidents occurred does not suffice to impute personal liability under Articles 25(3)(d), particularly in the absence of proof that his daily actions had a direct and measurable effect on the realisation of the charged incidents. However, should the Chamber find that Mr Al Hassan's actions contributed beyond a reasonable doubt to the incidents, the following defences apply.

560. It is apparent from video evidence that Adama and Khaled were both in the Islamic Police at this time.¹⁹⁹⁴ Mr Al Hassan exercised his functions under their strict authority. ██████████

██████████ testified that he would have been killed had he disobeyed the instructions to level the shrines.¹⁹⁹⁵ As a lower-ranked group member with no policy- or decision-making authority, Mr Al Hassan would have had even less protection from retaliation or punishment for disobedience.

561. Mr Al Hassan was also not a scholar in Islamic laws and would not have been able to identify or question the stance adopted by erudite religious leaders such as Sheik Abdallah and ██████████. Even ██████████ originally believed the decision to level the shrines was lawful. He testified that it was only in 2016, after lengthy discussions with imams and other scholars, that he realised that he was "wrong".¹⁹⁹⁶

11 THE CHARGED INCIDENTS OF PERSECUTION WERE NOT PROVED

562. The Prosecution has failed to demonstrate that the elements of persecution are fulfilled in connection with the charged incidents or that Mr Al Hassan bears individual criminal responsibility for such acts. It has failed to properly articulate either the "targeted group" or the discriminatory grounds by reference to severe violations of established international law. It has also failed to prove that the charged incidents were committed on discriminatory grounds or

¹⁹⁹³ [OTP Final Trial Brief](#), para. 466; ██████████

¹⁹⁹⁴ ██████████

¹⁹⁹⁵ ██████████

¹⁹⁹⁶ ██████████

See also ██████████

that Mr Al Hassan made culpable contributions to such incidents in full awareness of the guilty *mens rea* of the actual perpetrators.¹⁹⁹⁷ Allegations of human rights violations not attached to specific charged Article 7 or 8 incidents must also be disregarded as falling outside the proper ambit of Article 7(1)(h).

11.1 The Prosecution has failed to demonstrate that the perpetrators violated fundamental rights, protected under international law

563. Ansar Dine was not the Taliban or *Daesh*: girls and women in Timbuktu had access to education and employment;¹⁹⁹⁸ journalists continued to report and were granted access to do so;¹⁹⁹⁹ Imams continued to be free to deliver the same sermons;²⁰⁰⁰ public schools continued to operate,²⁰⁰¹ the right to private speech or belief was not regulated,²⁰⁰² and Christians worked unharmed and unimpeded in the hospital and in NGOs.²⁰⁰³

564. Although some schools closed, this occurred before Ansar Dine arrived in Timbuktu,²⁰⁰⁴ and was due to a variety of factors including the fact that teachers stopped being paid (due to the events in Bamako) and insecurity caused by the MNLA.²⁰⁰⁵ After its arrival, the MNLA also stole property and occupied school buildings.²⁰⁰⁶ In contrast, after it arrived, Ansar Dine liaised with the local authorities concerning the re-opening of school, holding examinations, and arranging for students to be transported to other areas to take part of examinations.²⁰⁰⁷ They also paid teachers to teach at *madrasas*, which were open to both girls and boys.²⁰⁰⁸ Ansar Dine did not influence or control the contents of the curriculum,²⁰⁰⁹ and religious classes were based

¹⁹⁹⁷ [Krnjelac AJ](#), para. 52.

¹⁹⁹⁸ **D-0553**: [MLI-D28-0005-9325-R01](#) at 9331, para. 33; **D-0512**: [MLI-D28-0006-2611-R02](#), 2616, para. 31; **D-0315**: T-185, p. 32, lines 8-15 (Conf); **D-0540**: T-0185, p. 52, line 9 – p. 53, line 16 (Conf); **D-610**: T-158, p. 13, line 25 – p. 14, line 12 (Conf).

¹⁹⁹⁹ **P-0654**: T-132, p. 26, lines 4-13 (Conf); **P-0065**: T-038, p. 16, lines 8-14 (Conf); T-039, p. 50, line 10 – p. 51, line 2 (Conf); **D-0246**: [MLI-D28-0006-9124](#) at 9129, para. 26.

²⁰⁰⁰ **P-0150**: T-110, p. 60, lines 15 – p. 61, line 12 (Conf).

²⁰⁰¹ **P-0654**: T-128, p. 4, line 17 – p. 5, line 7 (Conf).

²⁰⁰² **P-0150**: T-108, p. 22, line 24 – p. 23, line 1 (Conf) (“the jihadists never imposed any specific limits on speech or people’s ideas”).

²⁰⁰³ **D-0093**: T-211, p. 14, line 17 – p. 15, line 13 (Conf); [MLI-D28-0006-4212-R01](#) at 4215, para. 19.

²⁰⁰⁴ **D-0315**: T-185, p. 27, lines 15-22; p. 28, line 20 – p. 29, line 22 (Conf); **D-0512**: [MLI-D28-0006-2611-R02](#) at 2614, para. 15; **D-610**: T-158, p. 13, line 25 – p. 14, line 12 (Conf); **P-0150**: T-088, p. 35, lines 11-23 (Conf).

²⁰⁰⁵ **D-0315**: T-185, p. 29, lines 2 – 22 (Conf).

²⁰⁰⁶ **D-0315**: T-185, p. 29, lines 2 – 22 (Conf); **P-608**: T-154, p. 92, line 16 – p. 93, line 12 (Conf).

²⁰⁰⁷ **P-0654**: T-128, p. 4, line 17 – p. 5, line 7 (Conf); **D-0315**: T-185, p. 35, line 21 – p. 36, line 9 (Conf); **D-533**: [MLI-D28-0005-9325-R01](#) at 9331, para. 31.

²⁰⁰⁸ **D-0540**: T-0184, p. 53, lines 9-13 (Conf); T-0185, p. 52, line 9 – p. 53, line 16 (Conf); **D-0202**: T-203, p. 49, lines – p. 50, line 6 (Conf); **D-533**: [MLI-D28-0005-9325-R01](#) at 9331, para. 31.

²⁰⁰⁹ **D-0540**: T-183, p. 64, lines 15 – 20 (Conf).

on Malikite texts.²⁰¹⁰ Although students who had reached puberty were asked to dress in accordance with local traditions, no punishment was imposed if they did not.²⁰¹¹

565. There is also no internationally protected right to smoke, drink alcohol or practise sorcery (which is prohibited under Malian law, as in many countries). It is lawful to apply clothing standards: several notably liberal countries, such as Italy and Greece, have also banned certain clothing and shoes²⁰¹² while France famously banned the use of burqas and other religious symbols in an effort to promote its national ideal of *laïcité*.²⁰¹³ Single sex schools and classes are common in many countries and do not offend human rights law.²⁰¹⁴ Other restrictions fall within permissible derogations allowed under internationally recognised human rights law.²⁰¹⁵

566. Indeed, ICL case law has consistently affirmed that not every human rights violation will bring Article 7(1)(h) into play: wording “severely deprived”²⁰¹⁶ or “severe infringement” militates a particularly high threshold of human rights violations,²⁰¹⁷ such as deprivation of the right to life (through such actions as the murder of civilians),²⁰¹⁸ the right to personal liberty (such as the abduction of civilians who were under constant threat of beatings and death as well as under armed guard to prevent escape)²⁰¹⁹ and bodily integrity,²⁰²⁰ the right not to be held in slavery or servitude, and the right to private property (such as looting homes and shops of essential items such as food, medicine, livestock, and money).²⁰²¹

567. To hold otherwise would mean that all instances of a party limiting or denying a human right – regardless of necessity or circumstance – would result in a prosecutable offence of

²⁰¹⁰ **D-0540**: T-183, p. 54, line 6 – p. 56, line 2 (Conf); p. 64, lines 18-20 (Conf).

²⁰¹¹ **D-0540**: T-183, p. 65, lines 5 – 14 (Conf).

²⁰¹² See L. B. Bloom, “[Why This Italian Town Banned Bikinis \(And Other Surprising Laws In Italy\)](#)”, 8 July 2022.

²⁰¹³ [Article 1 of the Law of 2010-1192](#). See also [Dogru Judgment](#), paras 17-18, 64.

²⁰¹⁴ As of 2021, gender segregation in separate classes or schools is common in countries as diverse as Chile, Ireland, Israel and Singapore and is prevalent in many Muslim-majority countries. See UNESCO, GEM Report, “[In which countries do children attend single-sex schools?](#)” 29 March 2021. See also **Spain**: M. Martínez López-Sáez & R. Almenar Rodríguez, “[Gender-separate education in Spain: reflections on educational rights and freedoms from a constitutional and human-rights perspective](#)” 11(2) *Lex Social: Revista De Derechos Sociales* 289, 315 (“[g]ender-separate education has legally-existed in Spain for quite some time”). See also *Ley Orgánica 8/2013, de 9 de diciembre, para la mejora de la calidad educativa* (providing that admission of male and female students or the organisation of education differentiated by sex does not constitute discrimination); **United Kingdom**: [Equality Act 2010, Part I](#) (making exceptions from the prohibition on sex discrimination by schools to allow for the existence of single-sex schools and for single-sex boarding at schools).

²⁰¹⁵ [Article 4\(2\) ICCPR](#); [Article 27 of the American Convention on Human Rights](#). See also [UNHRC, CCPR General Comment No. 29](#) for further examples of other lawful limitations provided under international law as “derogations” or “exceptions”.

²⁰¹⁶ [Elements of Crimes](#), Art. 7(1)(h)(1).

²⁰¹⁷ [Ongwen TJ](#), para. 2846.

²⁰¹⁸ [Ongwen TJ](#), para. 152. See also [Ntaganda TJ](#), 8 July 2019, paras 740, 746.

²⁰¹⁹ [Ongwen TJ](#), para. 153.

²⁰²⁰ [Ntaganda TJ](#), 8 July 2019, para. 999.

²⁰²¹ [Ongwen TJ](#), para. 150.

persecution as a crime against humanity. This would render Article 7(1)(h) overbroad and meaningless, and protection under the Statute illusory. Hence, the Article was drafted to include the “in connection with” requirement in Element 4, to ensure not every kind of discriminatory practice was outlawed and to alleviate widespread State Party concern that the offence could be made to apply to too broad a range of discriminatory activities.²⁰²²

568. The Chamber’s assessment of the alleged severity of the restrictions must also take account of the time period and context in which these actions took place.²⁰²³ In the first place, human rights law, pre-2013, gave States a wide berth to impose measures designed to ensure social harmony and integration and to decide issues pertaining to family life. In the second place, the measures taken by Ansar Dine did not constitute a disproportionate interference within the context in which they were taken. Mali declared a state of emergency in 2012 subsequent to a *coup d’état* in Bamako, during which it also suspended its constitution.²⁰²⁴ There was an absence of governance and law and order in Northern Mali, including Timbuktu, which left the local population vulnerable and defenceless in the face of acts of violence and disorder perpetrated by members of the MNLA and Berabiche groups.²⁰²⁵ This governance vacuum had existed for months, if not years before the events of 2012.²⁰²⁶

569. Multiple witnesses have confirmed that there was a pyramid of needs in 2012, with security, food, and electricity at the top.²⁰²⁷ Ansar Dine fulfilled these needs in a fair and non-discriminatory manner.²⁰²⁸ Ansar Dine entered Timbuktu with the intention of restoring government and ensuring stability, peace, and essential services for the people.²⁰²⁹ Ansar Dine’s presence and the security measures they applied also helped prevent ethnic strife and a

²⁰²² D Robinson, “The Elements of Crimes Against Humanity, Persecution” in R Lee (ed) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001), p. 95. See also G. Mettraux, *International Crimes: Law and Practice* vol. II: Crimes Against Humanity, (Oxford University Press 2020), p. 673.

²⁰²³ [Nahimana AJ](#), para. 987 (“the context in which these underlying acts take place is particularly important for the purpose of assessing their gravity”).

²⁰²⁴ **D-0240**: T-191, p. 15, line 19 – p. 16, line 4 (Conf).

²⁰²⁵ **P-0245**: [MLI-D28-0006-4141-R01](#) at 4144, paras 17-22; **P-0540**: T-184, p. 11, lines 17-24 (Conf); **P-0315**: T-185, p. 37, lines 6-12 (Conf).

²⁰²⁶ **D-0553**: [MLI-D28-0005-9325-R01](#) at 9329, para. 24.

²⁰²⁷ **D-0146**: [MLI-D28-0006-3335](#) at 3339; **D-0512**: [MLI-D28-0006-2611-R02](#) at 2614; **P-0099**: T-147, p.10, lines 9-15.

²⁰²⁸ **D-0553**: [MLI-D28-0005-9325-R01](#) at 9331, paras 33, 37-38; **D-0551**: T-200, p. 74, line 18 – p. 75, line 2 (Conf); **D-0093**: [MLI-D28-0006-4212-R01](#) at 4214, para. 9; at 4215, paras 19, 20; at 4217, paras 29-31; at 4219, para. 40; T-211, p. 33, lines 2-14.

²⁰²⁹ **D-0551**: T-200, p. 60, lines 12-21 (Conf); **D-0605**: T-192, p. 37, lines 7-12 (Conf); **P-0065**: T-044, p. 67, lines 23-24 (Conf); p. 71, lines 5-7; T-050, p. 56, lines 5-19; **P-0608**: T-154, p. 93, line 4 – p. 94, line 13 (Conf).

humanitarian catastrophe.²⁰³⁰ Ansar Dine’s religious background helped rather than impeded such endeavours, as its reliance on traditional religious values and texts had greater legitimacy with the local population than secular alternatives.²⁰³¹ Their religious legitimacy was publicly affirmed by the fact that it was able to obtain donations and assistance from the High Islamic Council.²⁰³² Ansar Dine leaders also consulted with local leaders and representatives concerning the means that were taken to achieve governance and security objectives and to ensure social harmony.²⁰³³

570. Given the absence of police, lawyers, and judges, it was not feasible for Ansar Dine to attempt to achieve the same objectives through secular means, which it lacked the capacity and traction to implement. Indeed, throughout the North of Mali, the local population turned to religious and traditional leaders to guide them through this period.²⁰³⁴ There was also no secular alternative, as the MNLA also expressed its intention to rely on religious and traditional chiefs to regulate daily life,²⁰³⁵ and did in fact do so.²⁰³⁶

571. In line with ECHR case law, the regulations applied during 2012, in consultation with the local community, were necessary to ensure stability and security and did not constitute a disproportionate interference of the specific rights in question.

11.2 The Prosecution Has Not Demonstrated That Victims Were Targeted Because of Membership or Lack Thereof in an Identifiable Group or Collectivity

572. The Prosecution has failed to prove that the perpetrators acted in a manner that clearly targeted an “identifiable group or collectivity” and that such targeting was based on religion or gender. In the first place, the Prosecution has not provided the definition or parameters of the “identifiable group” against whom the discrimination was targeted: It is unclear from the confirmed charges whether the persecuted group was the civilian population in Timbuktu at large (geography), only the women within Timbuktu (gender), or Muslims or non-Muslims (religious). In the second place, the Prosecution has failed to demonstrate that the perpetrators

²⁰³⁰ **P-0099**: T-147, p. 8, line 21 – p. 9, line 3 (Conf); **P-0608**: T-154, p. 93, line 24 – p. 94, line 7 (Conf); [MLI-D28-0006-3325](#) at 3330 [REDACTED] “Ansar Dine helps us a lot. If we exist today in terms of security... it is thanks to God and Ansar Dine”); **D-0553**: [MLI-D28-0005-0325-R01](#) at 9329-9330, paras 26-29.

²⁰³¹ **D-0553**: [MLI-D28-0005-0325-R01](#) at 9330, para. 29; **D-0315**: T-185, p. 18, line 4 – p. 19, line 16 (Conf); [MLI-D28-0004-8148](#) at 8163, 8173; [MLI-D28-0004-8039](#) at 8088; **P-0643**: T-083, p. 53, lines 2-7; T-084, p. 16, lines 14-15.

²⁰³² **D-0553**: [MLI-D28-0005-0325-R01](#) at 9331, paras 37-38.

²⁰³³ **P-0093**: [MLI-D28-0006-4212-R01](#) at 4217-4218; **D-553**: [MLI-D28-0005-0325-R01](#) at 9330, para. 31.

²⁰³⁴ [MLI-D28-0004-8148](#) at 8163, 8173; [MLI-D28-0004-8039](#) at 8088.

²⁰³⁵ **D-0202**: T-202, p. 76, line 5 – p. 79, line 9 (Conf) (p. 76, lines 20-21: “[MNLA] wanted to establish Islamic justice and they chose judges for it from all the areas”).

²⁰³⁶ **D-0211**: T-190, p. 50, lines 10-24 (Conf).

acted in a manner that targeted this undefined, non-specified group, and if so, how. The DCC is entirely silent on this point as is the Trial Brief and the Closing Brief. As a result, Mr Al Hassan cannot be deemed to have received timely notice as concerns his right to be informed promptly, of the nature, cause, and content of the charges.

573. The first of the material elements of this crime requires that the persecuted group or collectivity and their individual members be “identifiable”, based either on objective criteria or in the mind of the accused. As laid out in the Ongwen judgment, protected characteristics include “political, racial, national, ethnic, cultural[,] religious, gender [grounds] as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognised as impermissible under international law”.²⁰³⁷ Neither the Ongwen Trial Chamber nor any other ICC or ad hoc chambers²⁰³⁸ have invoked geography or an open-ended definition based on location (i.e. “*la population civile de Tombouctou et de sa region*”) as an “identifiable group” or protected characteristic.

574. The reference to religion or gender does not cure the confusion or clarify the charges. There is no indication that Ansar Dine treated individuals in Timbuktu differently from other areas, for gender or religious reasons. There is in fact no indication that Ansar Dine applied a differential approach to any groups or genders: its overarching goal was to ensure the uniform application of *Shari’a* and its modus operandi of achieving this goal was based on the principle of non-discrimination.²⁰³⁹

575. Gender or religious based persecution requires specific targeting of that specific group. This targeting of the group “as such” is the key aspect that attracts the protection against discrimination. In order to assess difference, there must be a comparator by which the differential treatment can be evaluated:²⁰⁴⁰ for example, that members of one religious were

²⁰³⁷ [Ongwen TJ](#), para. 2734.

²⁰³⁸ ICC and *ad hoc* Tribunal jurisprudence on persecution suggest protection extends to the following rights: **Political, social, and economic rights** (see e.g. [Kupreškić TJ](#), para. 610; [Tadić TJ](#), para. 697; [ECCC Duch AJ](#), paras 244, 247); **the right to private property** (see [Ongwen TJ](#), para. 2846; [Ntaganda Confirmation Decision](#), para. 58); **the freedom of movement** ([Kupreškić TJ](#), para. 610); **the right to respect for dignity and right to security** (see [Nahimana AJ](#), paras 985-988, 2255, 2264); **the right to employment** (see [Brđanin TJ](#), paras 1031, 1049, 1067, 1071); **the prohibition against collective punishment** (see [Kupreškić TJ](#), para. 610); **the discriminatory denial of public services, including medical treatment** (see [Mladić TJ, Vol III](#), para. 3419); **the prohibition against arbitrary searches** (see [Krajišnik TJ](#), paras 736- 741); **the protection of physical and sexual integrity** (see [Brđanin TJ](#), para. 1061); **the right to equal access to and protection from the judicial process** (see [Brđanin TJ](#), paras 1031, 1044-1045, 1049).

²⁰³⁹ See *supra*, fns 76, 151 and *infra*, fn. 2095.

²⁰⁴⁰ ECtHR, [Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, “Prohibition of Discrimination”](#), 31 August 2022, para. 52 (“when bringing a complaint under Article 14, the applicant has to show that he or she has been treated differently from another person or group of persons placed in a relevantly similar situation, or equally to a group of persons placed in a relevantly different situation. The other person or group of persons to which the applicant is compared is called the “comparator”).

targeted for detention but others were not, or that certain rules only applied to women or were applied more harshly to women. Incidents affecting some persons who happen to belong to the group does not mean that the group itself is being targeted. As example, the detention of 100 persons, of which some happen to be females, will not equate to gender-based persecution unless it can be established that the women were detained because they were women.

576. The Prosecution's case failed to grapple with and address this critical distinction, indicating only that because some women were alleged to have been raped while in detention, this must be indicative of a systemic policy of discrimination against all women as a group. This is a logical fallacy. Even where an action against a single person has been found to constitute persecution, such as in *Ntaganda*,²⁰⁴¹ the victim must have been targeted on the basis of having belonged to the targeted group. As will be demonstrated below, Ansar Dine as a group did not apply negative differential treatment to women or individuals based on religious: in principle, the rules applied to everyone but if anything, the leaders would allow more lenience for women, when issues were brought to their attention.

11.3 No Special Intent to Target Victims Based on Gender or Religion has been Proven

577. The Prosecution has not demonstrated that the perpetrators of the alleged incidents knew and intended to target the victims because of religion or gender. As a first point, the Prosecution's case is evidentially deficient due to the absence of any concrete information concerning the identity of perpetrators, for wide swathes of incidents. This renders it impossible to assess the individual perpetrator's intention in committing the crimes in question. As a second, the Prosecution has also failed to provide evidence or argument that each perpetrator of each charged incident possessed the necessary special intent.

578. Persecution is a specific intent crime and requires the *mens rea* of the intent to discriminate.²⁰⁴² The perpetrator must have engaged in conduct, prohibited by Article 7 or 8, with the purpose of discriminating against the targeted group, with the knowledge that such discrimination would directly emanate from their actions. The *Ongwen* Chamber found that "the perpetrator harms the victim because the perpetrator perceives the victim as belonging to

²⁰⁴¹ *Ntaganda TJ*, paras 748- 752.

²⁰⁴² *Ongwen TJ*, para. 2739 ("[t]he act of discrimination must be carried out with the requisite intent, i.e. an intent to discriminate against the targeted persons on any of the grounds enumerated in Article 7(1)(h) of the Statute. See also *Kordić AJ*, para. 1041 ("[t]he definition of persecution contains materially distinct elements not present in the definition of murder under Article 5 of the Statute: the requirement of proof that an act or omission discriminates in fact and proof that the act or omission was committed with specific intent to discriminate.")

a particular group or collectivity”²⁰⁴³ while the ICTY has found that the perpetrator must “consciously intend to discriminate”.²⁰⁴⁴

579. Rather than proving that each incident (satisfying the requirements of Article 7 or 8) was committed for discriminatory grounds, the Prosecution has improperly elided vague accusations concerning general human rights violations with a range of disaggregated incidents.²⁰⁴⁵ They have not attempted to demonstrate that the perpetrator responsible for each charged incident acted with the necessary special intent.

580. This approach is not legally permissible. The essence of persecution as a crime as opposed to a human rights violation, is the discriminatory dimension of conduct that would otherwise fulfil the requirements of criminalisation under Articles 7 or 8, and which is also committed as part of a widespread or systematic attack on the civilian population.²⁰⁴⁶ The Elements of Crimes reinforces this point: Elements 1 to 6 of Article 7(1)(h) set out the requirement that the perpetrator, who possesses the discriminatory intent, must be the same person who engages in the conduct which violates Article 7 or 8 of the Statute. Paragraph 2 of the General Introduction further specifies that all material elements of persecution must be committed with intent and knowledge. This means that the discriminatory aspects of persecution cannot be disaggregated from the underlying incidents. The judicial inquiry must first start with the initial assessment that there exists – and has been proven to the requisite legal standard – an underlying act fulfilling the elements of Articles 6, 7 or 8 of the Statute, before the subsequent assessment can take place to determine whether the additional elements of persecution are fulfilled. In *Ntaganda*, for example, where the Trial Chamber held that the killing of a civilian priest was also an act of persecution as a crime against humanity, it first found that Ntaganda had specifically and “intentionally targeted Abbé Bwanalonga on ethnic grounds, i.e. by reason of his identity as a Lendu”,²⁰⁴⁷ after having already determined that the Lendus formed an ethnic group and had been subjected to other acts of violence.²⁰⁴⁸ It was only after having determined that other crimes within the jurisdiction of this Court had occurred,²⁰⁴⁹ as well as finding that

²⁰⁴³ *Ongwen TJ*, para. 2739. See also *Popović TJ*, para. 968 (“[t]his discriminatory intent requirement distinguishes the crime of persecution from the other crimes [...] by requiring that the accused acted with the intent to harm a human being *because* he or she belongs to a particular community or group”) (emphasis added).

²⁰⁴⁴ *Krnjelac TJ*, para. 435.

²⁰⁴⁵ *Al Hassan DCC*, para. 1092.

²⁰⁴⁶ *Ntaganda AJ on Sentencing*, para. 109 (referring, *inter alia*, to *Ntaganda TJ*, paras 1013-1022).

²⁰⁴⁷ *Ntaganda TJ*, para. 749.

²⁰⁴⁸ *Ntaganda TJ*, para. 3, fn. 9.

²⁰⁴⁹ *Ntaganda TJ*, 8 July 2019, para. 750.

Abbé Bwanalanga had been specifically targeted on the basis of his ethnicity, that the *Ntaganda* Chamber found his murder to be an act of persecution as a crime against humanity.

581. Discriminatory intent is subjective to the perpetrator's perception that the victim belongs to a particular group.²⁰⁵⁰ While the existence of special intent can, in certain circumstances, be inferred from the general behaviour of the perpetrator or circumstances surrounding the charged crime,²⁰⁵¹ due to the subjective nature of this belief, it cannot be imputed from general patterns of human rights violations nor from isolated attacks by individuals other than the perpetrators of the charged incidents. It would also offend the notion of individual criminal responsibility to infer the existence of knowledge and intent from the mere fact that an individual is associated with a particular group.

11.4 The Prosecution Has Not Proven a Connection to Article 7 or 8 Crimes

582. Persecution is not a self-standing crime; it requires an underlying act.²⁰⁵² Prior ICC charges or convictions have been contingent on a separate finding that the elements of the underlying incident were fulfilled.²⁰⁵³ It is therefore impermissible to rely on general patterns of human rights violations to prove persecution.²⁰⁵⁴ The Prosecution has suggested that Mr Al Hassan committed the crime of persecution pursuant to Article 25(3)(d) because the "shared and endorsed the Organisation's ideology"²⁰⁵⁵ and "through various discriminatory acts based on religious and/or gender grounds during the relevant period²⁰⁵⁶ [...] [including] the application of the Organisation's own ideological and religious visions, and related prohibitions, enforced through violence and the threat of violence".²⁰⁵⁷ The examples provided by the Prosecution as evidence of Mr Al Hassan's alleged contribution to the persecutory campaign include having investigated cases as part of his work at the Islamic Police;²⁰⁵⁸ carrying out patrols in the streets;²⁰⁵⁹ and mediating disputes amongst the local population.²⁰⁶⁰

583. Nowhere in these examples or in its arguments has the Prosecution provided evidence that these actions were carried out with a discriminatory intent and targeted against a specified,

²⁰⁵⁰ [Ongwen TJ](#), para. 2739.

²⁰⁵¹ [Ongwen TJ](#), para. 2739. See also [Popović AJ](#), para. 713, citing [Kvočka AJ](#), paras 460, 461.

²⁰⁵² [ICC Elements of Crimes](#), Art. 7(1)(h), Element (4): "[t]he 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".

²⁰⁵³ [Ongwen TJ](#), para. 2849; [Ntaganda TJ](#), para. 745.

²⁰⁵⁴ [OTP Trial Brief](#), para. 280.

²⁰⁵⁵ [OTP Trial Brief](#), para. 294.

²⁰⁵⁶ [OTP Trial Brief](#), para. 269.

²⁰⁵⁷ [OTP Trial Brief](#), para. 270.

²⁰⁵⁸ [OTP Trial Brief](#), para. 289, fn. 975; para. 294.

²⁰⁵⁹ [OTP Trial Brief](#), para. 294.

²⁰⁶⁰ [OTP Trial Brief](#), para. 289, fn. 975; para. 294.

identifiable group. Rather, the Prosecution relies on its arguments in respect of the other charges to justify bringing a charge for persecution, without due attention being paid to the concrete and distinct element distinguishing persecution from the other crimes against humanity: discrimination. Furthermore, the Prosecution contends the fact that some members of a group “felt” they were being targeted is sufficient to assume an actual and concrete discriminatory intent on the part of the perpetrators.²⁰⁶¹ This is an inapposite and erroneous interpretation of the elements of the crime of persecution.

11.5 The alleged incidents were not committed pursuant to the common purpose

584. The decision to apply *Shari’a* was not in and of itself based on discriminatory grounds nor was there any policy or intent to administer *Shari’a* or govern Timbuktu in a discriminatory manner. [REDACTED]

[REDACTED].²⁰⁶²

585. The Prosecution has not demonstrated that the actions of Ansar Dine were intended to produce less favourable or disadvantageous results for women or the people of Timbuktu or that the application of *Shari’a* (as opposed to the actions of individuals) was perceived as such by women or the people of Timbuktu.

11.5.1 There was no common purpose to commit the charged incidents for the purpose of targeting women on discriminatory grounds

586. Ansar Dine did not specifically target women, nor were women treated differently in respect of the application of *Shari’a* than were men. Modesty rules and dress codes applied equally to both sexes,²⁰⁶³ as did the rules on and punishment for extramarital sex and adultery. Notably, the Prosecution has not referred to a single incident or case before the Islamic Tribunal where a woman received harsher treatment than a man in an equivalent position and it was because of their gender. If anything, the leaders were receptive to local concerns regarding the need for women to be given special protections and exemptions from the applications of the rules.²⁰⁶⁴ When such concerns were raised, the leaders addressed them by lifting restrictions or allowing for more lenience and exemptions for women.²⁰⁶⁵

587. Furthermore, the women of Timbuktu continued to exercise fundamental rights in 2012. The Islamic Tribunal afforded women and men equal opportunity to file complaints and applied

²⁰⁶¹ [OTP Trial Brief](#), para. 282.

²⁰⁶² [REDACTED]

²⁰⁶³ **P-0623**: T-030, p. 8, lines 8-13 (Conf). *See also* **P-0150**: T-090, p. 19, lines 17-19 (Conf); **P-0065**: T-037, p. 15, line 19 – p. 16, line 16 (Conf).

²⁰⁶⁴ *See supra* paras. 54, 57, 135, 269, 276, 591.

²⁰⁶⁵ *See supra* paras. 54, 57, 135, 269, 276, 591.

Shari'a to them equally. Marriages and divorces were regulated using the same principles and procedures that were applied by *Qādīs* and Sheikhs before 2012.²⁰⁶⁶ Through the application of these principles, women were granted divorces,²⁰⁶⁷ and were able to obtain redress on such issues as spousal maintenance or spousal support rights.²⁰⁶⁸ Unlike Malian law enforcement authorities, which were reputedly lax in investigating rape and domestic violence allegations,²⁰⁶⁹ Ansar Dine vigorously pursued the rapist Bocar in order to underscore that “they were not discriminatory in the enforcement of God’s verdicts”.²⁰⁷⁰

588. Apart from dress requirements, which were compatible with local traditions²⁰⁷¹ and human rights law,²⁰⁷² no restrictions were placed on the ability of women to work.²⁰⁷³ The prohibition on working at night applied to men as well as women, as did the restrictions on circulating late at night.²⁰⁷⁴ Contemporaneous videos,²⁰⁷⁵ instructions²⁰⁷⁶ and evidence also demonstrates that women could continue to freely leave their homes and work at the markets.²⁰⁷⁷ Within Ansar Dine, there were women who were employed to teach.²⁰⁷⁸ The rules were also applied to public and not private places.²⁰⁷⁹ Instructions were issued to this effect and any individual that violated them would be punished.²⁰⁸⁰

589. Women, including prominent female representatives, also publicly supported *Shari'a*, particularly in the area of family law (marriage and divorce)²⁰⁸¹ and did not perceive it as being contrary to their rights or discriminatory.²⁰⁸²

²⁰⁶⁶ See *supra* fns. 430, 956, 973, 1210, 1216., 2087, and para 279.

²⁰⁶⁷ Original: [MLI-OTP-0001-7353](#), Translation (ENG): [MLI-OTP-0052-0015](#); Original: [MLI-OTP-0001-7408](#), Translation (ENG): [MLI-OTP-0078-6029](#) (Tribunal judges granting an irrevocable divorce to a wife who accused her husband of cheating and whose husband refused to take an oath that he was not).

²⁰⁶⁸ Case 56/1433-2012: Original: [MLI-OTP-0068-4760](#), Translation (ENG): [MLI-OTP-0078-1749](#) (a husband was ordered to repay his debt to his wife after she brought a complaint alleging he had failed to support her financially for a period of eight months).

²⁰⁶⁹ **P-0150**: T-105, p. 62, lines 9-17 (Conf); [MLI-D28-0005-2680](#) at 2682.

²⁰⁷⁰ [REDACTED]

²⁰⁷¹ **P-0608**: T-155, p. 21, lines 18-21; p. 22, lines 3-6 (Conf).

²⁰⁷² See *supra* fns. 2012, 2013, 2015.

²⁰⁷³ **P-0150**: T-107, p. 39, lines 4-6 (Conf); [MLI-OTP-0024-0015](#) at 0041.

²⁰⁷⁴ **P-0150**: T-102, p. 9, line 24 – p. 10, line 5; p. 15, line 20 – p. 16, line 9 (Conf).

²⁰⁷⁵ [REDACTED] showing local women walk past; [REDACTED]; [MLI-D28-0006-3315](#) at 00:00:00:16 – 00:00:04:48.

²⁰⁷⁶ [MLI-D28-0005-7250](#).

²⁰⁷⁷ **P-0065**: T-046, p. 53, lines 9-11 (Conf); **D-0315**: T-185, p. 32, lines 8-15 (Conf); **P-0150**: T-107, p. 39, line 4 – p. 40, line 10 (Conf); **D-0512**: [MLI-D28-0006-2611-R02](#) at 2616, para. 31.

²⁰⁷⁸ **P-0150**: T-107, p. 40, lines 8 -10 (Conf).

²⁰⁷⁹ **P-0150**: T-090, p. 19, lines 8-12 (Conf).

²⁰⁸⁰ See *supra* fn. 943.

²⁰⁸¹ [MLI-D28-0004-8794](#).

²⁰⁸² [MLI-D28-0004-3482](#) at 3485-3486; [MLI-D28-0006-5606](#) at 5672. See also Video: [MLI-OTP-0015-0495](#); Transcript: [MLI-D28-0005-6126](#), lines 10-13.

590. Women explained that the problems they faced were not because of Islam, *Shari'a*, or the “Islamists,” but the actions of undisciplined former MNLA members, who acted against rather in line with rules of Ansar Dine or AQIM.²⁰⁸³ Similarly, the women’s protest was also directed against specific members (Hamed Moussa) and specific practices adopted by those members:²⁰⁸⁴ As stated clearly by P-0603, the women had no problem with Mr Al Hassan, for example.²⁰⁸⁵ Even if some men in Timbuktu acted in sexist or discriminatory ways, this did not stem from Islam nor did it arise from the charged common purpose or the application of *Shari'a* itself. According to P-0150, these practices existed before Ansar Dine arrived in Timbuktu and “nobody can claim that these practices ended with the presence of Ansar Dine in the city”.²⁰⁸⁶

591. Ansar Dine and Mr Al Hassan cannot be faulted or convicted because they were not able to change or eliminate embedded cultural or traditional beliefs concerning women. The Prosecution has ignored in this connection the existence of systematic discrimination embedded in Malian society and the critical role played by pre-existing cultural and tribal identities. The Prosecution has not shown that Ansar Dine applied a system that was any more discriminatory than that which already existed in Mali prior to 2012²⁰⁸⁷ or which was not simply reflecting or following local traditions and practices concerning the role of women. Indeed, the essence of persecution as crime against humanity is that the practices must have been imposed as part of a wide-spread or systematic attack against the civilian population. Practices, traditions and beliefs pre-dating the creation or arrival of Ansar Dine fall outside the scope of this crime. Similarly, practices, traditions and beliefs which are attributable to extrinsic factors (Malian traditions and cultures) also fall outside the scope of the charges and the charged common plan.

592. The Chamber has also received probative and reliable evidence concerning the fact that different tribes and ethnicities displayed different attitudes to the role of women (as concerns how they dressed, the practices for marriage, and the expectations as concerns the proper

²⁰⁸³ See *supra*, para. 104, fn. 328.

²⁰⁸⁴ **D-0315**: T-185, p. 45, line 20 – p. 46, line 10; **D-0551**: T-200, p. 82, line 5 – p. 83, line 15.

²⁰⁸⁵ **P-0603**: T-126, p. 51, line 19 – p. 52, line 2 (Conf). See also **D-0315**: T-185, p. 53, line 20 – p. 54, line 11.

²⁰⁸⁶ **P-0150**: T-112, p. 65, lines 13-16 (Conf).

²⁰⁸⁷ **P-0114**: T-060, p. 64, lines 12-22 (Conf). The Malian legislation in force in 2012 only afforded women the right to divorce in limited, enumerated circumstances, making it easier to find relief through a *qadi* than through Malian legislation. See e.g. Mali, art. 325, [Loi n° 2011-087 du 30 décembre 2011 portant Code des personnes et de la famille](#). See also [MLI-D28-0005-2477](#); [MLI-D28-0005-2478](#); [MLI-D28-0005-2787](#) at 2795-2798; 2800-2802; 2815-2816; [MLI-D28-0004-3212](#); [MLI-D28-0005-2590](#) at 2592-2594; 2603-2605; 2609. For contextual comments on these documents, see Defence comments in [Defence BTM on Women and Social Values](#). Female genital mutilation was also tolerated by Malian authorities: see [MLI-D28-0004-2977](#); [MLI-D28-0004-3204](#); [MLI-D28-0004-3496](#).

conduct of married women). Foreigners also brought with them their own cultural beliefs and practices, including from more socially conservative countries, such as Libya, Algeria or Mauritania.

593. It would be highly problematic for the Chamber to conflate individual choices based on cultural, national or tribal backgrounds with *Shari'a* itself, finding that the gender-based persecution was a virtually certain consequence of the application of *Shari'a*. Such a conclusion would disincentivise States, with Muslim populations or which apply Islam, from ratifying the Convention on the Elimination of Discrimination against Women – as the mere application of *Shari'a* would constitute violation. As explained by Asifa Quraishi,²⁰⁸⁸

feminist advocacy strategies that situate themselves in opposition to sharia ultimately contribute to the presumed existence of this false dichotomy: one can be either “pro-Islam” or “pro-women,” but not both. (...) this imagined opposition between women’s rights and sharia is not only unnecessary, but also counterproductive for both feminist actors and Islamically-minded political activists.

594. Evidence has been presented that discriminatory practices were not applied by the group as a whole,²⁰⁸⁹ but rather by individual members of the group based on their personal tribal or national backgrounds and affiliations.²⁰⁹⁰ For example, certain husbands might impose upon their wives specific restrictions in respect of dress or going out that stemmed from their own personal preferences rather than the approach or policies of Ansar Dine. D-0605 testified unequivocally as to the absence of a discriminatory policy within Ansar Dine:

As far as I know - and given what I saw with my own eyes - there was no discrimination or racism or anything similar to that during the presence of Ansar Dine in Timbuktu. All people could have their rights respected, whether they had light skin or dark skin, irrespective of their race, gender or even religion. Each person could enjoy their rights.²⁰⁹¹

595. He also testified that the police officers were generally very “decent and respectable”, and that criminal or violent incidents perpetrated by members of the Police were isolated events by individual members who were punished – as would be any other offender – under *Shari'a*.²⁰⁹²

596. Similarly, the Prosecution has primarily relied on the actions of one person – Mohamed Moussa – to suggest a systematic and widespread attack took place in Timbuktu in 2012.

²⁰⁸⁸ A. Quraishi, “[What If Sharia Weren’t The Enemy?: Rethinking International Women’s Rights Advocacy On Islamic Law](#)” (2011) 25(5) Columbia J. Gender & L. 173, 176.

²⁰⁸⁹ **D-0605**: T-192, p. 36, lines 3-10 (Conf). See also [MLI-D28-0004-8743](#) at 8764.

²⁰⁹⁰ **P-0150**: T-104, p. 36, lines 12-14 (Conf); T-106, p. 73, lines 11-16 (Conf). See also **P-0065**: T-046, p. 31, line 2 – p. 32, line 3 (testifying that some tribal groups believed in discriminatory practices not applied by others).

²⁰⁹¹ **D-0605**: T-192, p. 38, lines 2-6 (Conf).

²⁰⁹² **D-0605**: T-194, p. 22, line 23 – p. 23, line 4 (Conf). See also T-193, p. 37, lines 6-15 for a discussion of the same incident. See also **P-0150**: T-090, p. 15, lines 2-9 (Conf); [MLI-D28-0006-3048](#), para. 9; **D-0605**: T-193, p. 51, lines 7-12 (Conf).

However, the evidence clearly demonstrates that Moussa acted of his own accord; his actions were not part of the group's philosophy or overall objectives.²⁰⁹³ This is no more clearly demonstrated than by the fact that Moussa was investigated and then removed from his position as head of *Hesbah* when his actions came to light.²⁰⁹⁴ Furthermore, the commissioner of the Islamic Police himself, Adama, was removed from his position, thus demonstrating leaders' commitment to ensuring that no one was above the law, in line with their overarching commitment to non-discrimination,²⁰⁹⁵ and protection of the local population.²⁰⁹⁶

11.5.2 There was no common purpose to commit the charged incidents for the purpose of targeting the people of Timbuktu on discriminatory grounds based on religion

597. The Prosecution's charge of persecution based on religious animus is defective. Indeed, its arguments do not suggest that Ansar Dine persecuted those who practiced Islam itself,²⁰⁹⁷ but rather those who did not follow the group's ideology in respect of Islam.²⁰⁹⁸ Ideology, however, is distinct from religion, and should not be conflated.

598. The concept of "religion" has been interpreted in identical fashion in respect of both persecution and genocide. In *Akayesu*, the Trial Chamber held that a "religious group is one whose members share the same religion, denomination or mode of worship".²⁰⁹⁹ At the ICTY, acts of discrimination directed by (predominantly Serbian Orthodox) Bosnian Serbs against Bosnian Muslims in Eastern Bosnia were found to have been based on religious grounds.²¹⁰⁰ Similarly, discriminatory acts by (predominantly Roman Catholic) Bosnian Croats against members of the Bosnian Muslim and Bosnian Serb groups were found to have been motivated, inter alia, by religious considerations.²¹⁰¹

599. This religious difference and demarcation does not exist in the current case. Ansar Dine and the local population shared the same Islamic faith, the same denomination (Sunni) and the

²⁰⁹³ **D-0093**: MLI-D287-0006-4212-R01 at 4216, paras 24-25; **D-0512**: [MLI-D28-0006-2611-R01](#) at 2614; **P-0150**: T-099, p. 51, lines 1-25 (Conf); **P-0150**: T-117, p. 7, line 16 – p. 8, line 8 (Conf).

²⁰⁹⁴ **P-0514**: T-208, p. 54, lines 17-22 (Conf).

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²⁰⁹⁷ OTP CoC Oral Submissions: T-005, p. 28, lines 10-15 (Conf).

²⁰⁹⁸ *Al Hassan DCC*, para. 888.

²⁰⁹⁹ *Akayesu TJ*, paras 515, 538 (the latter paragraph implying the same definition would apply in relation to the crime of persecution, according to G. Mettraux, *International Crimes: Law and Practice vol. II: Crimes Against Humanity* (OUP 2020), p. 597, fn. 1091).

²¹⁰⁰ See e.g. *Krnjelac TJ*, paras 438, 489- 490; *Tadić TJ*, para. 714, as cited in G. Mettraux, *International Crimes: Law and Practice vol. II: Crimes Against Humanity* (OUP 2020), p. 597.

²¹⁰¹ See e.g. *Naletilić & Martinović TJ*, para. 679, as cited in G. Mettraux, *International Crimes: Law and Practice vol. II: Crimes Against Humanity* (OUP 2020), p. 597.

same *madhab* (the Maliki school).²¹⁰² Members of Ansar Dine and the local population of Timbuktu historically shared the same religious beliefs; all of the former, and most of the latter, were Muslim and practiced Islam.²¹⁰³ Islam has always existed in Timbuktu and pre-dates French colonialism.²¹⁰⁴ Local religious representatives preferred Ansar Dine to MNLA and welcomed the application of *Shari'a* because of their shared faith and commitment to Islam.²¹⁰⁵ 600. Nor has the Prosecution shown that the version of Islam in force in Timbuktu in 2012 was brought to the region by Ansar Dine.²¹⁰⁶ It was not Ansar Dine that brought *Shari'a* to Timbuktu but Islam itself.²¹⁰⁷ Local religious leaders had expressed their public support for the imposition of rules to ensure virtuous and modest conduct before 2012.²¹⁰⁸ Along with multiple other witnesses,²¹⁰⁹ D-0202 confirmed that the religious practices applied while Ansar Dine was present in Timbuktu were the same that applied previously.²¹¹⁰ ██████ testified that when Iyad Ag Ghali met with representatives of the local population, they expressed their support because his proposals were consistent with the form of Islam they were already applying.²¹¹¹ Multiple Prosecution and Defence witnesses have given evidence that the local population

²¹⁰² See *supra*, fns 119, 120.

²¹⁰³ **D-0605**: T-192, p. 25, lines 19-25 (Conf); T-195, p. 16, lines 16-21 (Conf). See also **P-0529**: T-188, p. 21, lines 4-7 (Conf); **P-0638**: T-059, p. 25, line 4 (Conf).

²¹⁰⁴ [MLI-D28-0004-8039](#) at 8078.

²¹⁰⁵ ██████ Video: ██████; Transcript: ██████; Translation (ENG): ██████ at 5598, lines 75-81; **D-0553**: [MLI-D28-0005-9325-R01](#) at 9330, para. 29; **D-0312**: [MLI-D28-0006-5584-R01](#) at 5588-5589, lines 5-10.

²¹⁰⁶ **P-0004**: T-164, p. 27, line 20 – p. 28, line 8 (Conf).

²¹⁰⁷ ██████ Video: ██████; Translation (ENG): ██████ at 9103. See also **D-0551**: T-200, p. 20, lines 22-25 (“one needs to know that Timbuktu is cultural and Islamic, Timbuktu is known for its traditional Islamic status. It’s very religious, where the conduct of society is ruled by – is governed by the rules of Islam”).

²¹⁰⁸ [MLI-D28-0004-3335](#); **P-0004**: T-166, p. 4, line 11 – p. 13, line 9 (discussing concerns and events leading up to the *assemblée pour la correction des mœurs* taking place on 12 June 2010 as well as broad support for resolutions adopted therein); p. 12, lines 3-7 (discussing calls by local notables pre-2012 for the enforcement of traditional Islamic values); p. 14, line 8 – p. 15, line 14 (Conf); **D-0551**: T-200, p. 20, line 18 – p. 21, line 19 (Conf) (discussing the degradation in traditional Islamic values in Timbuktu pre-2012 as a matter of “great concern” in the town and being discussed at ██████); **P-0150**: T-105, p. 72, line 22 – p. 75, line 2 (Conf); **P-0654**: T-133, p. 12, line 22 – p. 15, line 14 (*see specifically* p. 14, lines 16-23: “the alarm bell had been sounded ever since 2009 by a number of wise men in Timbuktu who deplored what was going on in the city, particularly in the medina, in recent years. And in 2009, even then, Timbuktu was coveted because many tourists would come, and, to draw attention of visitors, Timbuktu had to remain authentic, including people’s clothing, the way the people behaved. So some remarks were made during this time when the alarm bells went off, so to speak, in 2010”); p. 20, line 4 – p. 21, line 16 (Conf); [MLI-D28-0004-3222](#); [MLI-D28-0004-3234](#); **D-0553**: [MLI-D28-0005-9327-R01](#), p. 9327-9328, paras 13-22; **D-0202**: T-202, p. 43, line 3 – p. 45, line 11 (Conf).

²¹⁰⁹ **P-0565**: T-052, p. 14, lines 1-16 (Conf); **P-0150**: T-105, p. 61, lines 7-24 (Conf); p. 62, line 20 – p. 63, line 8; p. 68, line 19 – p. 69, line 7 (Conf); **D-0240**: T-191, p. 48, line 22 – p. 49, line 7 (Conf); **D-0605**: T-192, p. 25, line 18 – p. 26, line 16; **P-0150**: T-097, p. 37, line 13 – p. 38, line 6 (Conf); **P-0114**: T-060, p. 64, lines 11-17 (Conf).

²¹¹⁰ **D-0202**: T-202, p. 43, lines 3-13; p. 46, line 3 – p. 47, line 11; p. 47, line 20 – p. 48, line 25; p. 51, lines 1-51 (Conf).

²¹¹¹ ██████

supported the dress code, the ban on alcohol and the steps taken to curb immoral conduct. The “dress code” was not “new” or “alien”: it was in fact fully consistent with Timbuktu’s own values and traditions,²¹¹² as evidenced by the existence of “sensibilisation sessions” before 2012.²¹¹³ Before, during and after 2012, the local population were opposed to public drunkenness or alcohol being drunk in public places.²¹¹⁴ The prohibition on *Zina* was also deeply entrenched in local communities.²¹¹⁵

601. While present, Ansar Dine regularly consulted with local Imams with the express objective of ensuring conformity with local traditions,²¹¹⁶ and they, in turn, were also able to discuss religious opinions with Ansar Dine leaders “*sans tabou*’.²¹¹⁷

602. The Prosecution’s allegations concerning the supposed banning of the festival of “Maouloud” are irrelevant. The festival was scheduled to occur in late January 2013. Ansar Dine left before it was scheduled to take place. The discussions between Ansar Dine and local Imams on this point had no connection to any charged incidents. The festival itself was also not uniformly accepted in Timbuktu before 2012, particularly after there was a stampede that led to loss of civilian lives.²¹¹⁸ [REDACTED]

[REDACTED]²¹¹⁹

603. Whereas the Prosecution has alluded in its Closing Brief to individuals being targeted for being non-believers, this last-minute pivot in its case theory was not pleaded in a timely manner. There was no reference to the targeting of individuals or groups on this basis in the charges or the Trial Brief. It constitutes a substantial mutation that should be excluded from consideration. The Prosecution’s new case that Ansar Dine targeted locals who were “ignorant”²¹²⁰ also falls outside the scope of the protected categories of Article 7(1)(h).

604. This material evolution in case theory also has not been evidentially substantiated. The Prosecution’s attempt to rely on the *Droukdel* memorandum is misplaced: **first**, the section

²¹¹² **P-0565**: T-052, p. 14, lines 2-7 (Conf); **D-0512**: T-181, p. 22, line 17 – p. 23, line 21 (Conf).

²¹¹³ **D-0315**: T-185, p. 21, lines 3-22 (Conf); T-186, p. 10, line 22 – p. 11, line 3 (Conf).

²¹¹⁴ **D-0540**: T-183, p. 30, lines 4-8 (Conf); **D-0315**: T-185, p. 19, line 20 – p. 20, line 18 (line 16: “[t]hat’s not part of our culture, nor our religion”); p. 20, line 19 – p. 21, line 2 (Conf).

²¹¹⁵ **D-0540**: T-183, p. 30, lines 9-24 (Conf); **P-0150**: T-097, p. 37, lines 16 – p. 38, line 3 (Conf); **D-0605**: T-195, p. 82, lines 7-12 (Conf); **D-0202**: T-202, p. 49, line 19 – p. 50, line 13 (Conf); T-203, p. 23, lines 15-19 (Conf); **D-0529**: T-189, p. 48, lines 17-25 (Conf); **D-0511**: Original: [MLI-D28-0005-9310-R01](#), Translation (ENG): [MLI-D28-0006-2629-R01](#) at 2632, para. 16.

²¹¹⁶ **P-0150**: T-107, p. 79, lines 10-21 (Conf); T-110, p. 59, line 16 – p. 60, line 14 (Conf).

²¹¹⁷ **D-0553**: [MLI-D28-0005-9325-R01](#) at 9330, para. 32.

²¹¹⁸ **D-0202**: T-202, p. 50, line 23 – p. 52, line 25 (Conf).

²¹¹⁹ **P-0551**: T-200, p. 78, lines 3-7 (Conf).

²¹²⁰ [OTP Final Trial Brief](#), para. 493 *et seq.*

in question does not clarify if it is discussing Gao, Timbuktu, or elsewhere, and **second**, it reflects the organisational position that particular rules or punishments should not be applied to individuals who were not true believers.²¹²¹ The speech attributed to Iyad Ghali quotes *Quranic* references without any suggestion the people of Timbuktu were disbelievers, in whole or in part, or that they were being targeted as such.²¹²² Similarly, steps taken to eradicate local superstitions, such as dismantling and replacing the Sidi Yahia door, for example, were the Timbuktu equivalent of dispelling fake news or proving the earth is not actually flat.²¹²³ The Sidi Yahia door was not a religious object, but was simply a barricade that aimed to protect children from playing and injuring themselves in the cemetery.²¹²⁴ As set out above, the rules concerning sorcery and magic were less strict than the equivalent provisions under Malian law.²¹²⁵ The prohibition on sorcery also served a legitimate public protection function, as some pre-Ansar Dine practices involved beating the *djinn* out of individuals or “covering the person with smoke and steam until the person chokes and loses consciousness”.²¹²⁶

605. While Ansar Dine applied the same rules to individuals sharing their faith without distinction, *Shari'a* was not applied against non-Muslims, although it was applied for them to ensure their protection. For example, individuals who tried to steal from a Christian NGO were punished by the Islamic Tribunal.²¹²⁷ Christian NGOs also continued to work at the hospital without problems,²¹²⁸ and assist with humanitarian aid, subject to the caveat that religious symbols not be displayed.²¹²⁹

11.6 The Prosecution has not demonstrated that Mr Al Hassan knowingly and intentionally contributed to the charged incidents of persecution

606. The Prosecution has failed to demonstrate that Mr Al Hassan knew and intended to further or assist the commission of crimes on discriminatory grounds. The only reasonable inference is the contrary: Mr Al Hassan used his role to assist women to obtain redress, protections and rights.

²¹²¹ [OTP Final Trial Brief](#), fn. 2125.

²¹²² [OTP Final Trial Brief](#), fn. 2124.

²¹²³ [REDACTED]

²¹²⁴ [REDACTED]

²¹²⁵ See *supra*, fn 1384.

²¹²⁶ **P-0150**: T-111, p. 21, lines 1-8 (Conf).

²¹²⁷ See e.g. Original: [MLI-OTP-0068-4736](#); Translation (ENG): [MLI-OTP-0078-1745](#) at 1746.

²¹²⁸ [REDACTED]

²¹²⁹ [REDACTED]

607. Even at the culmination of its case, the Prosecution has failed to grapple with the implications of the special *mens rea* requirement as concerns Mr Al Hassan’s personal responsibility for alleged acts of persecution. Apart from the highly unreliable nature of the items cited to demonstrate this point in the Prosecution Final Trial Brief, none of them, read at their highest, demonstrate that Mr Al Hassan knew and intended his contributions to further a purpose involving alleged acts of persecution or the commission of the alleged acts of persecution. None of the statements attributed to him are reflective of an intent to discriminate on grounds based on religion or gender or an awareness that Ansar Dine would do so. This evidence is also insufficiently reliable to establish such an essential element. As set out above, P-0114 acknowledged under oath that he could not be certain that the person he spoke to was Mr Al Hassan.²¹³⁰ The Prosecution also did not authenticate the contents of the 9 November 2012 video: [REDACTED] was unable to recall who filmed the video, and does not appear to have been present.²¹³¹ He also confirmed that the interview, which appears to have been scripted by Abdallah Al Chinguetti,²¹³² was never used,²¹³³ which gives rise to a reasonable inference that it was filmed for [REDACTED] scrapped documentary, which conflated *Hesbah* and the Islamic Police, due to his attempts [REDACTED] with Mr Al Hassan. It cannot, therefore, be used as a reliable foundation for ascertaining the actual tasks of the Islamic Police. Any negative inference derived from scripted propaganda is controverted by [REDACTED] direct evidence that Mr Al Hassan told him that “we are here for everybody’s security and safety, without any distinction or discrimination between anyone, or any kind of racism, or whether the person is rich or poor (...) and that they, the Islamic Police, whoever would come to them would find justice through them”.²¹³⁴

608. The Prosecution has not demonstrated that Mr Al Hassan was aware of alleged incidents concerning women. As set out above, the Islamic Police functioned like a normal police and were not concerned with the application of the moral rules.²¹³⁵ There is no evidence that Mr Al Hassan discriminated against women in connection with his daily tasks or that through such tasks, he knowingly and intentionally contributed to the discriminatory commission of alleged crimes. Mr Al Hassan expressed his clear disapproval and denunciation of the incidents of rape

²¹³⁰ P-0114: T-160, p. 71, line 23 – p. 72, line 6; p. 74, lines 3-4; p. 77, lines 7-10; p. 78, lines 18-25, p. 79, line 20 – p. 80, line 1 (Conf).

²¹³¹ [REDACTED]

²¹³² [REDACTED]

²¹³³ [REDACTED]

²¹³⁴ [REDACTED]

²¹³⁵ See *supra*, para. 48.

brought to his attention,²¹³⁶ and further expressed his opposition to the detention of women at the BMS, taking such steps that were in his power to assist the affected individuals.²¹³⁷ This demonstrates Mr Al Hassan's clear refusal to be a part of discriminatory actions.

11.7 Duress/superior orders/mistake of law or fact

609. The Defence refers to its arguments above that there is a reasonable basis to conclude that Mr Al Hassan did not possess the necessary intent to contribute to the charged crimes, by virtue of the fact that he was operating under duress, superior orders, or a mistake of fact or law. Although superior orders do not capture crime against humanity, if the acts underpinning persecution are based on conduct prescribed by Article 8, a lawful defence to the Article 8 conduct will necessarily eliminate the foundation for a conviction of persecution. In assessing these grounds, the Chamber must give careful reflection to the question as to whether Mr Al Hassan could have subjectively known in 2012, that orders to follow the tenets of Islam could equate to a form of criminalised discrimination based on gender or religion, particularly given the extent to which the Malian state had endorsed Islamic principles concerning women by enacting and retaining legislation on family and marital rights, based on *Shari'a*. Indeed, when this domestic legislation was challenged before the African Court of Human and Peoples' Rights, four years after the charged time period,²¹³⁸ the Malian state authorities maintained that the Court should excuse their non-compliance due to *force majeure* imposed by internal religious constraints,²¹³⁹ arguing further that "it would serve no purpose to enact a legislation which would never be implemented or would be difficult to implement to say the least; that the law should be in harmony with sociocultural realities".²¹⁴⁰ In circumstances where the Malian State - advised and assisted by trained lawyers – concluded that was necessary to follow the dictates of religious leaders concerning the application of *Shari'a*, it would be unreasonable to conclude that Mr Al Hassan could and should have determined otherwise, four years earlier.

12 CONCLUSION

610. Through this brief, the Defence has demonstrated that this case should never have been brought against Mr. Al Hassan, an ordinary police officer who acted under instruction and to assist the population. The Prosecution has failed to prove any or the materially defective charges beyond a reasonable doubt, and the Prosecution cannot overcome the evidence raised

²¹³⁶ D-0605: T-193, p. 37, lines 21-22 (Conf).

²¹³⁷ D-0093: [MLI-D28-0006-4212-R01](#) at 4216, para. 24. See *supra* para. 284, fn. 1007.

²¹³⁸ [APDF & IHRDA v. Mali](#), para. 46.

²¹³⁹ [APDF & IHRDA v. Mali](#), paras 63, 64.

²¹⁴⁰ [APDF & IHRDA v. Mali](#), para. 66.

by Mr. Al Hassan's affirmative defenses of mistake of law and fact; superior orders, or duress. Witness testimony demonstrated Mr. Al Hassan's lack of culpability, his low status, and his known good character. He neither assisted nor contributed to a common purpose to commit the charged crimes alleged. The charged common purpose was itself a chimera – with no element of criminality. Even the threshold elements are lacking from the Prosecution's case. Evidence to prove a NIAC in this case simply does not exist, and the Prosecution's attempt to pull together every distinct group of Muslim actors in the region does not reach the legal threshold. This case has highlighted a number of concerning issues with the manner in which the Prosecution plead and presented its case. Chief among these is the gross contamination of Mr. Al Hassan's interviews and other witness' evidence through torture. Further, to base charges on adherence to Islam offends the notion of plurality underpinning this international court. All of these enumerated issues bear on Mr. Al Hassan's fair trial rights. The Chamber should recognize Mr. Al Hassan's lack of criminal responsibility, and the issues above that would set grave precedents for this court if accepted. Mr. Al Hassan should be acquitted.



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At The Hague, The Netherlands