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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

Public redacted version of ''Prosecution's response to the Defence Final Brief'', 2 May 2023, ICC-01-12-01/18-2491-Conf

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Introduction

1. The Defence's Final Brief[1] portrays an incorrect picture of the evidence on the record concerning the roles played by Ansar Dine/AQIM and **AL HASSAN** during the occupation of Timbuktu in 2012 and the crimes that they committed against the population: the Defence looks at evidence in isolation, glosses over a substantial amount of important reliable evidence, misstates witnesses' testimony, makes unsubstantiated assertions, speculates, makes contradictory statements and also refers to evidence that is not on the record.

2. The Defence claims *inter alia* that strong bonds of cooperation and support between Ansar Dine/AQIM did not exist[2] in Timbuktu when an overwhelming amount of evidence proves otherwise. Ansar Dine/AQIM are presented as "saviours" when the evidence clearly shows that they took over Timbuktu after the government was forced to flee and brutally imposed their views upon its residents—violating their basic fundamental rights through violence, brutality and intimidation. The Defence acknowledges that **AL HASSAN** was a member of the Islamic Police, but describes the Islamic Police as a minor organ and **AL HASSAN** as having a limited role within it, which he used to help others.[3] This description is in stark contrast with reliable evidence demonstrating that **AL HASSAN** was an important member of the Islamic Police, who acted with zeal in enforcing the new rules and prohibitions imposed by Ansar Dine/AQIM, as depicted by a video showing him flogging civilians in public for their alleged transgressions.[4]

3. The Defence's Final Brief also contains important errors regarding the legal interpretation of the modes of responsibility—merging elements of co-perpetration under article 25(3)(a) with those of responsibility under article 25(3)(d)—and the interpretation of the charges for which **AL HASSAN** is standing trial.

4. As such, the Prosecution has endeavoured to correct some of the important misstatements and errors to assist the Chamber in its determination of the truth. However, due to the number of misrepresentations, the Prosecution's corrections are not exhaustive and a high degree of scrutiny should be applied to the Defence Final Brief.

5. For ease of reference the Prosecution's Response matches the sections of the Defence's Final Brief.

[1] ICC-01/12-01/18-2485-Conf-Corr ("Defence Final Brief").
[2] Defence Final Brief, para.2.
[3] Defence Final Brief, para.8 and.67.
[4] ICC-01/12-01/18-2475-Conf-Corr2 ("Prosecution Closing Brief"), para. 226.

Sections 2 and 3

AL HASSAN was not prosecuted on defective charges

6. The Defence's submissions regarding purported defects in the charges should be dismissed for a number of reasons.

7. First, the Defence seeks to re-litigate matters already ruled upon by the Pre-Trial Chamber, as well as the Chamber at the start of the trial. This Chamber has held that "for the purpose of the trial proceedings, any issues related to the charges have been exhaustively addressed".[5] This is consistent with rule 134(2) that "forecloses the possibility of a party raising objections or repeating observations concerning an issue related to the pre-confirmation proceedings at a subsequent stage."[6]

8. Second, the Defence submissions are unsupported. The Defence's argument is based on a misreading of one ICTR judgment which relates to the burden of proof on such matters "on appeal".[7] At first instance, in the ordinary way, it is for the Defence to substantiate its submissions. Yet, it fails to do so.

9. Third, as a matter of fact, the Defence arguments lack merit and should be dismissed. The charges are sufficiently specific to inform **AL HASSAN** of their nature, cause and content under article 67(1)(a). The Defence merges arguments regarding sufficiency of charges with submissions regarding the sufficiency of evidence, coupled with an incorrect legal interpretation of article 25(3)(d). As described below, the Confirmation Decision adequately describes the Common Purpose, and sufficiently identifies its members, **AL HASSAN**'s contributions and the incidents alleged.

2.1. The Common Purpose is adequately described

10. The confirmed charges clearly identify the "critical element of criminality" of the Common Purpose. The control of Ansar Dine/AQIM over Timbuktu and the imposition of their ideological and religious views involved the commission of the charged crimes.[8]

11. This definition accords with consistent jurisprudence.[9] The use of more specific terminology is unnecessary as long as the contours of the Common Purpose and its implementation are clearly defined.[10] In dismissing similar arguments in the *Bemba et al.* case in the context of article 25(3)(a) (co-perpetration), the Appeals Chamber held that it was sufficient for the Prosecution to plead (and the Pre-Trial Chamber to confirm) that the common plan "included" the commission of crimes as well as other

[5] ICC-01/12-01/18-923-Conf, para.93.
[6] ICC-02/04-01/05-1562 OA4, para.129.
[7] *Contra* Defence Final Brief, para. 10. *See* ICTR, *Renzaho v. the Prosecutor*, ICTR-97-31-A, Judgment, 1 April 2011, para. 125. While the penultimate sentence *mentions* prior litigation before the Trial Chamber, the sentence as a whole states that "the burden rests on the Prosecution to prove *on appeal*" (emphasis added).
[8] *Contra* Defence Final Brief, para.11-16. *See* ICC-01/12-01/18-461-Conf-Corr ("Confirmation Decision"), para.957; [redacted].
[9] The common purpose must have an element of criminality in the sense that it involves (or leads to) the commission of a crime under the Court's jurisdiction: Confirmation Decision, para.940; *Katanga* TJ, para.1626; *Mbarushimana* CD, para.271. Like the notion of "common plan" under article 25(3)(a), the common purpose need not be specifically directed at the commission of a crime and may also include non-criminal goals: *Katanga* TJ, para.1627; *Mbarushimana* CD, para.271.
[10] *See*. *Bemba et al.* AJ, para.136; *Ongwen* AJ, para.259, citing *Yekatom & Ngaïssona* OA2 AJ, para.54, 58, 60.

lawful conduct. What matters is the proper articulation of the "critical element of criminality in the common plan".[11] The same rationale applies to the notion of common purpose under article 25(3)(d).

12. With respect to the crimes of rape committed in detention, the Defence disregards that **AL HASSAN** is charged for these crimes under article 25(3)(d).[12] This provision is an exception to article 30(2)(b) and **AL HASSAN** need not share the intent of the members of the Common Purpose to commit the crimes.[13] The *Katanga* Trial Judgment does not support the Defence assertion to the contrary.[14] Instead, in *Katanga*, the Majority held that, while the members of the Common Purpose must intend the crimes within the meaning of article 30(2)(b), an accessory under article 25(3)(d)(ii) need only know of the intention of the group to commit the crimes pursuant to article 30(3).[15] In any event, the evidence shows that **AL HASSAN** espoused the Common Purpose and acted "with the aim of furthering the criminal activity or criminal purpose" pursuant to article 25(3)(d)(i).

2.2. The members of the Common Purpose are sufficiently defined

13. Contrary to the Defence's submission, the Prosecution identified with sufficient detail the members of the Common Purpose, namely all members of the groups Ansar Dine and AQIM in Timbuktu during the period of the charges.[16]

14. As confirmed by the Appeals Chamber, it is not necessary to identify all members by name. The level of detail required to satisfy the notice requirement varies depending on the circumstances of each case, including the specific mode of liability charged.[17] Even in the context of article 25(3)(a), it is not always necessary to identify each member of the common plan by name; rather it suffices that the charges adequately describe the category or group to which the members belong.[18] In this case and for the purpose of article 25(3)(d)—where the accused need not be part of the Common Purpose—the members of the Common Purpose have been adequately defined by reference to their membership to Ansar Dine and AQIM in Timbuktu during the period of the charges.

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[11] *Bemba et al.* AJ, para.134.
[12] Counts 11 and 12.
[13] *Katanga* TJ, para.1637-1638. *Contra* Defence Final Brief, para.17 (arguing that the Prosecution has failed to plead that Mr AL HASSAN knew and intended for the occurrence of the rapes in detention); *see also* para.22 (where the Defence makes the same allegation more generally with respect to article 25(3)(d)).
[14] Defence Final Brief, para.22, citing *Katanga* TJ, para.1641-1642.
[15] *Katanga* TJ, para.1641-1642. Nor does Judge Van den Wyngaert's minority opinion (at para.38) support the Defence's proposition. Judge Van den Wyngaert questioned whether an essential contribution to the *common plan* under article 25(3)(a) suffices to satisfy the requirement of a contribution to a *specific crime* under article 25(3)(d)(ii). The jurisprudence has however clarified that an accused's conduct under article 25(3)(a) must also have an impact on the crime (and not only on the common plan): *Ntaganda* AJ, para.1041, citing *Bemba et al.* AJ, para.810. The difference between art 25(3)(a) and (d) lies on the *quality* of the contribution (essential for art 25(3)(a)), but in both cases there must be a causal nexus between the person's conduct and the crime: *Ntaganda* AJ, para.1041, quoting *Bemba et al.* AJ, para.810.
[16] *Contra* Defence Final Brief, para.18-19.
[17] *Ongwen* AJ, para.237, citing *Yekatom & Ngaïssona* OA2 AJ, para.38.
[18] *Ongwen* AJ, paras. 274-277; *see* ICTY authorities in fn. 494. The Appeals Chamber confirmed that members of the common plan could be identified as members of the "Sinia brigade leadership".

15. Furthermore, for the purpose of notice, it is unnecessary to "clearly define the relationship between Ansar Dine and AQIM" and immaterial whether they are a uniform group or have different motives.[19] What matters is that their members in Timbuktu shared the Common Purpose for the period of the charges. The evidence demonstrates that they did.

2.3. AL HASSAN's contributions to the charged crimes are adequately described

16. The Pre-Trial Chamber correctly interpreted the required contribution of an accessory under article 25(3)(d), and the Confirmation Decision adequately describes the factual allegations underpinning **AL HASSAN**'s contributions. The Defence does not demonstrate otherwise. Instead, it mixes factual arguments regarding the specificity of the charges and the sufficiency of the evidence with legal submissions regarding article 25(3)(d) but by reference to other modes of liability,[20] in particular article 25(3)(a)—and the common plan.[21]

17. Pursuant to article 25(3)(d) the accused must contribute to the commission (or attempted commission) of the crime "in any other way" than those set out in article 25(3)(a) to (c).[22] The contribution (assessed holistically)[23] needs to have an impact on the commission (or attempted commission) of the crime(s).[24] Unlike article 25(3)(a), the contribution need not be essential,[25] nor significant or meet a specific threshold.[26] Thus, it suffices that the person's conduct has an effect on the commission (or attempted commission) of the crime(s).[27] This requires a case-by-case and fact-specific assessment.

18. Further, while the person's contributions must be assessed with respect to the charged crimes (for example, rape or torture), "a *direct* nexus between the conduct of the accessory and that of the physical perpetrator need not be established".[28] Nor is proximity of the person to the crime required.[29]

19. The Confirmation Decision does not merely set out **AL HASSAN**'s "general role and general actions".[30] Instead it adequately pleads the factual allegations underpinning his multifaceted

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[19] *Contra* Defence Final Brief, para.20; *see also* paras.38, 44.
[20] Defence Final Brief, paras. 21-31. The Defence's erroneous legal understanding of the required contribution of an accessory under article 25(3)(d) also transpires in section 4.
[21] Defence Final Brief, paras. 29. The Defence refers to "Mr Al Hassan's ability to frustrate the commission of the charge acts".
[22] Confirmation Decision, para.944; *Katanga* TJ, para.1618; ICC-01/09-01/11-373 ("*Ruto et al.* CD"), para.354.
[23] *See similarly* for co-perpetration: *Ntaganda* AJ, para.1060, 1064.
[24] Confirmation Decision, para.945, 948; *Katanga* TJ, para.1635.
[25] In the context of article 25(3)(a), this means that, without a person's contribution, the crime could not have been committed or would have been committed in a significantly different way: *Ongwen* AJ, para.661, *Ntaganda* AJ, para.1060, *Bemba et al.* AJ, para.820, 825.
[26] Confirmation Decision, para.948; ICC-02/04-01/15-422-Red ("*Ongwen* CD"), para.44, ICC-01/12-01/15-84-Red ("*Al-Mahdi* CD"), para.27; *Ruto et al.* CD, para.353-354; *contra Katanga* TJ, para.1632, *Mbarushimana* CD, para.276-285. *Contra* Defence Final Brief, paras. 24, 29.
[27] Confirmation Decision, para.948; *Ongwen* CD, para.44; *Al-Mahdi* CD, para.27; *Ruto et al.* CD, para.353-354.
[28] *Katanga* TJ, para.1635 (emphasis added). *Contra* Defence Final Brief, paras. 21 (requiring the Confirmation Decision to link AL HASSAN'S contributions to "specific incidents"), 25, 27, 28. *See also* Confirmation Decision, paras.945, 950. For article 25(3)(c), *see Bemba et al.* AJ, para.1328-1330.
[29] Confirmation Decision, para.945; *Katanga* TJ, para.1636.
[30] *Contra* Defence Final Brief, para.21.

contributions with respect to the crimes.[31] Likewise, it adequately pleads his *mens rea* with respect to the crimes for all the charged period,[32] including with respect to the contextual elements.[33]

2.4.The incidents have been properly pleaded

20. Finally, the Defence submissions regarding the lack of specificity of the incidents should be dismissed.[34]

21. Significantly, the Defence does not identify which incidents are affected by this purported lack of specificity. Instead it generally argues that "[r]egarding violence in detention, several incidents lack the date on which the victim was allegedly detained" and that "concerning allegations of forced marriages, the charges do not specify the perpetrator identities […] or any clear connection to Mr Al Hassan".[35] Yet, it is not always necessary to identify the exact date of the crimes or the identity of the perpetrators in order to provide an accused with adequate notice of the charges under article 67(1)(a). As noted above, this is a fact-sensitive and case-specific determination—the level of specificity required, and what constitutes sufficient notice, depends on the circumstances of each case.

22. With respect to rapes committed in detention and forced marriages (and, indeed, all the charges), the Confirmation Decision, read as necessary with auxiliary documents, provides sufficiently detailed information to adequately inform **AL HASSAN** of the charges and to enable him to prepare his defence. With respect to the rapes, the incidents are described by reference to confined temporal parameters and other specific identifying features, such as the location where the victim was detained and the perpetrator's membership to Ansar Dine/AQIM.[36] With respect to forced marriages (as other inhumane acts), the Confirmation Decision provides identifying features of the perpetrators and indicates that they likewise belong to Ansar Dine/AQIM.[37] **AL HASSAN**'s "connection" with the crimes is set out in the part on his individual criminal responsibility.[38]

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[31] Confirmation Decision, paras. 270, 276, 279, 286, 290, 292, 295, 297-298, 307-308, 311, 322, 350, 431-432, 434, 441, 461, 579-580, 582, 788, 878, 880, 882, 884-885, 912-913, 916-919, 921-923, 926-927, 928-929, 932, 954-1000.

[32] Confirmation Decision, paras. 912, 933, 936, 1001-1008; *contra* Defence Final Brief, para.30.

[33] Confirmation Decision, paras. 346, 414, 484, 493, 501, 513, 530, 643 and 646, and p. 451-452 regarding AL HASSAN's awareness of the factual circumstances that established the existence of an armed conflict; paras. 344, 653 and 706 and p.451 regarding AL HASSAN's knowledge of his conduct being part of a widespread and systematic attack against the civilian population; *contra* Defence Final Brief, para.27.

[34] Defence Final Brief, para.32-36.

[35] Defence Final Brief, para.34.

[36] Confirmation Decision, paras. 677-682; Amendment Decision 677-682; Decision on the Self -Contained set of charges, p. 30, para. 86, page 45.

[37] Confirmation Decision, para.594 (P-0520), 598 (P-0602), 606 (P-0610), 615 (P-0538), 622 (P-0553), 625 (P-0533's sister), 634 (P-1162), 637 (P-1460); Amendment Decision, para. 86-91 (P-0957).

[38] Confirmation decision (P-0520, P-0602, P-0610, P-0538, P-0553, P-0533's sister, P-1162, P-1460), paras 954-1010; Amendment Decision, para. 172-174 (P-0957); *Contra* Defence Final Brief para.34.

Section 4

AL HASSAN knowingly contributed to the Common Purpose and the commission of crimes

23. The Defence arguments regarding the alleged lack of a nexus between the Accused's conduct and the commission of the crimes charged in this case are based on an erroneous interpretation of article 25(3)(d) and (c), and/or a partial reading or misunderstanding of the evidence.

24. For liability under article 25(3)(c) or (d) an accused need not have the "capacity to frustrate the group or groups' objectives or any alleged crimes emanating therefrom".[39] Nor is it necessary that an accused knows or intends to further the commission of specific incidents.[40] As described in the Prosecution Closing Brief, the acts and conduct of **AL HASSAN**, taken as a whole, had an effect on the commission of the crimes charged in this case. The evidence also shows that the Accused made his contributions intentionally, and with the requisite *mens rea* under article 25(3)(d)(i) and/or (ii).

25. Indeed, the Defence arguments rest on considering individual pieces of evidence in isolation, and disregarding evidence that contradicts its theory.[41] Many Defence arguments are speculative,[42] and/or presented without any factual or evidential foundation.[43] Others are based on statements which are inconsistent with the evidence on the record,[44] or on selective references taken out of context.[45] Overall, the Defence portrays an incorrect image of **AL HASSAN**'s role and contribution, which is not supported by the evidence on the record. The Prosecution presents below some illustrative examples.

4.3 The Accused's general contributions to the Common Purpose

26. The Defence suggests that since there is only one report, dated May 2012, which **AL HASSAN** signed as "investigator",[46] his ability to conduct investigations was curtailed thereafter.[47] This is contradicted by evidence on the record, as described in section IV.B.4.b.iv.a. of the Prosecution Closing Brief. In fact, when discussing the report on this May 2012 case, **AL HASSAN** himself stated that the *emir* of the police asked him to investigate this case, and also confirmed that there were other occasions when he was asked to investigate.[48] **AL HASSAN** acknowledged that there were other cases where he

[39] *Contra* Defence Final Brief, para.80.
[40] *Contra* Defence Final Brief, para.64-65.
[41] *See e.g.* Defence Final Brief, para.67: "Mr Al Hassan's motives – which were directed towards helping his family and the local …", which is contradicted by his direct participation in the imposition of corporal punishments, such as the floggings of two men accused of drinking alcohol on or around 8 July 2012.
[42] *See e.g.* Defence Final Brief, para.81: "the inclusion of an additional number would be consistent with Mr Al Hassan's role as a linguistic interface".
[43] *See e.g.* Defence Final Brief, para.66, referring to "the health difficulties faced by his wife in child-birth in 2012" with only references to evidence related to the death of the daughter in February 2013. *See also* para.79, last sentence regarding "very real consequences to Mr Al Hassan, his family" that would allegedly have resulted from AL HASSAN leaving the Police or refusing to obey his orders.
[44] *See e.g.* Defence Final Brief, para.75, last sentence claiming that AL HASSAN's "ability to conduct investigations was curtailed after this point".
[45] *See e.g.* Defence Final Brief, para.84 on [redacted]'s documentary about which [redacted] gave a clear explanation.
[46] Report, MLI-OTP-0001-7527, translation MLI-OTP-0052-0089, MLI-OTP-0001-7528 to the left of the image, translation MLI-OTP-0077-2795.
[47] Defence Final Brief, para.75.
[48] P-0398:MLI-OTP-0060-1511, p.1512-p.1516, l.24-150.

interrogated a suspect and wrote a report, in the absence of the *emir* of the Police.[49]

27. The Defence claim that **AL HASSAN** did not have authority over other members of the Police is partly based on items which do not form part of the record and therefore cannot be considered—such as [redacted]'s interview transcripts and P-0582's summary[50]—and misrepresentations of evidence on the record. For example, P-0582's interview transcripts cited by the Defence shows that **AL HASSAN** was described by P-0582 as the "*commissaire*".[51]

4.3.2 AL HASSAN did contribute to the charged criminal incidents

28. Contrary to the Defence allegations,[52] the evidence shows that **AL HASSAN** played a substantive role in the establishment and execution of police patrols. In fact, P-0582 stated that **AL HASSAN**'s role "*consistait par exemple, à choisir les éléments […] qui doivent aller, en fait.*"[53]

29. Additionally, as described in the Prosecution Closing Brief,[54] the evidence also shows that the patrols by the Police went beyond "standard, lawful police functions, such as maintaining order and stability".[55] As confirmed by **AL HASSAN** himself in his November 2012 interview with [redacted] the role of the Police included "correcting objectionable acts […] such as drinking alcohol, smoking, and a woman adorning herself".[56]

4.3.3 AL HASSAN's participation in media interviews

30. The Defence claims that the media interviews given by **AL HASSAN** in 2012 were "scripted" are based largely on speculation. In any event, the evidence of [redacted] and [redacted] relied upon by the Defence[57] relates only to **AL HASSAN**'s December 2012 interview, which did not relate to the Police's work.[58]

31. In the October and November 2012 videos interviews—which did relate to the Police's role and activities[59]—**AL HASSAN** spontaneously answered questions from interviewers. These videos show that he endorsed the goals of Ansar Dine/AQIM to impose their own religious and ideological vision. For example, he criticised people who grew up with a secular education, saying that: "*je connais... des personnes âgées qui ont entre 60 et 70 ans et ne savent pas prier... ils avaient obtenu un doctorat et fait des hautes études etc. etc. mais ne savent pas prier... et ne connaissent pas le Coran... ne connaissent*

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[49] P-0398:MLI-OTP-0060-1484, p.1491-1492, l.207-256.
[50] Defence Final Brief, para.76, accompanying fns.215, 216, 218.
[51] P-0582:MLI-OTP-0062-3820-R02, p.3831, l.357.
[52] Defence Final Brief, para.82, accompanying fn.246.
[53] P-0582:MLI-OTP-0062-3820-R02, p.3836-3837, l.559-560. *See also* p.3837, l.568-571.
[54] *See e.g.* Prosecution Closing Brief, para.47, 51-52.
[55] Defence Final Brief, para.83. *See also* para.608, claiming that: "the Islamic Police functioned like a normal police and were not concerned with the application of the moral rules".
[56] [redacted]
[57] Defence Final Brief, para.85, accompanying fns.264, 265.
[58] [redacted]
[59] [redacted].

rien du Coran et boivent de l'alcool... et y croient toujours... et fument... […] la personne est d'abord un ennemi de l'Islam" (emphasis added).[60]

32. In any event, regardless of whether the media interviews given by **AL HASSAN** were published or scripted,[61] the fact that he was entrusted to speak with journalists on behalf of the Police demonstrates his level of importance at the time.

4.3.4 AL HASSAN's interactions with the local population

33. The Defence reliance on the *Mbarushimana* confirmation decision in relation to **AL HASSAN**'s interaction with the local population is inapposite.[62] In light of **AL HASSAN**'s authority, responsibilities, multiple tasks and presence in Timbuktu for the duration of the period relevant to the charges, the nature and importance of his role can be clearly distinguished from that of Mbarushimana.[63]

Section 5

5.1 The Prosecution has proven the existence of a "protracted armed conflict

34. A non-international armed conflict is established by proof of hostilities of sufficient intensity between parties with a sufficient degree of organisation.[64] The Defence overlooks that where the State is a party to such a conflict, it is presumed to possess the necessary degree of organisation.[65] Furthermore, none of the variety of factors relevant to assessing the organisation requirement is dispositive of itself.[66] Salient factors include the ability to conduct complex military operations, including to take and hold territory, as Ansar Dine/AQIM did.[67]

35. While the armed acts of a "coalition" of non-State armed groups need not be aggregated in this case in order to meet the intensity requirement, the Defence does not show that they could not be.[68] In any event, while the close relationship between Ansar Dine/AQIM is a question of fact,[69] there is no question

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[60] [redacted].
[61] *Contra* Defence Final Brief, para.84.
[62] Defence Final Brief, para.91.
[63] *Mbarushimana* CD, para.297, 317.
[64] *See also* Defence Final Brief, para. 94.
[65] *Contra* Defence Final Brief, paras. 101-102. *See e.g.* ICTY, *Prosecutor v. Haradinaj*, IT-04-84-T, Judgment, 3 April 2008 ("*Haradinaj* TJ"), para. 60; S. Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford: OUP, 2012) ("Sivakumaran"), p. 170.
[66] *Contra* Defence Final Brief, para. 95. *See e.g.* ICC-01/04-02/06-2359 ("*Ntaganda* TJ"), para. 704 ("factors and indicators are not individually determinative"); ICC-01/04-01/06-2842 ("*Lubanga* TJ"), para. 537 ("[n]one of these factors are individually determinative"); ICTY, *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-T, Judgment, 10 July 2008 ("*Boškoski and Tarčulovski* TJ"), para. 198 ("none of which are […] essential"); *Haradinaj* TJ, para. 60 ("none of which are […] essential").
[67] *Contra* Defence Final Brief, paras. 96, 98. *See e.g.* ICC-02/04-01/15-1762-Red ("*Ongwen* TJ"), para. 2685 ("the use of military tactics, the ability to carry out (large scale or coordinated) operations, the control of territory"); *Ntaganda* TJ, para. 704 ("the use of military tactics, the ability to carry out (large scale or coordinated) operations, the control of territory"); *Lubanga* TJ, para. 537 ("the force or group's ability to plan military operations and put them into effect"); *Boškoski and Tarčulovski* TJ, para. 200 ("the group's ability to […] conduct large scale military operations, the capacity to control territory"); *Haradinaj* TJ, para. 60 ("the fact that the group controls a certain territory; […] its ability to plan, coordinate and carry out military operations, including troop movements and logistics").
[68] *Contra* Defence Final Brief, para. 103-104.
[69] *See e.g.* Prosecution Closing Brief, paras. 534, 537-539, 548, 550.

that they were party to the conflict with the State authorities of Mali, and responsible for hostilities of sufficient intensity.[70] Notably, while parties to a non-international conflict are not required to control territory for the purpose of article 8(2)(c) or (e) of the Statute, "in the absence of active hostilities, it may be a determinative factor in assessing whether the intensity threshold is fulfilled."[71]

36. By mischaracterising the Prosecution as "splitting" the armed conflict, the Defence confuses the natural ebb and flow in the intensity of hostilities, relative to the strategic position of the parties to the conflict, with the termination of the conflict.[72] As the evidence demonstrates, there was no peaceful settlement of the non-international armed conflict in Mali prior to the alleged crimes in this case, in the sense of the complete victory of a party to the conflict (*debellatio*) or a "lasting absence of armed confrontations" between the parties "without real risk of resumption" of such confrontations.[73] The inquiry as to the termination of a non-international armed conflict represents a single overall assessment, not four "distinct" alternatives,[74] and should not be considered lightly.[75]

5.2 The nexus between the war crimes and the armed conflict has been proven

37. Contrary to the Defence suggestion,[76] even if **AL HASSAN** did not participate in combat operations, or Ansar Dine/AQIM were not actively engaged in hostilities in the immediate vicinity of the alleged crimes, this is not dispositive in determining the nexus between the charged war crimes and the armed conflict.[77]

38. The Defence overlooks the critical significance of the conflict in enabling and shaping the alleged crimes. Indeed, the ICRC has long argued that situations where a non-State armed group establishes control over territory, and then seeks to impose its own rules upon the civilian population, are precisely those in which international humanitarian law (IHL) *should* apply.[78] The disagreement of some

[70] *See e.g.* Prosecution Closing Brief, paras. 545-553.
[71] *Ntaganda* TJ, para. 717. *See also Ongwen* TJ, para. 2684; ICC-01/12-01/15-171 ("*Al Mahdi* TJ"), para. 49.
[72] *Contra* Defence Final Brief, paras. 105-108. *See e.g.* ICRC, *International humanitarian law and the challenges of contemporary armed conflicts*, 32nd International Conference of the Red Cross and Red Crescent, October 2015 ("ICRC 2015 *Challenges* Report"), p. 10; *Ongwen* TJ, para. 2684; C. Dwyer and T. McCormack, 'Conflict classification,' in R. Livoja and T. McCormack (eds.), *Routledge Handbook of the Law of Armed Conflict* (Abingdon: Routledge, 2016), p. 56.
[73] *Contra* Defence Final Brief, paras. 109-113. *See e.g.* ICTY, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995 ("*Tadić* Jurisdiction Decision"), para. 70; *Lubanga* TJ, para. 533; ICRC, *Commentary on the First Geneva Convention* (Geneva/Cambridge: ICRC/CUP, 2016) ("ICRC *Commentary on GCI*"), paras. 489, 491, 494; ICRC 2015 *Challenges* Report, pp. 10-11; Sivakumaran, pp. 253-254.
[74] *Contra* Defence Final Brief, para. 109.
[75] *See e.g.* ICTY, *Prosecutor v. Gotovina et al.*, Judgment (Vol. II), IT-06-90-T, 15 April 2011 ("*Gotovina* TJ"), para. 1694 ("[o]nce the law of armed conflict has become applicable, one should not lightly conclude that its applicability ceases. Otherwise, the participants in an armed conflict may find themselves in a revolving door between applicability and non-applicability, leading to a considerable degree of legal uncertainty and confusion").
[76] *Contra* Defence Final Brief, paras. 120-125.
[77] *See generally* ICC-02/17-138 OA4, paras. 69-70; ICC-01/04-02/06-1962 OA5, para. 68; ICTY, *Prosecutor v. Kunarac*, IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002, paras. 58-60.
[78] T. Rodenhäuser, 'The legal protection of persons living under the control of non-State armed groups,' [2020] 102(915) *International Review of the Red Cross* 991 ("Rodenhäuser"), p. 1003 (fn. 61). Concerning *factual* (rather than legal) analogies to "occupation", *see also e.g.* pp. 996, 1002, 1006-1007; R. Provost, *Rebel Courts: the Administration of Justice by Armed Insurgents* (OUP: 2021) ("Provost"), p. 176.

commentators with aspects of the nexus test, or the manner in which it may be applied in particular situations,[79] shows no error in this view—which continues to reflect the broad consensus of opinion.[80]

Section 6

The evidential foundation is sound

39. The Defence's allegation that the memory of Prosecution witnesses was "tainted through faulty investigative practices, inexperienced investigators and the use of photos and videos to identify perpetrators"[81] is unfounded and essentially based on speculation.

40. There is no concrete evidence on the record that there was any "improper influence by journalists/media propaganda" or that it affected the testimony or narrative of Prosecution witnesses.[82] The Defence speculates when it alleges that media outlets "such as France 2 and RFI were influential in furthering" a "false narrative that favoured pro-intervention objectives."[83]

41. Further, the Defence claim that "misreporting from foreign journalists propagated the false conflation between *Hesbah* and the Islamic Police and the BMS with the Islamic Police"[84] is not supported by the evidence cited. This is also the case with the claims that witnesses "were exposed to the biases of external parties through th[e] use of suggestive identification procedures" and that this "irretrievably altered and distorted the original memories of the Witnesses".[85]

6.2.3 There is no evidence of influence by [redacted]

42. The Defence claims that many journalists relied on [redacted] for tips and news, and that his alleged affiliation with MNLA led to the propagation of false and exaggerated anti-Ansar Dine news.[86] This is speculative and does not accurately represent the evidence.

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[79] *See e.g.* Defence Final Brief, para. 321 (fn. 1185: citing W. Schabas, 'Al Mahdi has been convicted of a crime he did not commit,' [2017] 49(1) *Case Western Reserve Journal of International Law* 75, pp. 97-98; K. Fortin, 'The application of human rights law to everyday civilian life under rebel control,' [2016] 63 *Netherlands International Law Review* 161, pp. 178-179). Even among commentators who might favour a more nuanced application of the nexus test, there is some disagreement whether this raises the threshold in practice: *see e.g.* E. Pothelet, 'Life in rebel territory: is everything war?', *Armed Groups and International Law*, 20 May 2020, penultimate paragraph (acknowledging that the threshold remains low, for example, for conduct allegedly violating common article, and disagreeing with Fortin in this respect).

[80] *See e.g.* 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] *Journal of Human Rights Practice* 387 ("Fortin (2022)"), p. 406 (recalling that "[t]he latest Challenges report by the ICRC indicates that all exercises of public administration by armed groups fall under the scope of international humanitarian law"). *See further* ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 2019, p. 53 ("the way in which non-State armed groups exercise control over, and interact with, persons living in territory under their *de facto* control is inherently linked to the conflict in question", which "plays a substantial part in the group's ability to control the lives of those living under its control and the manner in which such control is exercised"). *See also e.g.* *Al Mahdi* TJ, para. 49 (crimes in Timbuktu could not have been carried out without the "conquest" of the city, and "the justifications stated" for crimes "were the same as those advanced by the armed groups for taking over Timbuktu and Northern Mali more generally").

[81] Defence Final Brief, para.145.

[82] *Contra* Defence Final Brief, para.146.

[83] Defence Final Brief, para.146.

[84] *Contra* Defence Final Brief, para.153.

[85] *Contra* Defence Final Brief, para.195.

[86] Defence Final Brief, para.156.

43. The references provided by the Defence do not support the claim that [redacted] was "affiliated"[87] with the MNLA, nor that the MNLA was supporting French intervention—which is only supported by a brief extract concerning the repost of a tweet in 2017.[88] Last, the Defence allegation that [redacted] had a "clear motive" to "push" the anti-Ansar Dine narrative is also speculative. In fact, when P-0010 was questioned by the Defence about his conversation with [redacted], he testified that he never interviewed him and that he only spoke to him very briefly because he wanted help in getting to Timbuktu. The latter replied that he could not help him, and that was the end of the conversation.[89]

6.3 There is no evidence of improper influence of Prosecution Witnesses by NGOs

44. The Defence allegation that the testimony of Prosecution witnesses was contaminated by the influence of NGOs and their funders is unsupported by the evidence on the record, is based on speculation, and contains important misstatements. The Defence fails to refer to any evidence to show that specific Prosecution witnesses were contaminated in any manner. As such these allegations have no merit.

45. In particular, the Defence misrepresents P-0160's testimony when it claims that he was not conducting open inquiries during his interviews, was working under the premise that women had been raped at the BMS, and that he would keep on meeting them until they had agreed that they had been raped.[90] P-0160 never testified that he was suggesting crimes to victims. He stated that he was able to convince a number of victims to confide in him using a pedagogical approach based on familiarity, advice, orientation and guidance.[91] P-0160 emphasised that "social and cultural aspects" made it difficult for victims to acknowledge that they had been raped as this was not an easy thing to say to the authorities. Consequently, on several occasions they visited people "in their homes to take them out of their cultural milieu and get them to talk."[92] The Defence's claim that P-0160's explanation of his methodology is contradictory is not supported by the references provided.[93]

46. Further, the Defence's reference to P-0160's testimony—that he believed that four out of the seven documented cases of forced marriages in Timbuktu were consensual[94]—cannot be given much weight. P-0160's opinion was contradicted by the victims themselves. In effect, the Defence fails to cite P-0160's re-examination in which he testified that these four cases had been classified as forced marriages because "the people had stated that they were not in agreement with this form of marriages because they were going to be married to people -- to people who are carrying weapons for whom they had no

[87] Defence Final Brief, fn.485.
[88] Defence Final Brief, fn.486, referring to MLI-D28-0004-4802.
[89] P-0010:T-021, p.7, l.13-21.
[90] *Contra* Defence Final Brief, para.161.
[91] P-0160:T-066, p.51, l.14-20.
[92] P-0160:T-066, p.52, l.3-17.
[93] *Contra* Defence Final Brief, para.160, fn.499.
[94] Defence Final Brief, para.163.

intention."[95]

47. The Defence also cites [redacted]'s testimony to support the allegation that, before the witnesses testified in Bamako, they were given "additional training" including "words that we had to say".[96] However, [redacted] never testified about any "training". Rather, she testified that people helped her express herself so that she could be better understood.[97] Further, the Defence draws unfounded and speculative conclusions from the *Procès-Verbal d'audition de partie civile* (PV) of [redacted][98] and [redacted][99]—which are not on the record—and the civil party complaint/PV related to [redacted] (who did not testify).[100]

6.4 There is no evidence of evidential contamination through the Bamako proceedings

48. The Defence suggestion that Prosecution witnesses' interaction during "group travel"[101] to attend the Bamako proceedings would have contaminated their evidence is based on speculation and not confirmed by the record. The cross-examination of Prosecution witnesses demonstrates the contrary, including that of [redacted] and [redacted].

49. When [redacted] was cross-examined on her interactions with [redacted] while travelling to Bamako, and when she was there, she testified that [redacted] had never spoken to her about the "events in Timbuktu in 2012" and that she did not remember this.[102] P-0520 added that, although it was possible that she had spoken with [redacted], she did not remember what they spoke about and never heard [redacted]'s story that she was kept in prison for a day.[103]

50. [redacted] testified that she travelled alone in the bus as the other "girls came from Timbuktu", and met the other girls at a compound.[104] [redacted] specifically stated that, when they met, they did not tell each other why they were there, but knew that they were there to speak about their situation.[105]

51. Last, [redacted] stated that she was only accompanied by [redacted] when she travelled to see the *Juge d'instruction* in Bamako during [redacted] and that she simply advised her on the procedure before the *Juge d'instruction*.[106]

6.8 [redacted] had no impact on the reliability of the evidence

52. The OTP never intervened/participated in the acts of investigation – including interviews – by the Malian Investigative judge in Bamako. The Defence speculates that [redacted]'s role as an intermediary

[95] P-0160:T-068, p.37, l.18-p.38, l.9.
[96] Defence Final Brief, para.184.
[97] [redacted]
[98] [redacted]
[99] [redacted]
[100] Defence Final Brief, para.184, fn.597. [redacted]
[101] *Contra* Defence Final Brief, para.178.
[102] [redacted].
[103] [redacted]
[104] [redacted].
[105] [redacted]
[106] [redacted].

"impacted the reliability of the evidence she collected or was in contact with".[107] However, it fails to cite one single example to sustain the argument, but rather merely cites an extract of the *Lubanga* decision dealing with the misconduct of an intermediary which is inapplicable here.

6.8.1 The Prosecution complied with article 54(1)

53. The Defence allegation that the Prosecution did not respect article 54(1) by "failing to take appropriate measures throughout their investigation"[108] is not supported. The Prosecution takes no issue with the principle that the passage of time can potentially affect the accuracy of a witness' memory. However, the Defence does not support its argument that other intervening factors tainted the evidence, but merely relies *inter alia* on the unsupported premise that Prosecution witnesses were influenced in their statements or testimony by extraneous sources, such as the media.[109] The Defence further suggests that "highly biased publicity of the events in 2012 were also highly capable of suggestibly influencing the witness' recollections resulting in the creation of false memory",[110] but fails to cite concrete evidence showing that any specific Prosecution witness was influenced in such a manner.

54. Additionally, the allegation that the Prosecution held off taking statements from certain witnesses to avoid triggering disclosure obligations"[111] is unsupported. The Investigator's Note relied upon merely indicates that the Prosecution wanted to determine, first, whether the potential witness was relevant so as to avoid unnecessary exposure.[112]

6.8.4 The interview procedure was not flawed

55. The Defence suggestion that Prosecution witnesses would have been tainted by the OTP's "flawed interview procedure"[113] is also based on erroneous assertions. The Defence refers to the case of Witness P-0638 as a demonstration of how "vulnerable witnesses were shown documents, photos, and videos of perpetrators and the BMS in a suggestive manner."[114]

56. First, contrary to the Defence claim, there is no evidence that "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".[115] The Defence also fails to recall that **AL HASSAN** [redacted] and that P-0638 not only knew him but had already seen him "many times" before the arrival of the Islamists.[116]

57. Similarly, the Defence assertion that [redacted]'s testimony regarding **AL HASSAN**'s signature was

[107] [redacted]
[108] *Contra* Defence Final Brief, para.191.
[109] Defence Final Brief, para.193, fns.625 and 626.
[110] Defence Final Brief, para.193, fn.627.
[111] Defence Final Brief, para.192, fn.622.
[112] MLI-OTP-0037-1249-R01, p.1249.
[113] *Contra* Defence Final Brief, paras.200-204.
[114] Defence Final Brief, para.201, fn.645.
[115] Defence Final Brief, p.80, para.202, fn.646.
[116] [redacted]

contaminated due to his suggestibility has no merit. Rather, it seems to be grounded solely on [redacted] [117]

58. Last, as demonstrated below, the Defence allegations concerning witness P-0636—presented in support of its allegation that the OTP conducted a flawed interview procedure—are also unsubstantiated and incorrect.[118]

Sections 3 and 7

The charges of rape, sexual violence or forced marriage have been proven

59. The Defence misstates the legal test as to whether or not a marriage is forced.[119] The relevant question, rather, is whether "a person is compelled to enter into a conjugal union with another person by the use of physical or psychological force, or threat of force, or by taking advantage of a coercive environment."[120]

60. The Defence also misstates the evidence of Prosecution witnesses who were victims of sexual crimes and relies on the testimony of Defence witnesses such as D-0512—who are not credible—to contradict them. The Defence suggests that Prosecution witnesses were contaminated by intermediaries but offers no concrete evidence for this argument other than speculation.

61. The Chamber should reject the Defence's position that sexual and gender-based crimes ("SGBC")—including forced marriages between members of Ansar Dine/AQIM and local women/girls, sexual slavery and rapes occurring within those forced marriages and sexual slavery, as well as rapes of women held in detention—were merely "opportunistic".

62. First, contrary to the Defence arguments, these crimes were a consequence of the Common Purpose, and had a nexus to the armed conflict, as well as to the widespread or systematic attack on the civilian population. Specifically, they resulted from the Common Purpose to impose Ansar Dine/AQIM's control and power, and their own ideological and religious vision, including with regard to females. Controls were exercised over females' autonomy in nearly every aspect of their lives as well as the roles assigned to them, pursuant to Ansar Dine/AQIM's own views.[121] This directly contributed to the coercive environment that precluded genuine and voluntary consent on their part.[122] The occurrence in Timbuktu of all these forms of SGBC was well-known.[123]

63. Second, the SGBC should not be viewed as any different to other forms of physical violence inflicted

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[117] [redacted]
[118] *Contra* Defence Final Brief, para. 203.
[119] *See* Defence Final Brief, para.272.
[120] *Ongwen* AJ, para. 1024. Although the Chamber is in no way required to assess Islamic law for this purpose. "obtaining a woman's consent is a cornerstone of Islamic law'', as acknowledged by the Defence. *See* Defence Final Brief, para.290.
[121] Prosecution Closing Brief, Chapter VIII.A.1, including para. 394. *See also* Prosecution Closing Brief, e.g. para. 474; Closing Brief, Chapter X.D.
[122] Prosecution Closing Brief, Chapter VIII. A.2, including para. 401.
[123] Prosecution Closing Brief, Chapter VIII.A.1 and VIII.A.2, Chapter VIII.C.3.

on the civilian population. As explained by the Trial Chamber in *Ntaganda*, SGBC occurs (even in the absence of violence or threats) where perpetrators status puts them in a position of authority vis-à-vis the local population, and they abuse their power to take advantage of a coercive environment to have sexual intercourse with the victims;[124] and like other acts of physical violence, it is used as a tool to achieve their objectives.[125] Similarly, in *Kvočka* the ICTY Trial Chamber found that where female detainees were placed under the authority of armed male guards, who were known to be violent and could operate largely with impunity, it would be unrealistic to expect that none of these women placed in such vulnerable circumstances would be subjected to rape or other sexual violence.[126] Moreover, as Judge Eboe-Osuji stressed in *Gbagbo*, "a personal or sexual motive does not preclude findings that there was intent to commit a crime, or a policy to attack civilians".[127] Likewise, Judge Ibáñez stated that there should be no higher threshold for crime of rape, and that acts committed for "purely personal motives" can amount to crimes against humanity.[128]

Defence Witness D-0512 is not trustworthy

64. The Defence relies on the testimony of Defence witness D-0512 to impeach the evidence of Prosecution witnesses [redacted],[129] [redacted][130] and [redacted][131] as well as evidence related to [redacted][132]

65. However, D-0512's testimony cannot be relied upon by the Chamber as it is implausible and incapable of belief in many important aspects: throughout her testimony, D-0512 attempted to mask the truth regarding the crimes committed by the "Islamists" in Timbuktu during 2012.

66. For example:

- D-0512 was not forthcoming and tried to mislead the Chamber regarding the reasons

[124] *Ntaganda* TJ, p.431, para.945-946.
[125] *Ntaganda* TJ, para.805.
[126] *Kvočka* TJ, para.327["In Omarska camp, approximately 36 women were held in detention, guarded by men with weapons who were often drunk, violent, and physically and mentally abusive and who were allowed to act with virtual impunity. Indeed, it would be unrealistic and contrary to all rational logic to expect that none of the women held in Omarska, placed in circumstances rendering them especially vulnerable, would be subjected to rape or other forms of sexual violence. This is particularly true in light of the clear intent of the criminal enterprise to subject the targeted group to persecution through such means as violence and humiliation."]
[127] *Prosecutor v. Gbagbo*, ICC-02/11-01/15-1400-Anx1-Corr-Red, p.124, para.334. ["Nor was it correct of the Trial Chamber to allow the question of personal motives of the rapists—even as opportunistic—to detract from considering that 'rapes as part of a policy to attack a civilian population could co-exist with personal motives also associated with those crimes such as vengeance or a "pretext".' Notably, 'a personal or sexual motive does not preclude findings that there was intent to commit a crime or a policy to attack civilians."].
[128] *Prosecutor v. Gbagbo*, ICC-02/11-01/15-1400-Anx4-Red, p.161-162, para.395-396. Citing *e.g.*, ICTY, Appeals Chamber, *The Prosecutor v. Duško Tadić*, Judgment, 15 July 1999, IT94-1-A (hereinafter: "*Tadić* Appeal Judgment"), para. 270; *The Prosecutor v. Kvočka et al.*, Judgment, 28 February 2005, IT-98-30/1-A, para. 463. *See also* ICTY, Appeals Chamber, *The Prosecutor v. Goran Jelisić*, Judgment, 5 July 2001, IT-95-10-A, para. 49; ICTY, Appeals Chamber, *The Prosecutor v. Milorad Krnojelac*, Judgment, 17 September 2003, IT-97-25-A, para. 102; ICTY, Appeals Chamber, *The Prosecutor v. Milan Martić,* Judgment, 8 October 2008, IT-95-11-A, para. 154.
[129] [redacted]
[130] [redacted]
[131] [redacted]
[132] [redacted]

surrounding [redacted]'s arrest. She testified that [redacted] had been arrested by the "Islamists" because of "problems with them before 2012",[133] and in her admitted statement, D-0512 claimed that [redacted]'s arrest was linked to a driving accident that occurred in 2009—approximately three years before the arrival of the "Islamists" in Timbuktu.[134] However, in cross-examination, D-0512 admitted that [redacted] had been arrested because he was with his girlfriend that he had not married yet.[135] This matches the evidence on the record that the "Islamists" prohibited unmarried relationships between men and women.[136] It also explains why D-0512 affirmed in her statement that Adama had asked [redacted] "about his girlfriend and why he wasn't married yet."[137]

- D-0512 further claimed that she had never heard of people being flogged at Sankoré square for not following the rules[138] nor of people being punished for not respecting the rules implemented by the "Islamists" in 2012.[139]

7.1.3 D-0512 was not truthful regarding the case of [redacted]

67. D-0512's hearsay evidence regarding [redacted] also demonstrates that she is not credible.

68. She claimed that her sister's daughter told her[140] how [redacted] was "taken by the Islamists to the BMS",[141] emphasising that [redacted],[142] but neglects to address why she was taken there in the first place. This piece of vital information is absent from the five paragraphs that address the events concerning [redacted] in the Witness' statement.[143] When cross-examined on this issue, D-0512 claimed that she was never told about this and that it did not occur to her to ask why [redacted] had been arrested.[144] D-0512 denied having heard that [redacted] had been arrested for failing to wear a veil on her head.[145]

7.1.4 D-0512 was not truthful regarding [redacted]

69. D-0512 was also not truthful regarding her knowledge about Prosecution witness [redacted].

70. D-0512's claim that she saw and spoke with [redacted] every day of 2012 was shown to be false as she was not present in Timbuktu during the entire year of 2012: D-0512's cross-examination revealed that she was away from Timbuktu for close to two months—if not more—from August to October 2012[146]

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[133] D-0512:T-181, p.35, l.14-19.
[134] D-0512:MLI-D28-0006-2611-R04, p.2615, para.22-24.
[135] D-0512:T-181, p.39, l.17-p.41, l.5.
[136] *See* Report, MLI-OTP-0001-7514, translation MLI-OTP-0034-0169, p.0170 (on the right).
[137] D-0512:MLI-D28-0006-2611-R04, p.2615, para.25.
[138] D-0512:T-181, p.44, l.16-24.
[139] D-0512:T-181, p.44, l.25-p.45, l.8.
[140] D-0512:T-181, p.50, l.8-22.
[141] D-0512:MLI-D28-0006-2611-R04, p.2618, para.47.
[142] D-0512:MLI-D28-0006-2611-R04, p.2618, para.46.
[143] D-0512:MLI-D28-0006-2611-R04, p.2618, para.45-49.
[144] D-0512:T-181, p.50, l.23-p.51, l.4.
[145] D-0512:T-181, p.51, l.22-25.
[146] D-0512:T-181, p.45, l.9-p.49, l.4.

and not just 20 days as she had previously stated in her testimony.[147]

71. This is significant as much of her evidence regarding [redacted] is predicated on the allegation that she was close to her and able to observe her for the entire period during which the "Islamists" were in Timbuktu. This was clearly not the case and necessarily affects her statement that "[redacted] was never at the hospital in 2012, unless she went there for a consultation".[148]

7.2.1 D-0512 was not truthful or reliable regarding [redacted]

72. D-0512's evidence regarding [redacted] should also be disbelieved for similar reasons.

73. The Witness claimed that [redacted] "never left Timbuktu in all of 2012"[149] but, as shown above, D-0512 was not in the city throughout the year and would therefore not be able to make such an assertion.

74. The Witness also claimed in her statement that [redacted] married an "Islamist", that it was her family that agreed to her marriage and that she knew this because she "asked about this from her mother" who informed her.[150]However, the Witness did not personally know [redacted] She admitted in cross-examination that [redacted].[151] [redacted] was not her friend.[152]

75. In all, the Witness's knowledge regarding the said marriage between [redacted] and the "Islamist" seems to be based either on speculation or hearsay—as she herself admitted in cross-examination[153]—as she did not reside with [redacted] and her family during 2012. There was a wall between her house and that of [redacted] and she could not say what was happening during the day or night.[154] Further, there is no indication of how she would have allegedly learned that the "Islamist" divorced [redacted] approximately two months after their marriage.[155]

76. The Witness' evidence regarding [redacted]'s sister[156] is also at best based on hearsay. The Witness admitted in cross-examination that she was not a friend of [redacted]'s sister and did not follow her comings and goings at the time.[157] As such her evidence should not be relied upon.

D-0512 was not truthful regarding the victims of the "Islamists"

77. That D-0512 is unreliable is also shown in her sweeping claim that 90% of alleged victims of the "Islamists" that went to Bamako lied.[158] Her cross-examination revealed that this was an unsubstantiated opinion: she did not know all of the people that travelled to Bamako to file a complaint

[147] D-0512:MLI-D28-0006-2611-R04, p.2614, para.15.
[148] D-0512:MLI-D28-0006-2611-R04, p.2617, para.43.
[149] D-0512:MLI-D28-0006-2611-R04, p.2618, para.50.
[150] D-0512:MLI-D28-0006-2611-R04, p.2618, para.51.
[151] [redacted].
[152] D-0512:T-181, p.84, l.5-6.
[153] D-0512:T-181, p.84, l.16-19.
[154] [redacted]
[155] D-0512:MLI-D28-0006-2611-R04, p.2619, para.54.
[156] D-0512:MLI-D28-0006-2611-R04, p.2620, paras.61-63.
[157] D-0512:T-181, p.85, l.11-17.
[158] D-0512:MLI-D28-0006-2611-R04, p.2616, para.35.

nor did she know what they actually said.[159]

78. Similarly, D-0512's statement that, to her knowledge, the Islamists never raped or forcibly married anyone in 2012,[160] is without merit as there is no sound basis for her conclusions. The Witness claimed that "all the people" that the Islamists married "liked them and they married them in full consent"[161]—on the basis that "four or five" women that she allegedly knew were not forcibly married.[162]

7.1.2 Evidence regarding P-0609 and P-0957's incidents is reliable

79. There is no valid reason to dismiss the evidence of Witnesses P-0957 and P-0609. The PVs and civil party complaints of Witnesses P-0957[163] and P-0609[164] do not constitute testimonial evidence in the sense of rule 68, but rather are items of relevant documentary evidence which the Chamber previously recognised as formally submitted from the bar table[165]—despite arguments to the same effect by the Defence at the time.[166]

80. The Defence allegation that "no reliance can be placed on these records" because of the "extent to which Prosecution witnesses diverged from the content of the Bamako statements"[167] is not supported by the evidence.

81. Further, the references cited by the Defence do not support the assertion that P-0524's sole basis for her recollection of P-0609's account appears to be [redacted][168] If anything, the details and the language used in the relevant passages from P-0524's statement, for example, "*nous a aussi raconté*", "*nous a dit*"[169] suggest that P-0524 heard P-0609's account directly from her—not from another source. The same can be inferred from P-0524's evidence regarding P-0957's account as she states that P-0957 was "*cohérente dans son récit. Elle avait bonne mémoire*".[170]

82. Last, contrary to the Defence's assertion,[171] [redacted] Further, the allegation that [redacted] "substituted the witnesses' words with his own"[172] is based on speculation.

7.1.3 Evidence regarding P-1134's rape is reliable

83. The Defence alleges that the evidence related to P-1134's rape is based on "contradictory media

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[159] D-0512:T-181, p.70, l.8-20.
[160] D-0512:MLI-D28-0006-2611-R04, p.2616, para.36.
[161] D-0512:T-181, p.72, l.23-p.73, l.4.
[162] D-0512:T-181, p.73, l.21-p.74, l.7.
[163] *Procès-verbal*, MLI-OTP-0035-0146-R03, p.0147; Civil party complaint, MLI-OTP-0024-2814, p.2827.
[164] *Procès-verbal*, MLI-OTP-0037-1571-R03, p.1571; Civil party complaint, MLI-OTP-0024-2814, p.2827.
[165] ICC-01/12-01/18-2127, p.10. ICC-01/12-01/18-2102,Conf-AnxA, numbers 65, 68 and 109.
[166] ICC-01/12-01/18-2122, para.20, 21.
[167] Defence Final Brief, para.206.
[168] [redacted]
[169] MLI-OTP-0071-0246-R12, p.0261, paras.91 and 92
[170] MLI-OTP-0071-0246-R12, p.0263, para.105.
[171] *Contra* Defence Final Brief, para.205, fn.657.
[172] *Contra* Defence Final Brief, para.205, fn.658.

interviews" and details alleged contradictions without providing any specific references for these. It ends by stating that in her "most recent account"—a media article from [redacted]—she (P-1134) claims that she was flogged but does not mention any rape.[173]

84. First, the OTP's submissions on P-1134's arrest, detention and rape are founded on more than "media interviews", as can be seen from the testimonial and documentary evidence cited in its closing brief.[174]

85. Further, even assuming that P-1134 was indeed interviewed for this article and that her account is stated correctly, the fact that P-1134 did not mention sexual violence does not mean that it did not occur, especially given the nature of the crime and the stigma attached to it.

7.1.4 Witness P-0570 is trustworthy

86. The Defence contends that the Chamber should not place any weight on P-0570's evidence as the witnesses' description of the BMS does not respond to reality.[175] In fact, P-0570 testified that "*[l]es murs étaient de couleur verte comme de l'herbe fraîche, et blanche*" which is consistent with some of the photos of the BMS showing that some walls had a slightly darker colour than the other ones, leaning towards yellowish-green.

7.2.1 Witness P-0636 is trustworthy

87. On the basis of an unsigned [redacted][176] the Defence claims that "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?*"[177] It adds that the Witness cannot be trusted because of discrepancies between what she testified to in court and what she allegedly stated in [redacted][178] [redacted].[179]

88. However, P-0636 did not recognise [redacted] as being hers during her testimony[180] and [redacted] was never put to the Witness during her cross-examination—which explains why it is not in the court record. As such, these documents cannot now be used as prior inconsistent statements to impeach the witness' sworn live testimony before the Chamber. When cross-examining P-0636, Defence counsel stated that she was mainly exploring the methodology used in [redacted] that "the lack of signature was of primary concern obviously" and that it was not being used to confront the witness.[181] In any event,

[173] [redacted]
[174] [redacted]
[175] *Contra* Defence Final Brief, para.212, fns.678, 679 and 680.
[176] [redacted]
[177] Defence Final Brief, para.217.
[178] Defence Final Brief, para.217, fns.697 and 698; p.86, para.217 and 218, fns.702 and 705.
[179] [redacted]
[180] [redacted]
[181] P-0636:T-072, p.16, l.6-15.

P-0636 recalled being taken to the Police station.[182]

89. It follows that the Defence claim that P-0636 should be disbelieved because she never mentioned "BMS", described "black flags" or "men with turbans" before her preparation sessions with the Prosecution is without merit as it is seems to be based solely on [redacted] which the witness did not recognise, and [redacted] which is not on the record.[183]

90. In any event, the Defence's argument that P-0636 would have been influenced by "flawed Interview procedures"[184] is without merit. Regarding when she would have known about the BMS or where she was taken to, P-0636 testified that she had "heard that the Islamic Police was in town", and when she got there she understood that it "was indeed the Islamic Police".[185] The evidence does not demonstrate that the interview procedure would have influenced her testimony in any manner on this issue—this is speculative.

91. On the same topic, the Defence contention that "when shown a photograph of the BMS the Witness would have stated that "she did not remember the building"[186] is incomplete and does not fully reflect P-0636's testimony. In fact, when questioned on photograph MLI-OTP-0048-0729, P-0636 testified that she did not "really recognize things or places from photographs" but that the place "looks like the Islamists' place".[187] In addition, the Defence claim that P-0636 never mentioned a glass door in her statement is unsupported with a reference,[188] while the reference for the claim that the Prosecution "elicited details that replicated the photograph through a series of highly leading questions" refers to the Defence's own cross-examination of P-0636.[189]In regards to P-0636 being scared,[190] the Defence fails to point out that P-0636 explained that she felt worried because she had never before spoken to a "figure of authority".[191]

92. The Defence also erroneously claims that P-0610 testified that P-0636 was "only detained for a matter of hours before being released when her husband came to collect her."[192] In fact, P-0610 testified that P-0636 was put in prison because she was not covered up and "spent about one day there in prison", after which her husband went to fetch her.[193] Last, the Defence allegation that P-0636's concerns are indicative of her awareness that she was not saying the truth on certain matters is based on speculation.[194]

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[182] [redacted]
[183] Defence Final Brief, para.217, fn.702.
[184] Defence Final Brief, *Section* 6.8.4
[185] P-0636:T-072, p.32, l.19-25.
[186] *Contra* Defence Final Brief, para.203, fn.649.
[187] P-0636:T-072, p.56, l.18-24(Conf).
[188] Defence Final Brief, para.203, fn.653.
[189] Defence Final Brief, para.203, fn.653.
[190] Defence Final Brief, para.203.
[191] [redacted]
[192] *Contra* Defence Final Brief, para.218, fn.703.
[193] [redacted]
[194] Defence Final Brief, para.223.

7.2.1 Witness P-0538 is trustworthy

93. The Defence alleges that P-0538's account cannot be given weight because it is replete with extreme exaggeration. The Defence claims that she is not credible but fails to demonstrate this with concrete evidence.

94. The Defence claims that [redacted] "assisted her to end a marriage brought about through her father'', and that Ansar Dine did not create a coercive environment in which marriages occurred.[195]

95. However, [redacted] it is clear:

- that P-0538 and her parents were [redacted];
- that P-0538 never consented to the marriage; [redacted][196] [redacted];
- that P-0538 was "locked up'' by the "husband" on her first night,[197] and tried to run away from him.[198]

96. [redacted][199] [redacted][200] [redacted] Contrary to the Defence assertions, the Chamber can rely on P-0538's testimony that her "husband" was one of the Islamists and not a member of MNLA. [redacted],[201] after Ansar Dine/AQIM pushed the MNLA out of Timbuktu at the end of June 2012.[202] The fact P-0538 knew her "husband" by a nickname [redacted] and did not know his other name [redacted][203] is also consistent with evidence that some members of Ansar Dine/AQIM used a *nom de guerre*, rather than their own names.[204] Most importantly, the totality of P-0538's testimony and the circumstances she describes points to the fact

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[195] *See* Defence Final Brief, para. 227.
[196] [redacted]
[197] [redacted]
[198] [redacted]
[199] [redacted]
[200] *See* Defence Final Brief, para.228. [redacted]
[201] [redacted]
[202] *See e.g.* [redacted]; P-0004:T-164, p.37, l.14-p.38, l.12; P-0654:T-134, p.18, l.4-p.20, l.14.
[203] [redacted]
[204] *See e.g.* [redacted]

that her husband was indeed a member of AQIM/Ansar Dine.

97. The Defence suggests that P-0538 appears to have contradicted herself as to whether her father knew her husband before 2012, but fails to explain why this alleged contradiction on a peripheral matter should affect her general credibility.[205] The Defence also suggests that P-0538 is untruthful regarding her father's death because his death is "not recorded in any medical records or contemporaneous accounts",[206] but fails to cite any relevant reference for this affirmation and does not take into account her credible evidence regarding his death.

98. Further, the Defence fails to substantiate its assertion that P-0538's "account of being detained with other females who were also raped also mutated significantly while on the stand".[207] In fact, the reference provided by the Defence in this regard merely shows that Defence counsel put to P-0538 her prior statement on one specific point—whether she was indeed forced to "sleep with" the man who "married" her, and his friends, in front of the other girls in her cell. In the end, P-0538 offered an explanation for the apparent contradiction between her testimony and prior statement on this point.[208]

99. Last, the Defence engages in speculation when it affirms, first, that [redacted] told P-0538 about [redacted]; second, that P-0538 was encouraged by this; and, ultimately, that her "experience [redacted] […] transformed into an untruthful account".[209]

7.2.2 Witness P-0547 is trustworthy

100. The Defence's allegation that P-0547 "recycled information from [redacted][210] is unfounded and speculative.

101. Firstly, the Defence disregards several notable differences between P-0547's accounts and those of [redacted] such as the timing of the incident, the perpetrators, and the person who intervened to secure their release.[211]

102. Secondly, contrary to the Defence's allegation,[212] P-0547 never claimed to be [redacted][213] In fact, according to [redacted][14] [redacted],[215] and there is no basis to believe that P-0547 knew [redacted][216]

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[205] Defence Final Brief, para. 230.
[206] Defence Final Brief, para. 230, fn.757.
[207] Defence Final Brief, para. 230, fn.761.
[208] [redacted]
[209] Defence Final Brief, para. 230, *in fine*.
[210] Defence Final Brief, para. 236.
[211] ICC-01/12-01/18-2301-Conf, para. 9.
[212] Defence Final Brief, para. 239.
[213] [redacted]
[214] [redacted]
[215] [redacted]
[216] *Contra* Defence Final Brief, para. 239.

103. Thirdly, the similarities in the two victims' accounts of arrest and detention at the BMS can be explained by the fact that this was common practice by Ansar Dine/AQIM during the occupation of Timbuktu in 2012.[217]

104. D-0514's claim that P-0547 lied about having been raped is unreliable.[218] D-0514 stated that "that's all lies" "that's not something that was actually experienced". D-0514 added that "it is not something that [he] just believe[s]", and referred to what people saw "on social media, on WhatsApp, on Facebook".[219] This explanation is vague and general. Clearly, this is not based on what he would have seen or heard from P-0547. The clarifications he provided during cross-examination also show that he only speculated that [redacted][220] As D-0514 acknowledged, rape is considered to be a "genuine dishonour" for the victim in Timbuktu society.[221] Therefore, [redacted], it is unlikely that she would have confided to him about her rape.

105. Additionally, the Defence claim that P-0547 "exaggerate[d]" facts[222] is inconsistent with evidence on the record. In fact, her accounts regarding an incident on her street[223] are consistent with those of multiple other sources, including P-0004, P-0654, D-0213[224] and the Accused, who reported that [redacted].[225]

7.2.2 Witness P-0602 is trustworthy

106. The Defence also misrepresents P-0602's evidence regarding her lack of consent to the marriage with a member of Ansar Dine/AQIM.[226]

107. P-0602 testified that even though she and her father disagreed with the marriage proposal, "we had to give in" because "everything and everyone who was living in Timbuktu was theirs" in that period.[227] She did not know what would have happened if they had not given in, but she was "very afraid" as "they were capable of anything".[228] When they finally gave in, she "really felt bad" and often isolated herself to cry.[229]

108. While the Defence suggests that P-0602's family intentionally married her to an outsider because

[217] *See e.g.* Prosecution Closing Brief, para. 421-423.
[218] *Contra* Defence Final Brief, para. 241.
[219] D-0514: T-208, p.37, l.19-p.38, l.10.
[220] [redacted]
[221] D-0514: T-208, p. 63, l.11-15.
[222] Defence Final Brief, para. 242.
[223] P-0547: T-152, p.18, l.11-p.20, l.7.
[224] Prosecution Closing Brief, footnote 2229.
[225] *See e.g.* [redacted]
[226] Defence Final Brief, para. 254.
[227] P-0602: T-085, p.9, l.12-19, p.13, l.24-p. 14, l.10.
[228] P-0602: T-085, p.15, l.5-9.
[229] P-0602: T-085, p.9, l.22-24.

[redacted][230] the "forced" nature of her marriage is clear in light of the coercive circumstances at the time. It is also clear from her accounts, elicited before any showing of video images, that the people who came to ask her for marriage were "Islamists", two of who were armed.[231]

7.4.2 The elements of forced marriage/sexual slavery are satisfied

109. In regards to the issue of the coercive environment, the Defence suggests that the "mere presence of weapons is not tantamount to making threats to use violence".[232]

110. This view challenges common sense as the possession and display of weapons such as the Kalashnikovs carried by the Islamic Police[233] was sufficient to instil fear in the residents of Timbuktu and imposed Ansar Dine/AQIM's will upon them.

111. With regard to forced marriages, the Defence makes the unsubstantiated claim that "the evidence shows that the local population rejected marriage requests without suffering adverse consequences".[234] The evidence on the record shows the contrary.[235]

112. Further, the Defence summary of [redacted]'s evidence regarding forced marriages is incomplete. The Defence focuses on [redacted][236] but fails to address the totality of his evidence, especially [redacted][237]

Section 8

8.1 AL HASSAN's statements are reliable

113. There is no legal or factual foundation for the Defence claim that the Chamber cannot rely on the admitted statements of **AL HASSAN** because of the Prosecution's alleged failure to "lay a proper foundation or elicit evidence in an impartial and non-leading manner."[238]

114. The Defence allegations regarding "inappropriate memory pods and implantation" during **AL HASSAN**'s interview are not supported by the evidence.

115. As an example, the Defence cites the case of [redacted] in alleging that the Prosecution elicited evidence from **AL HASSAN** based "on the information shown or read to him rather than true independent memory recall".[239] However, **AL HASSAN** remembered this case even before the report

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[230] [redacted]
[231] P-0602:T-084, p.84, l.3-23, p.86, l.22-p.87, l.10. *See contra* Defence Final Brief, para. 255-256.
[232] Defence Final Brief, para.267.
[233] Video, MLI-OTP-0015-0495, 00:27:22:00-00:27:30:13, [redacted] P-0654:T-132, p.65, l.9-25.
[234] Defence Final Brief, para.268.
[235] Prosecution Closing Brief, para.406.
[236] [redacted]
[237] [redacted]
[238] *Contra* Defence Final Brief, para.298.
[239] Defence Final Brief, para.303.

was shown to him. Once the report was shown to him, he confirmed that it was the report that he had talked about, and recalled that the defendant was brought to the Police headquarters, before he was transferred to the Tribunal.[240]

116. In any event, these matters go ultimately to the weight of the evidence.

117. Last, the Defence view of **AL HASSAN**'s motivation in providing certain information to the OTP is not a "reasonable inference"[241] but only speculation.

8.2 The documentary evidence is genuine and reliable

118. Additionally, the Defence allegation that the reports and judgments were collected by "three different and equally unreliable sources: P-0007, P-0055 and [redacted]"[242] is unfounded.

119. The evidence cited by the Defence as contradicting P-0007's testimony does not carry much weight. D-0240's testimony that a hotel employee conducted an inventory after the departure of the army is double hearsay[243] with little probative value. There is no mention of how the inventory was done or what in fact was inventoried. When it was put to him by Defence counsel that the Islamists left nothing behind at the *Hôtel La Maison* when they departed, [redacted] did say "I believe so"—but this was only after an extract from a video was played to him in which a person (on the video) makes the same comment.[244] There is no information regarding the reliability of the person's information on this matter. And the Defence never asked [redacted] how he knew this to be the case or the basis of his knowledge on this issue. Most importantly, after looking again several times at this extract of this video during re-examination, [redacted] stated: [redacted][245] As such, neither the video nor [redacted]'s evidence on this matter carries much weight, especially considering the totality of the evidence demonstrating the reliability of the collected documents. Moreover, despite its suggestion that the collected documents are not reliable, the Defence itself treated some of them as genuine during the questioning of Prosecution witnesses[246] and to support its arguments in its own Final Brief.[247]

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[240] P-0398:MLI-OTP-0060-1580, p.1603, l.759-782, MLI-OTP-0060-1605, p.1606-1607, l.7-63, MLI-OTP-0060-1605, p.1607-1608, l.65-83. *See also* Prosecution Closing Brief, section VII.C.16 incident 24: Case of [redacted].

[241] Defence Final Brief, para.299, fn.1060.

[242] *Contra* Defence Final Brief, para. 304.

[243] [redacted]

[244] [redacted] MLI-OTP-0009-1749, 00:00:11:30-00:00:12:30, transcript MLI-OTP-0028-0839, p. 0847, l. 251-256.

[245] [redacted]

[246] [redacted] re. MLI-OTP-0001-7356; [redacted] re. MLI-OTP-0001-7546; [redacted] re. MLI-OTP-0001-7361; [redacted] re. MLI-OTP-0001-7560; [redacted] re. MLI-OTP-0001-7515; [redacted] re. MLI-OTP-0001-7545. [redacted] re. MLI-OTP-0053-0168 (from MLI-OTP-0001-7189 as described in MLI-OTP-0056-0432, p.0452). *See also* [redacted] re. MLI-OTP-0024-2814, p.2858.

[247] *See* as an example, Defence Final Brief, paras.371-372, fn.1360-1373, paras.374-375, fn.1380-1386, paras.381-384, fn.1419-1434, para.370, fn.1354, para.393, fn.1482.

120. In the same vein, contrary to the Defence's arguments,[248] the list of detainees found at the *Hôtel La Maison*[249] is reliable. While [redacted] had never seen it before his interviews by the Prosecution,[250] he described it in detail,[251] identified several prisoners on the said list and linked them to corresponding judgments.[252]

8.3 The Defence arguments regarding requirements for corroboration are unfounded

121. The Defence is incorrect to the extent it implies that the Chamber "cannot rely on untested […] evidence as a basis for conviction".[253] To the contrary, such evidence *may* be relied upon, provided that it is identified by the Chamber and sufficiently corroborated.

122. Pursuant to rule 63(4), "a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence." Consequently, the testimony of a single witness on a material fact may be accepted provided it is considered reliable and credible.[254] This is without prejudice, however, to the Chamber's power to determine that corroboration is necessary for it to be convinced of the reliability and credibility of a particular witness' testimony.[255]

123. Corroboration may also be necessary since convictions may not rest, solely or in a decisive manner, on the evidence of a witness whom the accused has had no opportunity to examine or to have examined either during investigation or trial. Accordingly, to the extent that any fact indispensable for conviction relies upon "untested" evidence of this kind, it must be sufficiently corroborated.[256]

124. It is for the Chamber to assess, in light of all the evidence before it, the nature and degree of corroboration which might be required.[257] Corroboration does not mean that two pieces of evidence must be identical in every particular, but rather implies a fact sensitive comparison of salient points based on the *compatibility* of two pieces of evidence with regard to the same or linked facts.[258] Sufficient corroboration might be provided by "evidence demonstrating a consistent pattern of conduct", even if

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[248] *Contra* Defence Final Brief, para.317.
[249] List, MLI-OTP-0001-7361, translation MLI-OTP-0034-0063, p.0064.
[250] Defence Final Brief, para.317.
[251] [redacted]
[252] *See e.g.* Prosecution Closing Brief, section VII.C.7 incident 13: Case of [redacted], VII.C.8 incident 14: Case of [redacted], VII.C.12 incident 19: Case of [redacted].
[253] *Contra* Defence Final Brief, para. 308. *See also* para. 297.
[254] *See e.g.* ICTY, *Prosecutor v. Delalić et al*, IT-96-21-A, Judgment, 20 February 2001 ("*Delalić* AJ"), paras. 492, 506; *Ongwen* AJ, para. 608 (fn. 1249); ICC-01/04-01/06-3121 A5 ("*Lubanga* AJ"), para. 218.
[255] ICC-01/05-01/13-2275-Red A A2 A3 A4 A5 ("*Bemba et al.* AJ"), paras. 1084, 1093.
[256] *See e.g.* IRMCT, *Prosecutor v. Karadžić*, MICT-13-55-A, Judgment, 20 March 2019 ("*Karadžić* AJ"), para. 449; ICTY, *Prosecutor v. Popović et al*, IT-05-88-A, Judgment, 30 January 2015 ("*Popović* AJ"), paras. 96, 1226.
[257] *See e.g.* ICTY, *Prosecutor v. Haraqija and Morina*, IT-04-84-R77.4-A, Judgment, 23 July 2009, para. 62.
[258] *See e.g.* ICC-02/11-01/15-1400 A ("*Gbagbo and Blé Goudé* AJ"), paras. 357-358; ICC-02/11-01/15-1400-Anx4-Red A ("*Gbagbo and Blé Goudé* AJ, Dissenting Opinion of Judge Ibáñez Carranza"), paras. 376-384; ICC-01/04-02/12-271-AnxA A, Joint Dissenting Opinion of Judges Trendafilova and Tarfusser, para. 48; ICTR, *Gatete v. the Prosecutor*, ICTR-00-61-A, Judgment, 9 October 2012, paras. 125, 205; *Nahimana et al v. the Prosecutor*, ICTR-99-52-A, Judgment, 28 November 2007, para. 428; ICTY, *Popović* AJ, para. 1228.

the corroborating evidence does not relate directly to the same fact as the untested evidence.[259]

8.5.1 Article 8(2)(c)(iv) is not limited to "conflict-related crimes"

125. Article 8(2)(c)(iv) does not contain a specific or elevated nexus requirement,[260] or indeed any greater restriction to proceedings with regard to "crimes related to or arising from the conflict" beyond the general nexus requirement applying to all war crimes.[261] Accordingly, for the purpose of article 8(2)(c)(iv), it is immaterial whether Ansar Dine/AQIM's "Islamic Tribunal" should be considered as "civil" or "military" in its activities.[262]

126. The potentially narrower application of article 6 of Additional Protocol II to the Geneva Conventions is irrelevant because common article 3 of the Geneva Conventions—the foundation of article 8(2)(c)(iv)—"retains an autonomous existence" and is not limited by the Protocol.[263] Nothing in article 8(2)(c)(iv), nor common article 3, nor customary international law supports the Defence claim. Indeed, excluding the application of common article 3 from trials conducted by non-State armed groups would be inconsistent with the object and purpose of common article 3.[264] Nor is there even general academic support for the point. To the contrary, some authors cited by the Defence reach more general conclusions contradicting the Defence position.[265]

127. Only one commentator frames the argument in the terms broadly adopted by the Defence.[266] Moreover, the policy-based justifications advanced for this approach are not persuasive, since application of the general nexus requirement to article 8(2)(c)(iv) does not lead to any legal inequality

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[259] *See e.g. Karadžić* AJ, para. 457

[260] *Contra* Defence Final Brief, paras. 126, 320-328.

[261] *Contra* Defence Final Brief, para. 321. *But see also* Rodenhäuser, p. 1004 (noting that, even if such a requirement were to apply, it may still arguably be met "if a person is, for example, prosecuted for an offence that does not have a nexus to the conflict but was criminalized only by the [non-state armed group]"); Provost, pp. 177-178. On the application of the general nexus requirement, *see above* paras. 37-38.

[262] *Contra* Defence Final Brief, paras. 325-327. *But see also* para. 339.

[263] *See* Y. Sandoz et al. (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff: 1987) ("AP Commentary"), p. 1350 (mn. 4457: the "applicability [of common article 3] is neither limited nor affected by the material field of application of the Protocol"); Rodenhäuser, p. 1004. In its own terms, as stated in article 1, Additional Protocol II "develops *and supplements* [common article 3] without modifying its existing conditions of application" (emphasis added): *contra* Defence Final Brief, para. 321. *See also* AP Commentary, p. 1397 (mn. 4597); ICRC, *Detention by Non-State Armed Groups: Obligations under International Humanitarian Law and Examples of How to Implement Them* ("ICRC Rules on Detention by Non-State Armed Groups"), p. 11 (noting in the introduction, generally and without qualification, that "[u]nder IHL, criminal suspects are entitled to essential 'judicial guarantees', meaning a fair trial"), pp. 60-63 (rule 13: "No one may be convicted of an offence for which they are not personally responsible. No one may be convicted or sentenced except pursuant to a fair trial affording all essential judicial guarantees").

[264] *See below* para. 130.

[265] *See e.g.* Defence Final Brief, para. 321 (fn. 1187: citing Provost, p. 169). *But see e.g.* Provost, p. 177 (concluding that "the references to criminal law [in common article 3] are unqualified, meaning that the norm can relate to the prosecution and punishment of *any* underlying offence […] it will apply to *any* penal proceedings before insurgent courts", emphasis added).

[266] *See e.g.* Defence Final Brief, paras. 321 (fns. 1184: citing K. Fortin, *The Accountability of Armed Groups Under Human Rights Law* (OUP: 2017)"), p. 50), 323 (fn. 1197: citing Fortin (2022), pp. 389-390, 407).

of belligerents,[267] nor necessarily excludes the potential application of international human rights law to non-State armed groups.[268]

8.5.2 The Defence misinterprets the actus reus requirement for article 8(2)(c)(iv)

128. The Defence incorrectly asserts that the *actus reus* of article 8(2)(c)(iv) is limited to "passing a sentence as part of a criminal process" and the imposition of "very serious penalties, such as the death penalty," to the exclusion of corporal punishment, "'*Ta'zirs*', provisional detention, or individual assaults".[269]

129. Yet to the contrary, the protections of common article 3 apply no less to "'summary' justice" meted out by members of armed groups than to sentences formally passed by a tribunal.[270] It is "prohibit[ed]" as such to impose punishments for violations of law on persons protected by common article 3 without judicial proceedings.[271]

130. Furthermore, since corporal punishment and imprisonment may violate the general requirement of "humane treatment" which is the "substantive core" of common article 3,[272] there is no reason *a priori* why the protections of common article 3 should not apply to the imposition of such practices as part of a criminal process. While provisional detention *as such* is not prohibited as summary justice,[273] it is a question of fact—to be assessed case-by-case—whether instances of detention were lawful instances of provisional detention or unlawful instances of summary punishment, having regard to factors including the objective basis for the suspicions against the person concerned, and the subsequent conduct of any investigation or prosecution.

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[267] *Contra* Defence Final Brief, para. 324; Fortin (2022), p. 408. *See e.g.* Rodenhäuser, p. 1008 (reasoning that the nexus requirement applies equally to all parties to the conflict, but merely has the potential to lead to differentiated outcomes according to the different factual circumstances relevant to the conduct of non-State and State entities); Provost, pp. 178-179.

[268] *Contra* Defence Final Brief, para. 323; Fortin (2022), pp. 407-408 (in particular stating concerns that an overbroad approach to article 8(2)(c)(iv) may lead to "criminalizing the phenomenon of armed groups carrying out trials and prosecutions", or make it impossible "in some circumstances for armed groups—in the same way as States—to simply violate human rights law when conducting trials that do not meet international standards" without risking the criminal prosecution of individuals). *But see e.g.* Rodenhäuser, p. 1011, 1020 (noting that IHL and international human rights law (IHRL) can be complementary, but that "where IHL is the only set of rules that undoubtedly binds [non-State armed groups] it would be legally and politically dangerous to dismiss this body of rules too quickly"); Provost, pp. 179-180 ("human rights […] can play an important role […] but there is a danger in construing their import as displacing or regulating international humanitarian law"). *See also* M. Klamberg, 'The legality of rebel courts during non-international armed conflicts,' [2018] 16 *Journal of International Criminal Justice* 235, pp. 246-247 (recalling the difficulties in employing IHRL enforcement mechanisms against non-State actors). Even the Defence notes that "[t]he application of international human rights law to non-State armed groups is controversial": Defence Final Brief, para. 352.

[269] *Contra* Defence Final Brief, paras. 329-333.

[270] *See e.g.* 2020 *Commentary to Geneva Convention III*, art. 3, mn. 711. *See also* mn. 725; Pictet (ed.), *Commentary to Geneva Convention IV* (ICRC: 1959) ("GCIV Commentary"), p. 39 ("Sentences and executions without previous trial are too open to error. 'Summary justice' […] adds too many further innocent victims to all the other innocent victims of the conflict […] [I]t is essential [to surround the administration of justice with safeguards aimed at eliminating the possibility of judicial errors] even in time of war").

[271] 2020 *Commentary to Geneva Convention III*, art. 3, mn. 711.

[272] 2020 *Commentary to Geneva Convention III*, art. 3, mn. 589. *See also* mns. 584, 596 ("the obligation of humane treatment is absolute and knows no exceptions").

[273] GCIV Commentary, p. 39.

131. It is irrelevant to the charges in this case, as confirmed by the Pre-Trial Chamber, whether the Islamic Tribunal complied with the constitutional order or domestic law of Mali, or whether Ansar Dine/AQIM was permitted to pass its own "laws".[274] Rather, the Islamic Tribunal was not a "regularly constituted court" within the meaning of article 8(2)(c)(iv) because it failed to afford the essential guarantees of independence and impartiality, or otherwise failed to afford all other judicial guarantees generally recognised as indispensable under international law.[275] Even if Ansar Dine/AQIM were permitted to determine the laws applicable in the territory under its control, they still needed to respect the core requirements of common article 3, which "constitute the minimum standards that protect individuals against any attempt to implement a lower threshold of protection."[276]

132. In light of the "fundamental character" of common article 3, and its nature as a "minimum yardstick",[277] the Defence's alternative frames of reference for interpreting the requirements of article 8(2)(c)(iv) drawn from different contexts (such as the Statute's complementarity regime, or extradition law) are not persuasive.[278] This "minimum yardstick" need not be further adjusted to ensure it does not "exceed the capabilities of armed groups",[279] or to take into account "cultural considerations".[280] That common article 3 inherently addresses these concerns is a given.

133. Consequently, to establish the *actus reus* of article 8(2)(c)(iv), what is required—no more and no less—is that the Islamic Tribunal did not afford the "*essential* guarantees of independence and impartiality" *or* that its judgments did not "afford all other judicial guarantees generally recognized as *indispensable* under international law" (emphasis added), as understood in the context of common article 3.[281]

- Independence requires the actual performance of judicial functions without any external interference, including from those persons charged with the enforcement of the law.[282] While this does not absolutely prohibit members of a non-State armed group's "executive" arm

[274] *Contra* Defence Final Brief, paras. 334-339.
[275] Confirmation Decision, paras. 428, 482-483.
[276] E. Heffes, 'Generating respect for international humanitarian law: the establishment of courts by organized non-State armed groups in light of the principle of equality of belligerents,' in T. Gill et al. (eds.), *Yearbook of International Humanitarian Law 2015* (T.M.C. Asser: 2016), p. 195. *See also* 2020 *Commentary to Geneva Convention III*, art. 3, mn. 727; ICRC Rules on Detention by Non-State Armed Groups, rule 12, p. 59 (noting that, if non-state armed groups adopt "law", that law must be "in compliance with international law").
[277] 2020 *Commentary to Geneva Convention III*, art. 3, mn. 581.
[278] *Contra* Defence Final Brief, paras. 340-344.
[279] *Contra* Defence Final Brief, para. 345. *See also* paras. 346-348. Positive obligations under IHL, such as the doctrine of superior responsibility, do not oblige members of non-State armed groups to carry out a trial, if they are unable to meet the minimum requirements of common article 3, and instead allow for alternative "necessary and reasonable" measures to be undertaken. *Contra* Defence Final Brief, para. 349. *See e.g.* 2020 *Commentary to Geneva Convention III*, art. 3, mn. 730.
[280] *Contra* Defence Final Brief, para. 355. *See also* paras. 352-357.
[281] Consequently, no question arises of potential derogation from IHRL obligations: *contra* Defence Final Brief, para. 351.
[282] *Cf.* Defence Final Brief, para. 349. *See e.g.* ICRC Rules on Detention by Non-State Armed Groups, rule 13, p. 61 (noting, for example, that "[t]he court, and its judges, must […] not be under the direct influence or control of the commander who is responsible for the detainees").

from performing judicial functions, there must be specific procedures in place to ensure that they act independently and appear to a reasonable observer to be independent.[283] For example, such persons may need to suspend carrying out their "executive" functions, or to refrain from participating in activities relevant to the matter under judicial consideration.[284] Impartiality not only requires "neutrality",[285] but active efforts by those persons discharging judicial functions "not [to] allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the matter before them, nor act in ways that improperly promote the interests of one side" *as well as* ensuring that the tribunal "appear[s] to a reasonable observer to be impartial."[286]

- The "judicial guarantees generally recognised as indispensable under international law" at least include, as the Defence concedes,[287] the rights set out in articles 6(2)(a) to (f) of Additional Protocol II—which, in this regard, equally inform common article 3.[288] The right to have the necessary rights and means of defence include, at least, the right to speak in defence, the right to assistance and advice, and the right to call evidence in defence.[289]

134. In determining whether these requirements are met, the Chamber should look at the relevant facts as a whole—including the "cumulative effect of factors" relevant to independence, impartiality, and fairness—in order to determine whether the *actus reus* of article 8(2)(c)(iv) is made out.[290] It follows, as the Defence seems to agree, that investigative and preliminary conduct may be taken into account, if it has an impact on the passing of sentence or carrying out of an execution.[291]

8.8 & 8.10 The Defence misinterprets the mens rea requirement for article 8(2)(c)(iv)

135. The perpetrator of a crime under article 8(2)(c)(iv) is required to know "of the absence of a previous judgement or the denial of relevant guarantees and the fact that they are essential or indispensable to a fair trial".[292] Interpretation of this requirement is primarily a matter of statutory construction.[293] Any alleged mistake of law in the meaning of article 32(2) is relevant only to the extent that it negates the required *mens rea*, if that *mens rea* required a particular legal evaluation. A mistake of law as to whether given conduct constitutes a crime within the jurisdiction of the court does not exclude criminal responsibility. In assessing whether this *mens rea* is established, the Chamber should consider, "in the

[283] 2020 *Commentary to Geneva Convention III*, art. 3, mn. 716.
[284] *See also e.g.* ICRC Rules on Detention by Non-State Armed Groups, rule 13, p. 62.
[285] *Contra* Defence Final Brief, para. 350.
[286] 2020 *Commentary to Geneva Convention III*, art. 3, mn. 717.
[287] Defence Final Brief, para. 358.
[288] 2020 *Commentary to Geneva Convention III*, art. 3, mns. 720-721. *See also* mns. 722, 724.
[289] *See.* Defence Final Brief, para. 359. *See e.g.* K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (CUP: 2002) ("Dörmann"), pp. 424-430.
[290] Elements of Crimes, art. 8(2)(c)(iv), Element 4 (fn. 59).
[291] *See* Defence Final Brief, para. 341.
[292] Elements of Crimes, art. 8(2)(c)(iv), Element 5.
[293] *See e.g.* Dörmann, p. 438.

light of all relevant circumstances, the cumulative effect of factors" with respect to the relevant guarantees.[294] Notably, there is no categorical requirement that the accused pursued a particular profession, or had technical expertise in the law.[295]

136. To the contrary, the required assessment is fact-sensitive, and does not call for any assessment of the moral beliefs of the individuals concerned.[296] Rather, what matters is whether the accused is aware of the relevant characteristics of the tribunal's proceedings which render them unfair. The Defence submissions concerning **AL HASSAN**'s possible view of his religious obligations—relying on evidence in the record and other sources which are not in evidence—do not squarely address the key questions as set out in Prosecution Closing Brief.[297]

The Defence misrepresents evidence relating to count 6

137. The Defence's allegations regarding count 6 are mainly based on a cherry-picking approach which is not supported by the totality of the evidence. The following examples are non-exhaustive illustrations of this.

138. The Defence suggestion that the establishment of "Shari'a courts" in the North of Mali predated Ansar Dine[298] is not supported by the evidence. The Tribunal itself admitted that "Sharia was not enforced" in Mali before Ansar Dine/AQIM's arrival in Timbuktu.[299] In fact, the Tribunal applied new rules and sanctions based on Ansar Dine/AQIM's ideological and religious vision.[300] In this regard, **AL HASSAN** stated "*ces punitions ils ne les connaissaient pas […] C'est la première fois qu'ils ... qu'ils les voient*". In an interview dated 30 October 2012, he added that "*[l]a loi des mécréants sévissait depuis 120 ans... […] au Mali... maintenant ces 120 années sont... terminées... une page noire... nous devons ici […] appliquer la loi islamique... et défendre... la loi islamique... jusqu'à la mort*".[301]

139. The Defence does not rely on concrete evidence to suggest that the Tribunal was established in accordance with the laws and procedures of the group, or clarify which exact law and procedures it is

[294] Elements of Crimes, art. 8(2)(c)(iv), Element 4 (fn. 59: making clear that this also applies to "element[] 5").
[295] *Contra* Defence Final Brief, para. 378. *See also* para. 426.
[296] *Contra* Defence Final Brief, para.407.
[297] *Contra* Defence Final Brief, para.408. *See also*, paras. 406, 409-426. *See* Prosecution Closing Brief, paras. 571-631.
[298] Defence Final Brief, p.131, para.325.
[299] *See e.g.* Prosecution Closing Brief, sections VII.A.1, para.301; VII.C.3 incident 3; VII.C.19 incident 28, Judgment, MLI-OTP-0001-7437 to the right of the image, translation MLI-OTP-0078-0212; MLI-OTP-0001-7438 to the left of the image, translation MLI-OTP-0078-0215; Judgment, MLI-OTP-0001-7373 (third judgment in the document), translation MLI-OTP-0077-2371.
[300] *See e.g.* Prosecution Closing Brief, section VII.A.1, para.301; [redacted]; Audio, MLI-OTP-0038-0886, transcript MLI-OTP-0056-0843, translation MLI-OTP-0063-1029, p.1034, l.191-193; [redacted] Prosecution Closing Brief, sections VII.C.3 incident 3, VII.C.15 incident 23, VII.C.19 incident 28 and VII.C.25 incident 40.
[301] *See e.g.* Prosecution Closing Brief, section VII.A.1, para.301; *See also*, P-0398:MLI-OTP-0051-1099, p.1102-1103, l.82-103. [redacted]

referring to.[302] This claim is also contradicted by the Defence's fully inaccurate allegation that Ansar Dine and AQIM are not "organized armed groups" for the purpose of international humanitarian law.[303]

140. Further, the Defence claims that members of the Tribunal were not required to be members of Ansar Dine nor to swear an oath to Al Qaeda.[304] This is not determinative of the independence and impartiality of the Tribunal. Evidence shows that Abou Zeid, Koutaïba and Abdallah Al Chinguetti controlled the appointment of the Tribunal's members,[305] who were selected for their anticipated loyalty to Ansar Dine/AQIM, their ideology and objectives and that they worked under the control of Ansar Dine/AQIM senior leadership.[306]

141. The Defence alleges that **AL HASSAN** had no reason to question the legitimacy and decisions of the Islamic Tribunal. However, **AL HASSAN** himself was clearly aware of the lack of independence/impartiality as well as the lack of procedural guarantees.[307]

142. The Defence alleges that the Prosecution failed to demonstrate that **AL HASSAN** made culpable contribution to these charged incidents and that the Tribunal did not base its judgments on the police reports.[308] As shown in the Prosecution Closing Brief, the evidence shows the opposite.[309]

143. The Defence's claim that there are "distinctly different signatures" on police reports is unfounded.[310] The Defence only refers to MLI-OTP-0001-7207 which is not a Police report but a permit to dig a well, and [redacted]'s comment on the same document, identifying a signature as Adama's.[311] Save for an attestation of debt which was co-signed by Adama and **AL HASSAN** as witnesses,[312] **AL HASSAN**'s signature is the only Police member's signature identified on the Police reports found at the

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[302] Defence Final Brief, sections 8.6 and 8.7.1.
[303] Defence Final Brief, sections 5.1.1 and 5.1.3.
[304] Defence Final Brief, p.147, para.366.
[305] *See e.g.* Prosecution Closing Brief, para.293.
[306] *See* sections VII.A.1 and 2, IV.B.4.b.iv.b of the Prosecution Closing Brief. *See also*, Confirmation Decision, para. 956, in which the Pre-Trial Chamber found that for crimes to be attributed to a "group of persons acting with a common purpose" within the meaning of article 25(3)(d), it is sufficient that perpetrators "*travaillaient et exécutaient des tâches pour Ansar Dine/AQMI, en appliquant les nouvelles règles édictées par Ansar Dine/AQMI*".
[307] *See e.g.* Prosecution Closing Brief, paras.370-373 and paras.300-301. *See also*, [redacted]
[308] Defence Final Brief, section 8.9.
[309] *See e.g.* Prosecution Closing Brief, para.307. *See also*, Prosecution Closing Brief, sections, VII.D.1, para.362, VII.A; VII.C and IV.B.4.b.iv.a. [redacted] P-0398: MLI-OTP-0062-0969, p.0983-0987, l.449-601, MLI-OTP-0062-1168, p.1171, l.86-92, p.1174-1175, l.189-232, MLI-OTP-0060-1484, p.1492-1495, l.264-365(as corrected on p.1484_01, points 6 to 10), MLI-OTP-0062-1143, p.1156-1157, l.420-462(as corrected on p.1143_02, points 16 to 20), MLI-OTP-0062-0988, p.0993-0995, l.147-230, MLI-OTP-0051-0631, p.0634-0635, l.76-104, MLI-OTP-0060-1511, p.1512-1518, l.24-206, p.1518-1519, l.209-249, MLI-OTP-0060-1511, p.1512-p.1516, l.24-150, MLI-OTP-0060-1484, p.1491-1492, l.207-256. P-0620:MLI-OTP-0064-0175, p.0301-0302; Report, MLI-OTP-0001-7527, translation MLI-OTP-0052-0089. Report, MLI-OTP-0001-7527, translation MLI-OTP-0052-0089, MLI-OTP-0001-7528 to the left of the image, translation MLI-OTP-0077-2795. Judgment, MLI-OTP-0001-7373 (first judgment in the document), translation MLI-OTP-0077-2371, MLI-OTP-0055-0259 (original handwritten version collected by P-0055), translation MLI-OTP-0077-2416.
[310] Defence Final Brief, para.393, fn.1482.
[311] Permit to dig a well, MLI-OTP-0001-7207, translation MLI-OTP-0077-2738; [redacted].
[312] Police report, MLI-OTP-0001-7546, translation MLI-OTP-0054-0014.

BMS and the *Hôtel La Maison*.[313]

144. The Defence also suggests that [redacted]'s identification of **AL HASSAN**'s signature was contaminated by a "flawed interview procedure". The Defence claims that after [redacted] stated that 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 **AL HASSAN**.[314] First, the Defence does not refer to any precise part of [redacted]'s interview transcript or testimony. Second, this is contradicted by [redacted]'s clear explanations in court. [redacted][315]

145. The Defence further suggests that **AL HASSAN** made no culpable contributions to the implementation of penalties related to charged incidents.[316] This is another example of a selective approach to the evidence.[317]

Section 9

9.4 There is no valid justification for the crimes charged under counts 1-5 and mutilation

146. The crimes charged under counts 1-5, and mutilation, cannot be justified as "lawful sanctions".[318] This concept is only expressly included in the Statute for the crime against humanity of torture under article 7(1)(f).[319] There is no basis to consider that a similar qualification must be read into the elements for the crime against humanity of other inhumane acts under article 7(1)(k) or similar war crimes under article 8.[320]

147. Even if, *arguendo*, the "lawful sanctions" exclusion is deemed to apply to other similar crimes, it is not applicable to the specific incidents charged in this case. The legality of sanctions must be determined by reference to international law in accordance with article 21,[321] having regard both to the nature of the sanction in question and the circumstances in which it is imposed, including the existence

[313] Prosecution Closing Brief, para.152.
[314] Defence Final Brief, para.202.
[315] [redacted]
[316] Defence Final Brief, section 8.9.5.
[317] *See e.g.* Prosecution Closing Brief, sections IV.A.2.a, VI.B.1, sections VI.B.3 and VI.A.
[318] *Contra* Defence Final Brief, para. 493-506.
[319] Elements of Crimes, article 7(1)(f), Element 3.
[320] *Compare* Statute, article 7(1)(k), 8(2)(c), 8(2)(e).
[321] Confirmation Decision, para. 243. *See also* D. Robinson, "Elements of crimes against humanity: article 7(1)(f)", in R.S. Lee et al. (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational: 2001), p. 92 (noting that the drafters left it open for the Court to decide the extent to which the "lawful sanctions" element was subject to applicable international law).

or otherwise of procedural guarantees. Corporal punishment has long been considered to constitute torture and/or cruel, inhuman, or degrading treatment/punishment.[322] Even if non-state armed groups may enact laws governing territories under their control, they cannot legalise conduct that is absolutely prohibited under international law,[323] including applicable rules of international humanitarian law.[324] Alleged motives for imposing corporal punishments to "further justice, security, and community well-being" or to "ensure public order"[325] are irrelevant to the *mens rea* for the crimes charged under counts 1-5 and mutilation.

9.4.2 The "lawful sanctions" exclusion does not apply to the crime against humanity of other inhumane acts under article 7(1)(k) or war crimes under article 8(2)(c)

148. The Defence is incorrect to suggest that the "lawful sanctions" exclusion (derived from the crime against humanity of torture) also applies to any crime against humanity.

149. The crimes in the Statute must be interpreted in the first place with reference to the relevant statutory provisions, assisted as appropriate by reference to the Elements of Crimes. Further reference to the content of general international law may be made to the extent necessary, consistent with the definition of the crimes themselves and the principles in article 21. With the exception of torture as a crime against humanity, no other crime makes reference to any exclusion for "lawful sanctions".

150. In this regard, the Defence's reliance on the introduction to article 7 of the Elements of Crimes[326] is misplaced. The reference to conduct "impermissible under generally applicable international law" does not imply any additional element to be proved,[327] but rather the drafters' endorsement that the crimes expressly enumerated in article 7 are themselves already generally recognised to be impermissible.[328] Consequently, no issues of so-called "legal pluralism" arise.[329]

151. The Defence arguments regarding the applicability of the "lawful sanctions" exclusion (derived from the crime against humanity of torture) to the crime against humanity of other inhumane acts are

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[322] *See* Confirmation Decision, para. 243, 245 (*especially* fns. 645-652, and references therein). Reference to the contrary practice of certain States does not necessarily rebut this: *contra* Defence Final Brief, para. 500.

[323] *See e.g.* Human Rights Committee, General Comment No. 20 on article 7 of the International Covenant on Civil and Political Rights, para. 3, observing, *inter alia*, that "no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority." *See also* Committee against Torture, General Comment No. 2 on article 2 of the Convention against Torture, para. 5 noting, *inter alia*, that: "Article 2, paragraph 2, provides that the prohibition against torture is absolute and non-derogable. […] it rejects any religious or traditional justification that would violate this absolute prohibition."

[324] *See* para. 132 above and para. 154 below.

[325] *Contra* Defence Final Brief, para. 483-492.

[326] Defence Final Brief, para. 498.

[327] Elements of Crimes, art. 7, Introduction, para. 1 (continuing: "as recognized by the principal legal systems of the world").

[328] *See* D. Robinson, "The context of crimes against humanity", in R.S. Lee et al. (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational: 2001), pp. 70-71 (recalling that this formulation was "carefully discussed" by the drafters, and that it was understood that "this provision did not limit article 7 in any way" but merely "asserted as fact that crimes against humanity are defined in article 7 *are impermissible and so recognized*", emphasis added).

[329] *Contra* Defence Final Brief, para. 497.

unfounded. The Defence only relies upon one academic article dated 1993,[330] which relates to the interpretation of "inhuman treatment" under article 3 of the European Convention on Human Rights ("ECHR") adopted by the European Commission of Human Rights in early cases.[331] Yet, the subsequent case law of the European Court of Human Rights clearly establishes that the prohibition under article 3 of the ECHR is absolute and that "no local requirement relative to the maintenance of law and order" would allow the use of a punishment contrary to this provision.[332]

152. Similarly, the "lawful sanctions" exclusion does not apply to the war crimes of torture, cruel treatment and mutilation under article 8(2)(c)(i) or the war crime of outrages upon personal dignity under article 8(2)(c)(ii),[333] which are all listed as "serious violations of article 3 common to the four Geneva Conventions of 12 August 1949" under the Statute. As specified in the Introduction to the Elements of Crimes for article 8, "[t]he elements for war crimes under article 8, paragraph 2, of the Statute shall be interpreted within the established framework of the international law of armed conflict […]." There is no basis within that framework to consider that the "lawful sanctions" exclusion is an additional element applicable to war crimes under article 8(2)(c).

9.4.2 The charges incidents in this case cannot be justified as "lawful sanctions"

153. In any event, the conduct charged in this case relevant to counts 1-5, and mutilation cannot be said to have arisen "only from", or to be "inherent in or incidental to, lawful sanctions".[334]

154. Notably, contrary to the Defence's suggestions,[335] international humanitarian law clearly prohibits corporal punishments. The Defence's claim that a specific prohibition of corporal punishment was not included in common article 3 because it is "still employed in many national jurisdictions"[336] is unfounded.[337] The ICRC documents cited in support[338] in fact relate to the drafting history of article 4 of the 1977 Additional Protocol II. Those documents show that despite two delegations' objections, the overwhelming majority voted to include a specific reference to "corporal punishment" in the Additional

[330] Defence Final Brief, para. 493, fn. 1797.
[331] *See e.g. Greek* case, 5 November 1969, Yearbook on European Convention on Human Rights 12, p. 186 in which the European Commission on Human Rights defined "inhuman treatment" under article 3 of the ECHR as "at least such treatment deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable".
[332] *See e.g. Tyler v. United Kingdom*, Application no. 5856/72, Judgment, 25 April 1978. *See also Jabari v. Turkey*, Application no. 40035/98, Judgment, 11 July 2000, para. 41-42, in which the European Court found a real risk of the applicant being subjected to treatment contrary to article 3 of the ECHR if she were to be returned to Iran, taking into account that the punishment of adultery by stoning may be resorted to by the authorities there.
[333] *Contra* Defence Final Brief, para. 332, 493, 495.
[334] Elements of Crimes, art. 7(1)(f), Element 3. *Contra* Defence Final Brief, paras. 495-496.
[335] *Contra* Defence Final Brief, para. 493, 495.
[336] Defence Final Brief, para. 332.
[337] *See e.g.* 2020 *Commentary to Geneva Convention III*, art. 3, mn. 631 (noting that the reference to "cruel treatment" should be understood in light of Additional Protocol II, art. 4(2)(a), which expressly proscribes "any form of corporal punishment" as a fundamental guarantee for all persons not taking direct part in hostilities, and noting that "provided it fulfils the specific requirements of, for example, mutilation or torture, corporal punishment would also be prohibited through these prohibitions […] in common article 3").
[338] Defence Final Brief, fn. 1226.

Protocol II,[339] which Mali ratified in 1989. The prohibition of corporal punishments is also expressly included in rule 91 of the 2005 ICRC study on customary international humanitarian law, article 4(a) of the 1994 ICTR Statute and article 3 of the 2002 SCSL Statute.[340]

155. Furthermore, in this case, the conduct in question was imposed in an arbitrary manner, without due process, and pursuant to Ansar Dine/AQIM's attempt to impose by force and violence their control and power, and ideological and religious vision, upon Timbuktu and its population.[341]

156. Nor can there be any concern about the principle of legality.[342] The criminal prohibition of the charged crimes in Mali was both foreseeable and accessible at the time,[343] not least because Mali had ratified the Statute more than a decade before the alleged crimes, on 16 August 2000.[344]

9.4.1 & 9.4.3 Motives are irrelevant

157. For all the crimes charged under counts 1-5, or mutilation, it is immaterial whether punishments were carried out—as the Defence contends—with the motive "to secure human welfare, maintain peace and to establish a righteous society",[345] since this confuses motive with intent.[346]

158. With the exception of torture as a war crime under count 3, none of the crimes charged under counts 1, 2, 4 and 5, or mutilation, requires the perpetrator to act with a prohibited purpose, such as "obtaining information or a confession, punishment, intimidation or coercion or any reason based on discrimination of any kind".[347] With regard to torture as a war crime, proof that the pain or suffering was inflicted for the purpose of "punishment" suffices to establish the prohibited purpose. There is no further requirement for the perpetrator to make a value judgment as to whether that punishment was lawful or otherwise, or for that purpose to be carried out with a particular motive. In any event, the facts of this case also demonstrate that the conduct in question further satisfied other prohibited purposes, such as intimidation, coercion, and discrimination.

[339] ICRC Official Records of the Diplomatic Conference, 1979, Vol. VIII, p. 421–429, para 5, 12; Vol. X, p. 49–50, para. 146–147; p. 103–104.
[340] In the context of international armed conflicts, *see also e.g.* Geneva Convention III, art. 87; Geneva Convention IV, art. 32; Additional Protocol I, art. 75(2)(a).
[341] *See e.g.* sections VI, VII and X of the Prosecution Closing Brief.
[342] *Contra* Defence Final Brief, paras. 503-505.
[343] *See* ICC-02/05-01/20-503 OA8, para. 85.
[344] ICC-02/05-01/20-503 OA8, para. 86 ("this test is satisfied if the State in which the conduct occurred is a Party to the Statute […], which describes the prohibited conduct clearly and defines the crimes entering into force in July of 2002").
[345] Defence Final Brief, para. 483.
[346] *Contra* Defence Final Brief, paras. 483-484.
[347] *Contra* Defence Final Brief, para. 507.

Section 10

10.3 "Attack" in article 8(2)(e)(iv) should be interpreted more broadly than "combat action"

159. As set out in the Prosecution Closing Brief,[348] while it is true that the Appeals Chamber in *Ntaganda* declined to reverse the Trial Chamber's interpretation of article 8(2)(e)(iv), the appeal judgment did not disclose a majority view concerning the proper interpretation "attack" in article 8(2)(e)(iv).[349] Rather, the judgment reflects a 2-1-1-1 split. Judges Hofmański and Morrison considered that "attack" in article 8(2)(e)(iv) must be interpreted consistent with article 49(1) of Additional Protocol I, as a "combat action".[350] For different reasons Judges Eboe-Osuji,[351] Ibáñez Carranza,[352] and Bossa[353] considered that "attack" in article 8(2)(e)(iv) should be interpreted more broadly. The facts of that case did not offer scope for an assessment of the degree of any "temporal connection" required to hostilities, nor is it clear that the judges were necessarily in agreement on that particular question.[354]

160. The Prosecution agrees that *Ntaganda* has not clarified the law on article 8(2)(e)(iv), but maintains that the legal interpretation of the Trial Chamber in *Al Mahdi*—which recognised that the term "attack" in article 8(2)(e)(iv) has a special meaning insofar as it applies to certain cultural objects, consistent with the IHL prohibition of all acts of hostility against them[355]—has not been over-ruled.

161. The Prosecution's submission before the *Ntaganda* Appeals Chamber and in this case are not inconsistent. If the Chamber considers article 8(2)(e)(iv) to be legally inapposite, it should promptly give the necessary notice of a potential legal recharacterisation to article 8(2)(e)(xii).[356] In this regard, the Defence cannot claim "irremediabl[e] prejudice" on the basis of events in another case.[357] What matters

[348] *See* Prosecution Closing Brief, para. 442. *See also* *Ntaganda* AJ, para. 1164.
[349] *Contra* Defence Final Brief, paras. 535-537.
[350] *Ntaganda* AJ, para. 43.
[351] Judge Eboe-Osuji considered that the Trial Chamber was wrong to define "attack" for the purpose of article 8(2)(e)(iv) according to article 49(1) of Additional Protocol I, and that "the kind of attack that the Rome Statute forbids can occur outside the course of active hostilities", and only declined to uphold the Prosecution appeal because he considered that the conduct would still have been better charged under article 8(2)(e)(xii). *See* *Ntaganda* AJ, para. 1164; ICC-01/04-02/06-2666-Anx5-Corr A2, paras. 103-132, 136-137.
[352] Judge Ibáñez Carranza considering that the Prosecution appeal should have been granted, and that "attack" in article 8(2)(e)(iv) should be defined by reference to the likelihood of resulting injury, death, damage or destruction and should encompass a wider temporal period than hostilities or combat action per se. *See* *Ntaganda* AJ, paras. 1165-1168.
[353] Judge Bossa stated that she "agree[d] with Judges Eboe-Osuji and Ibáñez that the interpretation assigned by the Trial Chamber to the meaning of the word "attack" is narrow, in the particular circumstances of this case", and made clear that she considered that the *ratissage* was part of "one violent attack" in which "the conduct of hostilities had not ceased". Like Judge Eboe-Osuji, she only declined to uphold the Prosecution appeal because she considered that the conduct would still have been better charged under article 8(2)(e)(xii). *See* *Ntaganda* AJ, paras. 1-9, 12.
[354] *Contra* Defence Final Brief, para. 536.
[355] *See also* Prosecution Closing Brief, para. 442 (fns. 1847-1848).
[356] *Contra* Defence Final Brief, para. 539. As recalled by the Prosecution, it is stated in express terms in article 8(2)(e)(xii) that this crime only applies to "property of an adversary". Consequently, as the Prosecution stated in abstract terms, it does not "protect property belonging to the *same party* to the conflict *as the perpetrator*": ICC-01/04-02/06-2431 A2, para. 60 (emphasis added). The Prosecution did not, however, express a view as to the circumstances in non-international armed conflict in which property should be considered as belonging to the same party to the conflict as the perpetrator.
[357] *Contra* Defence Final Brief, para. 539.

is what may be necessary in such circumstances under regulation 55(2) and (3).

10.1 The Defence makes an erroneous reference to the material scope of the charges

162. The Defence allegation that the attacks against the *Monument des Martyrs* and the *Al Farouk* Monument should be excluded because they were not confirmed by the Pre-Trial Chamber[358] is without merit.

163. Indeed, these incidents do not form part of the charges under count 7—which were squarely defined, materially, geographically and temporally in the Confirmation Decision,[359] and addressed in the Prosecution Closing Brief.[360] The *Monument des Martyrs* and the *Al Farouk* Monument were among the first monuments targeted by Ansar Dine/AQIM in April/May 2012 because of their religious and historical significance to the local population.[361] As such, while not charged under count 7, the incidents are nonetheless part of the underlying acts of persecution under count 13.[362]

10.7 The Defence's allegations concerning the Accused's contribution are factually and legally incorrect

164. The Defence misrepresents [redacted] when it alleges that the members of the Police present during the destruction of mausoleums were [redacted][363] and for this reason [redacted] concerning the setting up of barricades by the Police is inconsistent.[364] In fact, [redacted][365]

165. The Defence also claims that witnesses [redacted] "affirmed that Talha and the Security section were responsible for security at the sites and that Security was generally responsible for checkpoints and barricades".[366] First, the Defence does not support this allegation with any witnesses' evidence [redacted]. Second, part of the sourcing is unrelated to the topic.[367] Third, the Defence mischaracterises [redacted] in relation to Talha's presence at the Sidi Mahamoud cemetery. [redacted] that Talha was there to check the place after destruction had occurred.[368]

166. The Defence alleges that the Accused's "waving in greeting" on the occasion of the destruction of the Djingareyber mosque "does not amount to encouragement" because he exercised no authority in relation to either the actions or the persons present.[369] This allegation is factually and legally incorrect. The term used in Arabic by the Accused corresponds to its French translation "*saluer*", which has a

[358] Defence Final Brief, p.199, para.532
[359] Confirmation Decision, para.531.
[360] Prosecution Closing Brief, sections IX.A.1 to IX.A.6.
[361] Confirmation Decision, para.527; Prosecution Closing Brief, p.158, para.444-445.
[362] Prosecution Closing Brief, p.179, para.500; DCC, para. 1092.
[363] Defence Final Brief, para.552.
[364] Defence Final Brief, para.554.
[365] [redacted]
[366] Defence Final Brief, p.206-207, para.554 and fn.1982.
[367] [redacted]
[368] [redacted]
[369] Defence Final brief, p.208, para. 558.

different meaning than the English "waving". In fact, it also indicates greeting in person. In relation to encouragement, Pre-Trial Chamber I found that "*[…] Dans certaines circonstances, le fait ne serait-ce que d'être présent sur les lieux du crime (ou à proximité) en tant que « spectateur silencieux » peut être interprété comme une approbation tacite ou un encouragement*".[370] The authority over the perpetrators is only one of the factors to be assessed. The ICTY case law cited by the Pre-Trial Chamber held that it is the position of authority held by the Accused, as well his prior conduct, which altogether allows the conclusion that the Accused's presence at the crime scene amounts to official sanction of the crime and thus substantially contributes to it.[371]

Section 11

167. The Defence submissions conflate different elements of the crime of persecution and mischaracterise the established jurisprudence regarding the legal and evidential requirements for the charge.

168. The requirement of severe deprivation of fundamental rights is to be assessed in relation to standards derived from international customary or treaty law.[372] The suspension of the Malian constitution, or the existence of a state of emergency at the time of the charged incidents, are not relevant for the determination of whether victims of the charged acts of persecution were severely deprived of their fundamental rights. The *Ntaganda* Trial Judgment rightly held that the correct legal test is whether the substantive right cannot be enjoyed by the person entitled to it, and that "the provisions of Article 7(1)(h) would be meaningless if non-state armed groups cannot be held accountable for severe human rights violations".[373]

169. Assertions of cultural or religious belief cannot justify the severe deprivation of the fundamental rights. The Special Rapporteur on Freedom of Religion and Belief has stated that "freedom of religion or belief can never be used to justify violations of the rights of women and girls […] [W]omen's rights take priority over intolerant beliefs used to justify gender discrimination".[374] The UN Committee on Economic Social and Cultural Rights has likewise stated that "no one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope".[375] The Special Rapporteur on Cultural Rights has specifically cited the imposition of the veil on women in Mali during the 2012 occupation, and the associated use of threats and punishment, as "a violation of international

[370] Confirmation Decision, para. 903.
[371] *Ndahimana* AJ, para.147 referring among others to *Brdanin* AJ, para. 273.
[372] *Ntaganda* TJ, para 991; *Kupreškić* TJ, para. 621; *Kvočka* AJ, para. 319; *Krnojelac* AJ, para. 185; *Nahimana* AJ, para. 985; *Šešelj* AJ, para. 159.
[373] *Ntaganda* TJ, para. 993.
[374] Report of the Special Rapporteur on Freedom of Religion and Belief, UN Doc A/HRC/37/49, 28 February 2018, para. 42.
[375] UN Committee on Economic Social and Cultural Rights, General Comment No 21, UN Doc E/C.12/GC/21, 21 December 2009, para. 18.

law"[376] and a form of "cultural engineering".[377]

170. Contrary to the Defence submissions, each individual underlying act for the crime of persecution need not satisfy the severity threshold in isolation—persecutory acts are to be assessed cumulatively. The ECCC stated in the *Duch* case that "the crux of the analysis lies not in determining whether a specific persecutory act or omission itself breaches a human right that is fundamental in nature. Rather, it lies in determining whether or not the persecutory acts or omissions, when considered cumulatively and in context, result in a gross or blatant breach of fundamental rights".[378] Moreover, persecutory acts are to be examined "in their context and with consideration of their cumulative effect" to determine whether they resulted in the severe deprivation of fundamental rights required by the first element of the crime of persecution.[379] The *Ntaganda* Trial Judgment recognised that any act which amounts to a crime against humanity—including the specific example of rape and sexual slavery—would result in a deprivation of fundamental rights and meet the minimum severity threshold in and of itself.[380]

171. Although acts amounting to other international crimes are more than sufficient to satisfy the severity threshold, underlying acts of persecution are not limited to international crimes.[381] The Elements of Crimes make clear that persecutory acts merely require a nexus between the discriminatory denial of a fundamental right and the commission of crimes within the jurisdiction of the Court.[382]

172. The Prosecution proved that the victims were targeted by reason of the identity of a group or collectivity.[383] The nature of the group and the grounds for targeting them should not be conflated. Persecution is fundamentally a crime of discriminatory intent.[384] The text of article 7(1)(h) refers to an

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[376] Report of the Special Rapporteur on Cultural Rights, UN Doc A/72/155, 17 July 2017, paras 73, 74, 76: "Through the imposition of "modest" dress codes, fundamentalist groups promote the idea that women are limited to a stereotypical, subordinated position in society and limited in their bodily autonomy, cultural choices and ability to do such things as ride bicycles or play sports. They further promote a culture of shame about women's bodies… Some women's rights experts argue that many of the world's great religions often use modesty and segregation to exclude women from public space. Hence, the concept of modesty is not gender-neutral — it is "gendered modesty". Fundamentalist movements exacerbate this tendency. Women who violate these dress codes are subject to threats and punishment by State and non-State actors, in violation of international law, in many contexts… In Mali, during the 2012 jihadist occupation of the north, fundamentalists required women to wear black veils and loose-fitting clothing, or risk whipping and imprisonment."

[377] *Ibid*, para 79-80: "Many fundamentalist or extremist dress codes for women represent a process of radical change, rather than the preservation of tradition. Some of the more restrictive garments purveyed by fundamentalists today are themselves an assault on the pre-existing cultural status quo… It is possible to defend the fundamental human rights of those who veil to be free from violence and discrimination, while critiquing the cultural engineering that has relentlessly promoted the covering of women. Only then, in many contexts, will women truly be able to make free cultural choices about the way they dress."

[378] *Duch* AJ, para 257.

[379] *Ntaganda* TJ, para 992; *Kupreškić* TJ, para. 615, 620-622; *Kvočka* AJ, para. 319-321; *Krnojelac* TJ, para. 434.

[380] *Ntaganda* TJ, para. 994.

[381] *See* Confirmation Decision, para. 668 and 672. *See also e.g. Popović et al*, AJ, para.738, finding that "persecution as a crime against humanity does not require that the underlying acts are crimes under international law", and that it is not necessary to "establish the elements of the underlying acts, including the *mens rea*, even when the underlying act also constitutes a crime under international law".

[382] Element 4 of the Elements of Crimes for Article 7(1)(h): "the conduct was committed in connection with any act referred to in article 7, paragraph 1 of the Statute or any crime within the jurisdiction of the Court".

[383] *Contra* Defence Final Brief, para. 572.

[384] *See Kvočka* TJ, para. 197: "discriminatory grounds form the requisite criteria [for persecution], not membership in a particular group".

"identifiable group or collectivity", and the Elements of Crimes requires that either individuals are targeted "by reason of the identity of a group or collectivity" or that the perpetrator targeted the group or collectivity as such.[385] International criminal law does not impose a requirement for a comparator group to assess differential treatment or establish discriminatory intent.

173. The target group may be defined in the positive or in the negative;[386] in this case, the civilian population of Timbuktu perceived by the perpetrators as not adhering to their religious ideology were targeted on the grounds of religion, and women and girls were additionally targeted on both religious and gender grounds. Geography is not the defining characteristic of the target group. However, it may contribute to the parameters of how members of the target group are perceived or how the target group for specific incidents is identified. For example, in the *Ongwen* case, the Chamber found that the perpetrators perceived civilians living in Northern Uganda, particularly those living in government-established IDP camps, as affiliated with or supportive of the government of Uganda and therefore targeted them on political grounds.[387]

174. Persecution does not require the victims all to have been "members, sympathisers, allies of, or in any other way related to" the target group as a question of fact.[388] The "identifiable group" requirement may be based on objective criteria or on the subjective determination of the perpetrator.[389] The perpetrators' perception of them and intent to discriminate on one of the prohibited grounds is the key factor.[390] Exclusivity of targeting is not a legal requirement but it may be relevant to establish discriminatory intent.[391] In this case, the existence of dress codes in relation to men does not negate the evidence of discriminatory intent regarding the treatment of women; on the contrary, given that the definition of gender in article 7(3) refers to "the two sexes, male and female, within the context of society", evidence of differential rules prescribing the appearance, behaviour and social freedoms of males and females supports the conclusion that gender in the Rome Statute sense was a fundamental part of Ansar Dine/AQIM's ideology.

[385] Element 2 of the Elements of Crimes for Article 7(1)(h).
[386] What the *Jelisić* TJ referred to as "groups defined by exclusion"; *see* *Jelisić* TJ, para. 71.
[387] *Ongwen* TJ, para. 2907.
[388] *Ntaganda* TJ, para. 1011.
[389] ICC-01/17-9-Red, para. 133; *Blagojević and Jokić* AJ, para. 583; *Duch* AJ, para. 272.
[390] *Krnojelac* AJ, para. 186.
[391] *Kvočka* TJ, para. 195-197.

175. Perpetrators may intend to discriminate against the target group on more than one ground. The nature of gender as a concept, and its definition in article 7(3), mean that it is particularly likely to intersect with other forms of discrimination.[392] In particular, in relation to sexual crimes, the existence of personal motives or gratification on the part of the direct perpetrator does not negate discriminatory intent.[393]

Karim A. A. Khan KC, Prosecutor

Dated this 2nd day of May 2023
At The Hague, The Netherlands

[392] OTP Policy on Gender Persecution, para. 55; ICC-02/05-01/20-433, para. 80; ICC-01/14-01/21-218-Red, para. 30.
[393] *Kvočka* AJ, para. 370; *Kunarac* AJ, para. 103 and 153.