

1 International Criminal Court
2 Trial Chamber X
3 Situation: Republic of Mali
4 In the case of The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed
5 Ag Mahmoud - ICC-01/12-01/18
6 Presiding Judge Antoine Kesia-Mbe Mindua, Judge Tomoko Akane and
7 Judge Kimberly Prost
8 Closing Statements - Courtroom 3
9 Thursday, 25 May 2023
10 (The hearing starts in open session at 9.31 a.m.)
11 THE COURT USHER: [9:31:21] All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE MINDUA: [9:31:56](Interpretation) The hearing is open.
15 Good morning, all.
16 Court officer, would you like to call the case, please.
17 THE COURT OFFICER: [9:32:06] Good morning, Mr President, your Honours.
18 This is the situation in the Republic of Mali, in the case of The Prosecutor versus Al
19 Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, case reference ICC-01/12-01/18.
20 And for the record, we are in open session.
21 PRESIDING JUDGE MINDUA: [9:32:30](Interpretation) Thank you very much,
22 court officer.
23 I welcome all who are present here in the courtroom. And, of course, I welcome
24 Mr Al Hassan, who is also present.
25 I also welcome those who are in the public gallery and all those who are following

1 these proceedings remotely.

2 As each morning, I would like to hear from each of the parties and participants who is
3 present today.

4 Mr Duterte, would you like to introduce yourself and your team.

5 MR DUTERTRE: [9:33:17](Interpretation) Good morning, your Honours. Today
6 the Office of the Prosecutor is represented by Mousa Allafi, behind me,
7 Sandra Schoeters, Marie-Jeanne Sardachti, Caroline Leroy, Mr Garcia, Yayoi
8 Yamaguchi, and myself Gilles Duterte, as well as Yanogo Pengdwende. And I
9 would like to also welcome all those in and around the courtroom, as well as
10 the public.

11 PRESIDING JUDGE MINDUA: [9:33:58](Interpretation) Thank you, Prosecutor. I
12 turn now to the Defence.

13 Ms Taylor, would you like to introduce yourself and your team. Thank you.

14 MS TAYLOR: [9:34:05] Thank you very much, Mr President, your Honours.
15 The Defence for Mr Al Hassan is represented today by Dr Felicity Gerry, to my right,
16 and Maître Beaulieu Lussier, to my left. And going around this way, we have
17 Maître Alka Pradhan, we have Maître Leila Abid, we have Maître Mohamed Youssef,
18 we have Professor Mohamed Badar, we have Mr Maouloud Al-Ansary, we have
19 Maître Kelsey Ryan and we have Ms Brianna Dyer. Thank you -- and myself,
20 Melinda Taylor. Thank you very much. And good morning to everyone in and
21 around the courtroom.

22 PRESIDING JUDGE MINDUA: [9:34:44](Interpretation) Thank you very much,
23 Ms Taylor.

24 I now turn to the Legal Representative of Victims.

25 Mr Nsita, would you like to introduce yourself and your team.

1 MR LUVENGIKA: [9:34:53](Interpretation) Good morning, your Honours.
2 The victims are represented at today's hearing by Ms Prisque Biyéké Dipanga,
3 Andrés Felipe Arias Morales, by Ms Julie Goffin, my colleague Mayombo Kassongo,
4 and also by Seydou Doumbia, who is attending in Bamako.
5 I too am present, obviously, but I wanted to point out that -- to the Chamber that due
6 to very heavy rain in Bamako, the two other members of our team are currently still
7 under way and doing their best to join us in due course. So they shall be joining us
8 with some -- with a slight delay this morning. Thank you.

9 PRESIDING JUDGE MINDUA: [9:35:56](Interpretation) Thank you, Mr Nsita.
10 And thank you very much for that little clarification regarding your two colleagues
11 who are in Mali.
12 Now, today's our third day, the third day during which we are hearing the closing
13 statements of the parties and the participants.
14 This morning we are going to hear submissions from the Defence. We began to hear
15 their closing statements yesterday, we shall now hear the remainder thereof.
16 I would now like to hand the floor over to Ms Taylor.

17 MS BEAULIEU LUSSIER: [9:36:37](Interpretation) In fact, your Honour, it is I who
18 shall address the Court, if I might.
19 So I will be addressing the allegations of forced marriage and other inhumane acts
20 such as sexual slavery, rape and rape in detention.
21 I will be covering the following four topics:
22 First of all, the absence of proof beyond reasonable doubt that there were forced
23 marriages as part of a common plan.
24 Secondly, the lack of evidence beyond any reasonable doubt that Mr Al Hassan knew
25 that there were alleged forced marriages and also the absence of proof that he

1 contributed to the alleged forced marriages in any way.

2 Secondly, the fact that the environment was not coercive and that Ansar Dine did not
3 take advantage of such an environment.

4 And finally, the fact that there is not evidence beyond any reasonable doubt which
5 would allow one to find that there were rapes in detention as part of a common plan
6 and that Mr Al Hassan was aware of them and contributed to them.

7 First of all, the Defence puts it to you that the Prosecutor has not proven to you that
8 the group had a common plan to force -- including to force women to marry.

9 The Prosecutor alleges that Iyad Ag Ghaly said that he would give wives to men who
10 joined the group. Now this allegation is from an individual who is captured at
11 Aguelhok at the beginning of 2012. Now, that individual allegedly heard this from
12 a deserter who had joined Ansar Dine. That deserter allegedly said that
13 Iyad Ag Ghaly was giving women to members of the group.

14 Now, this is hearsay which is not corroborated. What is more, it relates to a point in
15 time which is outside the charging period and is not within the geographical scope
16 either, and it is totally unrelated to what was happening in Timbuktu. Given
17 the circumstances surrounding that event and the position held by the witness, what
18 he has to say cannot be given credibility and is not reliable.

19 Now, contrary to what the Prosecutor claims, witnesses have explained that
20 the members of the group were educated in the Maliki approach to marriage, which
21 requires that consent be obtained from the bride or the guardian, depending on
22 the case. The members had to respect local traditions. This was explained by
23 the Prosecutor's witness, P-155, as well as Defence witness D-202. The Prosecution
24 witness at transcript 103, page 11, and the Defence witness at transcript 203, page 18.
25 D-529 also testified to the effect that the group had not applied pressure or

1 encouraged its members to marry.
2 So, there was never any question of women being taken as a wife without their
3 consent.
4 Furthermore, the Prosecutor has tendered evidence to the effect that it was widely
5 known in the local population that Ansar Dine forced women to marry members of
6 the group. That evidence is general of nature and unreliable.
7 First of all, at -- or in a footnote on page 1622 of its brief, the Prosecutor relies on an
8 article which was written (Redacted) who reports on a case of forced
9 marriage. However, that journalist simply wasn't in Timbuktu during the events,
10 with the exception of a few days. (Redacted)
11 (Redacted)
12 (Redacted), is therefore based on indirect
13 hearsay and is insufficiently reliable.
14 Neither is there evidence to the effect that the article was published or disseminated
15 in Timbuktu at the time or that Mr Al Hassan knew or had knowledge of it.
16 Furthermore, when this testimony -- sorry, furthermore, giving testimony under oath,
17 this witness did not refer to the document. He didn't refer to any particular evidence
18 of forced marriages in Timbuktu between members of the group and local women,
19 but rather said that forced marriages had always existed, as had various other types
20 of discrimination against women, in various forms, such as forced marriage,
21 polygamy and, indeed, circumcision.
22 In any case, the reliability of that article is also undermined by the fact that the
23 witness was unable to differentiate between the different groups, in other words,
24 between MUJAO and Ansar Dine, in the case in hand.
25 The Prosecutor also refers to a UN report which was published in November 2012

1 which contains general allegations regarding groups who were involved in forced
2 marriages in Timbuktu. Now, this report cannot be used to attribute an intention to
3 members of Ansar Dine. Once again, there is no evidence Mr Al Hassan had read
4 that report.

5 Now, throughout the course of this trial, your Honours, we have heard evidence to
6 the effect that various married women during the events could remain at home with
7 their families and also receive visits from female friends, and here the Defence would
8 refer to its final brief at paragraph 56. Furthermore, women could refuse to marry
9 and there were no consequences, as set out in paragraph 54 of the Defence's final
10 brief.

11 The simple fact members of the group married local women is not sufficient to find
12 that forced marriage was committed in furtherance of a common plan.

13 As regards the proof regarding the particular incidents in the charging document,
14 the Defence would refer you to its final -- the final brief, in paragraphs 216 and 259.

15 We would put it to you that the Prosecutor has not proven to you that these offences
16 took place or that they were part of a common plan. The Prosecutor is asking you to
17 make inferences from circumstantial evidence and that is not reasonable.

18 Now, secondly, Mr Al Hassan -- I would like to address Mr Al Hassan's alleged
19 specific conduct and contribution to the alleged common plan.

20 First of all, no evidence has been provided that Mr Al Hassan had knowledge that
21 police patrols contributed to forced marriages and was used to identify women and to
22 arrange marriages.

23 Now, the Prosecutor gives the example of P-520, P-538 and P-610. Even if we were
24 to take it that the events took place as recounted by the victims, it is significant that
25 none of them made a link between the patrols and their marriages and none of them

1 identified Mr Al Hassan.

2 So it is -- it would not be a reasonable inference to make from the evidence provided
3 by the Prosecutor but would simply be speculation.

4 Now, the Prosecutor also holds it against Mr Al Hassan that he did not take measures
5 to limit the behaviour or the conduct of Ansar Dine members when on patrol. Once
6 again, to do that, Mr Al Hassan would first have had to have knowledge of such
7 a practice. What Mr Al Hassan did know was that the members of Ansar Dine had
8 been informed of the ban on rape and he also knew that members of Ansar Dine had
9 been -- it had been explained to him the nature of the local practices and traditions, as
10 stated in paragraph 55 of the Defence's final brief.

11 Now, as stated in the Pre-Trial Chamber's decision confirming the charges at
12 paragraph 948, the Statute requires that the contribution referred to in Article 25(3)(d)
13 must be important, must be substantial, that is to say, and must meet a certain
14 threshold.

15 The fact that Mr Al Hassan was a member of the Islamic police is insufficient to prove
16 such a contribution. The Prosecutor does not specify in his final brief that
17 Mr Al Hassan behaved in such a way that the patrols were used to organise arranged
18 marriages. The Prosecutor has also not -- has not provided evidence that
19 Mr Al Hassan was responsible for training and discipline within the police or that he
20 neglected his duty in any way.

21 Now, as regards the payment of dowries, the Defence puts it to you that the only
22 conclusion that could be drawn is that Mr Al Hassan did not contribute in any way to
23 a common plan by providing assistance to the members of his group in the form of
24 a dowry to marry a local woman.

25 Now, according to the Prosecutor's final brief, Mr Al Hassan wrote a request for

1 someone called "Mohamed" to obtain financial assistance to pay a dowry.
2 Now, this is based purely on a statement given by Mr Al Hassan, which, as was
3 explained to you yesterday, was given while he was under the effects of torture.
4 That statement was given on 6 October 2017, the selfsame day that Mr Al Hassan
5 asked the investigators of the Office of the Prosecutor to intercede so that he could be
6 transferred to a regular prison, to escape from the torture that he had been subjected
7 to at the DGSE.
8 So on the basis of what was said by the accused under the effects of torture, can this
9 conclusion be drawn that he was contributing to forced marriages? Also, please
10 remember that Mohamed is one of the most commonplace names in Timbuktu and
11 this is an insufficient basis to know whether there had been consent or not, whether
12 the members of a family were -- were approached regarding the proposed marriage.
13 (Microphone not activated) ... there was a request of the group to assist to pay
14 the dowry and that this constituted a major contribution of a nature to provide
15 influence?
16 And when the evidence could be there that Mr Al Hassan did this, can it be
17 concluded that there was a causal link? The Defence says no, but once again
18 the Prosecutor asks you to speculate because the evidence does not support
19 the references you are asked to make.
20 In the light of the proceeding, the only logical reference which can be made is the fact
21 that Mr Al Hassan possibly contributed to helping the conclusion of marriage
22 according to local customs.
23 Furthermore, there is no evidence to the extent that Mr Al Hassan exercised any
24 pressure on women such that they marry through his administrative functions in
25 the police. P-150 furthermore admitted not having any recollection that

1 Mr Al Hassan acted as an intermediary in marriage.
2 Even if P-626 stated that it was normal, even before 2012, to use prominent
3 intermediaries in Timbuktu, as was his case, in order to arrange marriages.
4 Furthermore, the simple fact that Mr Al Hassan knew that members of the senior
5 police officers had married local women, namely, Adama and Abou Dhar, doesn't
6 confirm the fact that Mr Al Hassan knew the intention of the group to put pressure on
7 women or that they were not able to refuse this marriage. The Defence even
8 presented evidence to the effect that Adama's marriage was consenting, and I refer
9 you to paragraph 20 of the response of the final Prosecution brief.
10 Now, where it concerns the allegation to the effect that Mr Al Hassan mediated in
11 order to resolve marital disputes, the Defence puts it to you that the Prosecutor has in
12 no way proven that he played any such role in relation to the incidents charged or
13 that he knew that he assisted in the mediation of marriage which resulted from
14 a non-consenting marriage.
15 And once again, P-626 will confirm that also playing a role as a mediator in
16 the framework of marital conflicts before and during 2012 and that it was a normal
17 practice.
18 How could Mr Al Hassan have known that he contributed to a crime if he was
19 a mediator at the time?
20 It's also important that women complained for different reasons for having suffered
21 harm in their marriages, and they were accorded a divorce by the Islamic tribunal.
22 They had the option to divorce. And I refer you to the footnote in the Defence brief
23 where we list several judgment in this point.
24 The fact of playing a mediating role within the framework of marital disputes is
25 completely irrelevant.

1 Thirdly, members of Ansar Dine were not able -- did not in a coercive environment
2 for sexual crimes, contrary to what the Prosecutor alleges, bearing arms by members
3 of the group was for legitimate defence only and the members were well educated to
4 this effect, as set out in the Defence brief, namely paragraph 49 thereof.

5 In addition, a Prosecution witness, P-654, a prominent person from Timbuktu,
6 confirmed that with the occupation men started to give women credit and respect.
7 They were no longer provoked in the streets. And the imposition of Sharia ended
8 theft and rapes. And this was a positive aspect of the occupation. And here I refer
9 you to the transcript T-133, page 35 thereof.

10 This statement of the witness is revealing. How could the Prosecutor confirm that
11 there was a coercive environment if the women of Timbuktu were more respected,
12 that there was less pressure on them and that they could obtain divorces?

13 Finally, where it concerns the commission of rapes on certain women in detention,
14 the Defence puts it to you that the Prosecutor wasn't able to demonstrate that these
15 rapes were part of a common plan.

16 No evidence has also been presented to demonstrate that Mr Al Hassan was present
17 when the women were in detention. Nevertheless, it was demonstrated by
18 the Defence in paragraph 134 of its final brief that most of the women who were
19 detained were detained by Mohamed Moussa while he was in BMS.

20 P-582 clearly affirmed that he was not aware that rapes took place in Timbuktu
21 during the time of the events, nor particularly by members of the group.

22 Another Prosecution witness, (Redacted), heard about rumours
23 according to that women were raped in detention and decided to (Redacted)
24 (Redacted)

25 (Redacted) this individual confirmed that the rules in place for

1 the guards responsible for women were very strict and that there were no violations.

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 In addition, it's important to stress that women did not report rapes before the arrival
7 of the NGOs and the media after 2012.

8 It's also important to stress that the women's march organised in October 2012 was
9 about demands related to the imposition of a dress code and not to denounce the fact
10 that there had been rapes in Timbuktu. And here I refer to Ms Taylor's submissions
11 from yesterday.

12 The Prosecutor asks the Chamber to draw the conclusion that rapes were committed
13 in detention and that Mr Al Hassan had sufficient knowledge, whereas the proof is
14 the fact that the people present at the time themselves were not even aware of this.

15 The simple fact that Mr Al Hassan confirmed that the convention of proper behaviour
16 and the prohibition of the blameworthy did not establish that there was a conduct
17 adopted which produced a causal effect between the commission of rapes in
18 detention.

19 The simple fact that women were detained does not mean that they were victims of
20 sexual violence. The Prosecutor hasn't presented reliable and credible proof to the
21 extent that guards were known as being abusive and acted in impunity, and it would
22 be unrealistic to believe that they could guard women without being subject to abuse.

23 The reference of the Prosecutor to the judgment of the ICTY in the Kvočka case,
24 namely paragraph 327 thereof, is erroneous. They knew that the fact that they were
25 only guarded by men doesn't mean anything. Such a legal presumption does not

1 exist. On the contrary, it is a fact that the Prosecutor must prove, which is something
2 that the Prosecution has not done.

3 The Prosecution put it to you the day before yesterday that Ansar Dine clearly
4 exposed all women and young girls who were detained to the risk of rape intervening
5 within the normal course of events. A risk is not a sufficient threshold to meet
6 the criteria accepted by this Court. Ms Taylor has already addressed the test which
7 requires almost certainty. A risk is not almost certainty.

8 There is, therefore, no proof beyond reasonable doubt to support the fact that
9 Mr Al Hassan would have contributed to the so-called commission of rape or adopted
10 a behaviour which facilitated the commission of rape, or even that he knew
11 the intention of the group to commit these rapes.

12 Thank you. I give the floor to my colleague.

13 PRESIDING JUDGE MINDUA: [9:57:57](Interpretation) Thank you very much,
14 Counsel, for your brilliant presentation, and above all, for your brevity.

15 And the floor is now to your colleague, Maître Youssef.

16 MR YOUSSEF: [9:58:38] Thank you, Mr President. Thank you.

17 PRESIDING JUDGE MINDUA: [9:58:39](Interpretation) Please go ahead.

18 MR YOUSSEF: [9:58:40] Mr President, your Honours, this part of our closing
19 submissions concerns the Islamic police reports and the Prosecution's claims
20 regarding their link to the Islamic tribunal judgments.

21 It is our submission that Mr Al Hassan did not make a culpable contribution to
22 the proceedings before the Islamic tribunal.

23 Our submissions in this section have five small parts:

24 The status of the evidence on the specific issue, the methodology of the police reports,
25 the limits of the police's competence, the Islamic tribunal's methodology. And last I

1 will discuss the voluntary nature of the population's interactions with the Islamic
2 police.

3 Overall, it is our submission that the reports of themselves demonstrate that

4 Mr Al Hassan was a low-level clerk.

5 His actions were pursuant to the Islamic tribunal decisions which, when properly put
6 in context, were orders.

7 Thus he cannot be said to have individually committed crimes or made a culpable
8 contribution to a criminal purpose as alleged or at all.

9 The Prosecution provided us with the Islamic tribunal judgments and Islamic police
10 reports, and claimed the judgments were based on the police reports.

11 And for most of the charged incidents, there is no evidence from the parties
12 mentioned in the Islamic tribunal judgments or the police reports.

13 Witnesses were called who may have had knowledge about those incidents, but their
14 personal knowledge of the incidents was not established.

15 They never witnessed the drafting process of the police reports, they were not present
16 in Timbuktu throughout the entire period, so they could not have possibly known
17 about every specific incident. It was therefore crucial to establish their personal
18 knowledge.

19 And instead of calling that evidence, your Honours, the Prosecution is asking
20 the Chamber to speculate.

21 When those witnesses appeared before this Chamber, all they were asked by
22 the Prosecution was to repeat the names and dates they could read on both
23 the reports and the judgments. Repeating names and dates on two separate
24 documents gives no weight to the documents. Anyone who could read Arabic could
25 have done that.

1 The Prosecution in the closing arguments, for example, referred to an alleged tribunal
2 judgment, this is item 98 and 99 on the Prosecution's list. A handwritten text inside
3 a notebook. Here is another good example where a Prosecution witness could have
4 had knowledge about this incident, or the author, or the circumstances surrounding
5 the drafting of that note, or the link with Mr Al Hassan, if any.

6 And that witness testified before the Chamber, and was shown the document in
7 the middle of a batch of documents, but no questions were asked about this incident
8 whatsoever.

9 So once again the Chamber is asked to speculate.

10 And the Islamic tribunal didn't hide it when they relied on other investigations for its
11 findings.

12 Let's take the example of incident 42.

13 Here is an incident where Mr Al Hassan had no role whatsoever. The locals
14 complained about the persons in question, as confirmed by Witnesses D-514 and
15 Witness P-984. They were arrested by the security battalion and then taken to
16 *Hesbah*.

17 A Prosecution witness confirmed that a member of *Hesbah* always oversaw
18 the application of a sentence and confirmed that in this particular case a member of
19 *Hesbah* is seen reading out the sentence prior to execution.

20 Mr Al Hassan was not present during the execution of the sentence.

21 The tribunal even recognised in the judgment the role of *Hesbah* and the emir of
22 *Hesbah* in conducting investigations on this case. *Hesbah*, your Honours, not
23 the police.

24 We also have examples where the Islamic tribunal judgment contains information not
25 in the police report, which again shows the tribunal did not rely on the police report,

1 whomsoever instructed to draft them or drafted them.

2 For example, incident 19. We have a report that is one line. A driver, found with
3 two jars, one containing water and one containing cotton, as well as a piece of paper
4 containing a magic text. This is it.

5 This is item 98 on our list, your Honours.

6 The tribunal judgment, on the other hand, contains information on the route
7 the person in question does as a driver, a more specific description of the items found
8 in his possession, where the items were found and the mention of his grandfather's
9 funeral. That's item 99.

10 Similarly, in incident 20, the report is only three very brief lines. The judgment, on
11 the contrary, refers to the specific items in the possession of the person in question, it
12 refers to the individual being questioned by the Islamic tribunal and confessing before
13 them.

14 And while the Prosecution claimed that Mr Al Hassan wrote the police reports, they
15 did not establish how he received that information, especially that Mr Al Hassan was
16 not acting alone in the police, and he had superiors who gave him orders.

17 These alleged incidents demonstrate that the tribunal considered every aspect of
18 a case when seized of a matter. Their work was not complimentary to the police.
19 Their work was done from scratch, under oath, independently, without reliance on
20 the police report, as if the police reports never existed.

21 Furthermore, the judgments make no mention of a police report. The mere existence
22 of a police report doesn't mean the judges even saw it, and any link we try to establish
23 here would be an assumption.

24 And in some cases before the Islamic tribunal the Chamber has heard there's no police
25 report at all.

1 And the only logical conclusion here is that the Islamic tribunal was able to and did
2 indeed conduct the proceedings without any role by the police whatsoever. And
3 those examples can be found in items 100 to 112 in the Defence's list.
4 It is therefore crucial not to generalise or make assumptions or speculate on the role, if
5 any, played by the police or Mr Al Hassan. This is the only safe approach to this
6 case on the issues when considering contribution.
7 Mr Al Hassan made no contribution at all.
8 As foreshadowed, I go on to make submissions on the methodology of the reports.
9 The police reports are nothing but a summary of information, an untested account of
10 what may have been said, and it was left to the Islamic tribunal to verify or
11 completely disregard.
12 Almost all of the reports are half a page, and some of them are one line, which
13 suggests that the police conducted no investigations. They conducted no
14 investigations themselves. And this does not establish beyond reasonable doubt
15 the role played by Mr Al Hassan, if any, in the proceedings before the Islamic
16 tribunal.
17 Mr Al Hassan could not and was not qualified to predict how the tribunal would
18 issue its findings.
19 A Prosecution witness testified that the Islamic tribunal followed an approach of, and
20 I quote, "avoiding punishment should there be any uncertainty" and "mitigating
21 punishment commensurately with the nature of the crime in question."
22 This was within the competence of the Islamic tribunal, not the police. And we can
23 also draw inferences from the fact that *Hesbah*'s composition included judges in the
24 Islamic tribunal, whereas the police did not. So the existence of the police reports
25 further demonstrates the police's lack of competence or authority, otherwise

1 the referrals would not have existed and the police would have issued rulings itself.
2 And this leads me to the third part of this section concerning the limited competence
3 of the Islamic police.
4 There was no discretion or leeway for Mr Al Hassan or any member of the police
5 vis-à-vis the processing of complaints or the implementation of the tribunal's verdicts.
6 When a report reads "to the Islamic court", this was not a prosecutorial act of seizing
7 a court, it was nothing more than an indication of lack of competence, an indication of
8 the definitive end of the police's minimal role in the case.
9 The police, Mr Al Hassan and his superiors were all under the obligation to transmit
10 complaints to the tribunal. It was similar to the role of the Registry in transferring
11 the parties' submissions to a chamber. And even with that analogy, the police were
12 not always approached and parties went directly to the tribunal or through *Hesbah*.
13 The police was also under the obligation to transport individuals to the Islamic
14 tribunal, just like Mr Al Hassan was transported to the courtroom today.
15 A transport service is not a contribution to the legal proceedings before a tribunal.
16 Koutaïba, a key scholar in 2012, confirmed that the police or *Hesbah* would be
17 committing a forbidden act if they interfered with complaints for adultery, theft or
18 drinking alcohol. It was a forbidden act because the *qadi* was the religious authority
19 entrusted with the interpretation of the law and the issuing of sentences, not
20 the police and not certainly not Mr Al Hassan.
21 We have heard Witness D-202 testify that questioning Sharia is questioning God or
22 his representatives on Earth.
23 And as Prosecution witness P-65 testified, Mr Al Hassan was powerless to depart
24 from the system, he was under the obligation to seek the decision of his emir and
25 could not bypass him.

1 And this puts superior orders into context, upon which Dr Gerry will speak later.

2 We have also heard a Prosecution witness testify that the Maliki legal school, also

3 called in Arabic Al-Madhhab Al-Maliki, to which the locals were most accustomed,

4 was followed by Ansar Dine and the Islamic tribunal.

5 It is an eminent and well-established authority in Islamic governance that is not

6 inconsistent with international law. This legal school is not only followed in

7 Timbuktu but almost all of North and West African states, and can be found in

8 countries in the Arabian peninsula.

9 This system of governance does not permit the police to make interpretations of

10 the law, or decide on disputes between parties or issue sentences. And even in

11 a system of Islamic governance, the police still functioned like a regular police and

12 civilian registry.

13 In this system *Hesbah*, not the police, apply and enforce religious rules. As

14 confirmed by Koutaïba, the emir of the police could not issue decisions on *tazir*.

15 Given that Ansar Dine was following a standard and widely accepted system of

16 Islamic governance, Mr Al Hassan could not have possibly known that his

17 participation would in and of itself be contrary to international law.

18 In the Prosecution closing arguments, we were shown a video where Mr Al Hassan is

19 portrayed to have said he should defend Islamic law until he dies.

20 This is not an extremist pact or a hostile statement. This is an expression of belief,

21 a belief that made it impossible for Mr Al Hassan to disobey religious orders or take

22 the risk of departing from his faith.

23 We have, for example, heard Witness D-272 testify that while he might not be

24 personally in favour of applying some of the Sharia rules, he was simply incapable of

25 contradicting them. Witness D-213 also said that as a Muslim he could not be

1 opposed to Sharia.

2 D-240 said that Sharia was recognised in Timbuktu and by the majority of Muslims.

3 Prosecution Witness P-654 explained how before 2012 each community in Timbuktu

4 had a *qadi*, referred matters to customary chiefs, local imams and Timbuktu, and I

5 quote, "Timbuktu has always functioned like this."

6 Imam Daoud, a local notable who was also a member of the Islamic tribunal at the

7 time, said, and the quote is in French: (Interpretation) "No justice is better than divine

8 justice." *Fin de citation.*

9 (Speaks English) This position does not turn these individuals into extremists. This

10 is a belief shared by many other individuals from the Muslim faith, including

11 Mr Al Hassan.

12 This is the belief and obligation that Mr Al Hassan complied with and that should not

13 be punished with an extremist label.

14 I now move on to part four of this section, your Honours, and it concerns the Islamic

15 tribunal's methodology.

16 A Prosecution witness testified that the Islamic tribunal had to leave no stone

17 unturned to ascertain the truth.

18 He and other witnesses said that the Islamic tribunal conducted its own investigations

19 from scratch. We have examples of the Islamic tribunal's hearings. The tribunal

20 notes thoroughly demonstrate how the judges heard the witnesses and took note of

21 their accounts, and again their notes contain no indication of a role played by

22 the police in the investigations whatsoever.

23 This is item 124 on the Defence list.

24 The Prosecution's claim that the tribunal judgment was based on the police reports is

25 baseless. Besides matching names and dates, no progress in this trial was made to

1 provide the necessary link between the alleged reports and the Islamic tribunal
2 findings. And today we are right where we started, with no proof of the Prosecution
3 allegations at all.

4 So we are left with what we see, and what we see at most is that none of the Islamic
5 tribunal judgments even mention the existence of the Islamic police reports. None of
6 the Islamic tribunal judgments acknowledge any role played by the police in
7 the findings issued by the tribunal.

8 We have also heard before this Chamber a Prosecution witness who testified that
9 Mr Al Hassan did not have any influence over the court and did not contribute in any
10 way to the decisions reached by the court.

11 He also testified that Mr Al Hassan did not take part in any court duties.

12 Incidents must therefore be assessed on a case-by-case basis, and no assumptions
13 should be made on the role, if any, of Mr Al Hassan or the police in the proceedings
14 before the Islamic tribunal.

15 Now I move to the last part of our submissions in this section, concerning
16 the voluntary aspect of approaching the police.

17 The Prosecution has called evidence of many cases of individuals who were seeking
18 protection from thieves and bandits, women who were ill-treated by their husbands,
19 people who were claiming debts, people who wanted to protect their commerce or
20 land, others who wanted to retrieve property stolen by looters, and others who
21 simply wanted to honour contractual obligations.

22 D-240 affirmed that no pressure or influence was applied when he appeared as
23 a witness before the Islamic tribunal. The population continued to approach
24 the police voluntarily and lodged complaints all throughout 2012 simply because it
25 was useful to them and because their rights were preserved.

1 And this, this is what Mr Al Hassan would have seen. This is what Mr Al Hassan
2 would have understood.

3 And not only did the population continue to approach the police with their concerns,
4 but they were also supportive of the role it played in deterring theft.

5 They continued to file complaints of theft after the amputation, until as late as
6 September 2012 to early December 2012. And here I refer to incidents 24, 27 and 35.
7 These were incidents filed by members of the Arab community against members of
8 the Arab community. And we heard evidence that the Arab community applied
9 Sharia before 2012.

10 Notables deplored theft in the greatest terms. Prosecution witness P-4, speaking
11 about a theft case of fuel used by the population, said, and I quote, and the quote is in
12 French: (Interpretation) "We are ashamed of all these practices of the Timbuktu
13 people, we who are proud of our values, who are so honourable, so proud. What a
14 baseness, what a crime of theft, what dishonour." End of quote.

15 (Speaks English) We have heard evidence about the locals calling the green number
16 provided by the groups in the middle of the night asking for help, and they were
17 provided with immediate assistance, as confirmed by Witness D-554.

18 The Islamic police performed its tasks without discrimination based on ethnicity or
19 tribe or social status, as confirmed by Prosecution witnesses P-65, P-150, and Defence
20 witnesses D-93, D-315, D-551, D-553.

21 Your Honours, insofar as this evidence negates knowledge or assists on
22 the affirmative defences, and this will be addressed shortly by Dr Gerry, but at this
23 stage we submit that the evidence is such that the Prosecution simply cannot prove
24 there were criminal acts, nor a common purpose arising from the police reports.

25 And it follows that there is no evidence, your Honours, Mr Al Hassan was anything

1 more than a low-level clerk, acting on orders in accordance with decisions made with
2 basic judicial guarantees and in accordance with public acceptance and
3 understanding.

4 Thank you.

5 With your leave, your Honour, I will pass the microphone to Dr Gerry.

6 PRESIDING JUDGE MINDUA: [10:19:22](Interpretation) Thank you very much,
7 Maître Youssef, for your brilliant and eloquent presentation.

8 I now give the floor to Ms Gerry.

9 Dr Gerry, you have the floor.

10 MS GERRY: [10:19:37] Mr President, your Honours, I will speak very, very briefly
11 on the important context of Islamic law and the affirmative defences, and close on
12 behalf of the Defence for Mr Al Hassan.

13 I start with a summary of the situation and context in 2012: The great power of this
14 International Criminal Court is its ability to make simultaneous enquiry into
15 a situation and the potential criminal liability of an accused person within that
16 situation. It is a power that is intended to have universal reach with a vision of
17 international law that includes the Muslim world. It is a power that must be
18 exercised in context and with great responsibility. When this Chamber sits down to
19 make findings on the situation in Mali in 2012, we submit it must be recalled that
20 Timbuktu is, and always was, traditionally, culturally, a major hub of Islamic
21 civilisation. For centuries, Timbuktu has thrived as the centre of Islamic culture and
22 learning. It is appropriate, we submit, to conclude on the evidence in this case that
23 Islam is indeed the soul of Mali. In 2012, Mali was also a post-colonial society and,
24 as Ms Pradhan has explained before me, it is commonly understood that post-colonial
25 or neocolonial instability is not the same as an armed conflict. Instability is a feature

1 of history. It is a feature of Mali history. It is our submission that central to this
2 case is the need to understand Mali and to understand Islam and the Muslim society
3 in Mali which 90 per cent of the population adhere to.

4 The evidence explains that the term "Islamic law" covers the entire system of law and
5 jurisprudence associated with the religion of Islam. In many ways, like any
6 jurisprudence, it can be divided into two parts, namely, the primary sources of law,
7 sharia, and the secondary sources of law with the methodology used to deduce and
8 apply the law, Islamic jurisprudence or *fiqh*. These are considered by Muslims to be
9 of divine revelation and thus create the immutable part of Islamic law.

10 You can conclude on the evidence that in Mali, Islamic or Sharia law is and always
11 has been the heart of the population's cultural, legal and political society. You have
12 heard evidence that there are various schools of thought, the evidence is such that
13 you may infer a lack of consensus as between schools. The Prosecution did not call
14 independent expert evidence but you have clear evidence that there are differences in
15 interpretation of the Koran by scholars and judges. However, that does not make
16 the work of Ansar Dine, nor the Islamic tribunal, extreme.

17 Interpretation is fundamental in law and is fundamental in Islamic law. It is
18 the element that separates the *madhahib*, the ways to act, from one another. It is
19 the way. While there is no question that the Koran is the first source of Sharia, there
20 is no evidence to enable you to choose differences among the schools nor to rank
21 other sources of Islamic law, nor should you do so. The sole evidence is that
22 the Maliki school of thought may have been followed. At best this is evidence of an
23 attempt at stability and legal certainty. It is not evidence of an extreme ideology.

24 This is not a case where mock trials of the population were held. It is a case where
25 governance and law was legitimate.

1 It is not for this Chamber to impose a selective approach to Islam on Mali in 2012.
2 Ansar Dine was not bringing "new rules" as alleged or at all, but protecting
3 the traditions, population and heritage of the city and the region and, for example,
4 appointing scholars and having structures which ensured that the decisions made
5 were valid in Islamic law and would be accepted as valid by the population.
6 The libraries still stand and the manuscripts are safe. Whilst "crisis" in name, any
7 crisis in fact was averted through peaceful consultation with local dignitaries, an
8 Islamic tradition reflecting the usual Islamic nature of Ansar Dine.
9 The evidence is that Ansar Dine governed according to customary Islamic law and
10 established practice and the police were subordinate, not part of any governance
11 structure or policy making. We know this from the evidence of Abou Zeid's
12 instructions that policy and procedures were decided by the emir and from
13 the evidence of Koutaïba's interview which clearly restricted the powers of the police
14 to a secondary organ.
15 Timbuktu has never been a Western cosmopolitan city. It was socially conservative
16 and controlled by religious notables where traditional values were preferred. Before,
17 during, and after 2012, *qadis* and *sheikhs* applied Sharia to resolve disputes in matters
18 ranging from marriages, divorce, adultery, theft, and murder with valid
19 interpretation. No expert has suggested otherwise. The Malian authorities were
20 aware these judges exercised this role. Ansar Dine continued this tradition and
21 those employed, like young Mr Al Hassan, worked in a customary Islamic situation
22 and context. It therefore cannot be inferred from the Islamic processes and decisions
23 made that any international crime would occur in the ordinary course of events, nor
24 that any crime was virtually certain. To suggest there were no basic guarantees is
25 tantamount to suggesting that Mali is to be held to a higher standard than most

1 state parties in a transitional situation, particularly when people in an Islamic country
2 needed the basic Islamic structures that they were afforded.

3 As Ms Taylor has explained, Ansar Dine can and should be characterised as, at most,
4 a national group. It did not amalgamate with AQIM. Ansar Dine restored services,
5 brought security and access to justice according to customary Islamic law. Its
6 member Houka Houka has since been commended and not prosecuted. This is good
7 evidence that Mr Al Hassan was never party to an unlawful conflict because there
8 was no armed conflict. There was an attempt at stability and nothing more.

9 A proper analysis month by month of the situation in Mali in 2012, as presented by
10 Ms Taylor, is that there was no criminal purpose or policy.

11 Turning to the accused person, the evidence shows that Mr Al Hassan is and was
12 a respectable member of the ancient Tuareg tribe. Mr Al Hassan stayed in Timbuktu
13 out of necessity. He was not zealous, but a Muslim doing his job properly. As
14 Mr Youssef has explained, in 2012, Mr Al Hassan served his fellow people as
15 a low-level subordinate to whom the governance of Timbuktu through customary
16 Islamic law and principles was lawful, including the punishments according to Sharia.
17 His were honest and genuine and reasonable beliefs.

18 On Tuesday, the apparent zenith of the Prosecution case this week was a video at
19 their item 103 in which Mr Al Hassan says that he believes Islam was being followed.
20 No caliphate. Nothing extreme. No AQIM propaganda. Just Islam. Allegedly
21 having keys to handcuffs, a walkie-talkie or a phone, as suggested by the Prosecution
22 on Tuesday this week, does not make a leader. Even the Prosecution outline on
23 Tuesday itself showed that Mr Al Hassan's role was of an ordinary police officer. As
24 Madam Beaulieu Lussier has explained, marital relationships were without Mr Al
25 Hassan's knowledge or were consensual or appeared so, even if this Chamber

1 concludes that created a mistake. He did not commit rape, nor was he complicit in
2 any sexual offence or persecution. On punishments, for example, the Prosecution
3 played a video of Mr Al Hassan accompanying Mousa to fulfil his sentence. It must
4 be remembered that this sentence of Mousa was for murder, where the accused man
5 had shot a farmer, where Mousa's defence of self-defence was rejected in properly
6 held proceedings demonstrating basic trial rights were indeed afforded. It misleads
7 this Chamber to suggest that Mr Al Hassan was anything other than being supportive.
8 The actual evidence was that he talked to the family about *diya* but they "asked for
9 *qisas*", so at most Mousa had Mr Al Hassan's company as the sentence proceeded.
10 This Chamber can properly conclude that Mr Al Hassan's role was one of service, not
11 of criminal conduct or purpose and not of persecution. He plainly had no purpose
12 to subjugate or denigrate anyone. He worked as an ordinary police officer, a civil
13 functionary doing his best for his family and the population according to ordinary
14 Islamic structures. All of this is clear from the evidence.
15 Superficially, the core issue is simple, criminal liability only flows where a person is
16 aware that a circumstance exists, or a consequence will occur in the ordinary course of
17 events.
18 In this case knowledge is more complex. Because of the way that the Prosecution
19 put their case they must prove knowledge of the situation as they suggest it was,
20 knowledge of the alleged purpose, if such a purpose can be proved at all, as well as
21 knowledge of the alleged individual crimes within Mali. This inevitably contains
22 some objective factors as the Chamber must make findings on the ordinary course of
23 events in Mali where Islamic law was customary, and governance and judgments in
24 2012 were through Islamic law. It is our submission, taking this approach, there is
25 no safe foundation to convict Mr Al Hassan.

1 It is also not a mere knowledge test. That would remove the operation of intention.
2 We say the proper approach can be expressed as follows:
3 He did not know the essential facts about the alleged crimes or the alleged purpose
4 and his liability is excused because he was, or may have been, which allows for
5 reasonable doubt, operating under a mistake in circumstances of necessity and bound
6 to follow superior orders.
7 It is in this way that the defences of mistake of fact or law, superior orders and duress
8 are applicable to all the confirmed charges because they are all relevant to his alleged
9 knowledge, intention, and conduct. For example, not only did he not participate in
10 the subjugation of women, he did not know the use of Islamic law was unlawful,
11 because, in Mali in 2012, it wasn't. The Prosecution conceded in their closing
12 address on Tuesday that the religion was Islam and the request by Iyad Ag Ghaly was
13 simply to abide by the Koran. We submit that it is impossible for this Court to infer,
14 for example, that regulating smoking and drinking, theft or clothing as set out in the
15 Koran would mean that Mr Al Hassan knew international crimes were being or
16 would be committed.
17 Mr Al Hassan, a family man and police officer, was tasked with following Islamic
18 governance and law and obliged to do so. It was lawful and he believed it was
19 lawful, even if this Chamber concludes he was mistaken.
20 The suggestion in paragraph 574 of the Prosecution final brief that the Defence has
21 responsibility to substantiate its claims that affirmative defences apply is
22 misconceived. As set out in detail in our final brief and response, substantiation
23 suggests a legal burden on the accused, whereas it is an evidential burden.
24 Assuming what the Prosecution meant was that there must be evidence of substance
25 for the Chamber to consider on the affirmative defences, we submit this has been

1 achieved.

2 On mistake, the fact that there were meetings with local dignitaries, that issues were
3 listened to and adaptations were made was not meaningfully changed.

4 There was evidence that Ansar Dine restored services and gave free health care which
5 allows for an inference of what Mr Al Hassan saw in terms of legitimacy. Society
6 was visibly Islamic.

7 On duress, discrimination of the Tuareg was rife. This Chamber must reject
8 the Legal Representative of Victims' submissions that being a Tuareg is equated with
9 criminality.

10 On superior orders, bearing in mind that this is both a defence and the context for any
11 mistake, there is evidence that the supreme authority was held by the Islamic tribunal
12 and the absolute prerogative was Adam's, then Khaled's and Abou Dhar's.

13 The evidence demonstrates that Timbuktu is and was Islamic and Mr Al Hassan
14 functioned within Islamic law and governance. Returning to the Prosecution video
15 at their item 103, we can see and hear Mr Al Hassan's honest and genuine and
16 reasonable belief that Islamic law was being applied. Nothing extreme. Nothing
17 foreign. He literally says "Islam". The logical conclusion is that there was no
18 extreme vision and if there was any mistake it was honest and reasonable and any
19 conduct was unavoidable.

20 Put another way, there is ample evidence that a reasonable person in Mr Al Hassan's
21 position would believe that people were governed and judged according to Islamic
22 law, even if using an interpretation, and that Islamic punishments were carried out
23 following a proper order. Accordingly, even if this Chamber thinks that
24 Mr Al Hassan was operating under a mistake of fact or law, he is excused.

25 The fact that the public engaged extensively in that system suggests this was a belief

1 held by many, making it reasonable for Mr Al Hassan to believe as he did. P-150,
2 a witness, said that Sharia was to be followed. On this alone Mr Al Hassan can
3 reasonably claim he acted lawfully. Intention cannot be inferred from circumstances
4 of legitimacy, mistake or necessity. He also played no role in the decision to apply
5 Sharia or subsequent decisions concerning how it should be interpreted and applied.
6 Ansar Dine's work was directed towards ensuring protection, harmony, and positive
7 outcomes for the local population as a whole, which, to Mr Al Hassan, was a lawful
8 result. Notably, local imams also counselled the local population to obey and
9 cooperate with the groups. Given this backdrop, it was not unreasonable for
10 Mr Al Hassan to act as he did with a positive impact for the local population.
11 Refusal would have placed Mr Al Hassan and his family in grave danger. His
12 alleged presence at punishments was mandated. He was never empowered with the
13 responsibility or power to decide punishments. The sole area of discretion afforded
14 to him was mediation and reconciliation, which he did.
15 As I have said, it is too great a stretch to decide that international crimes can be
16 constructed from interpretive Islamic law and governance and reasonable doubt as to
17 knowledge is sufficient to acquit.
18 There is sufficient evidence for this Chamber to conclude that governance and judicial
19 decision-making were lawful and therefore lawful to Mr Al Hassan, particularly as
20 a Muslim Tuareg subject to orders, even if this Chamber concludes he was mistaken.
21 The suggestion that Mr Al Hassan could have fled is fanciful. The Prosecution
22 simply cannot rebut the reality in that context. Mr Al Hassan's actions were
23 a reasonable and necessary response allowing him to protect himself, the local
24 population and his family.
25 So, in conclusion, in conclusion on behalf of the Defence: In a criminal trial, we

1 submit that however confronting some evidence may be, the consequences cannot be
2 laid at the door of Mr Al Hassan. This Chamber must maintain standards of both
3 law and evidential process and develop the law on knowledge and affirmative
4 defences to function safely on the factors we have identified. The Prosecution
5 written and oral submissions were strikingly absent of law, leaving you to grapple
6 with the legal principles we have outlined. The evidence we have of Mr Al Hassan's
7 knowledge is that he was working where Sharia was applied, he believed this would
8 bring justice for the community and he worked for the community.

9 The Prosecution case, and I have about 12 words left, if I may, the Prosecution case
10 suffers from --

11 PRESIDING JUDGE MINDUA: [10:39:26] Yes, please, you may, you may.

12 MS GERRY: [10:39:29] The Prosecution case suffers from misreporting, flawed
13 evidence gathering, reliance on torture-tainted interrogations and myopia on Islamic
14 law such that there is reasonable doubt on every charge when Mali is properly
15 understood and the international criminal law in the Rome Statute is properly
16 applied.

17 The correct outcome for Mr Al Hassan is to conclude his conduct was not unlawful,
18 nor intended to be, and to acquit of all charges. The two words you must find are
19 not guilty.

20 Thank you.

21 PRESIDING JUDGE MINDUA: [10:40:14](Interpretation) Thank you very much,
22 Dr Gerry, for your very clear and eloquent presentation.

23 Ms Taylor, what is the situation? Is this the end of your closing arguments?

24 MS TAYLOR: [10:40:28] Yes, thank you very much. That concludes our
25 presentations.

1 PRESIDING JUDGE MINDUA: [10:40:38](Interpretation) Thank you very much,
2 Ms Taylor. Thank you for the -- your last submissions, your very high quality
3 submissions presented by yourself and your colleagues.
4 We shall now move to the questions which the Chamber wishes to put.
5 Judge Akane will put the first question, and we shall now listen to that.

6 JUDGE AKANE: [10:41:08] Thank you, Presiding Judge.
7 The Prosecution described P-0580's daughter in paragraph 261, 264 and 318 of its final
8 brief. The Defence described P-0580's daughter and made references to a name that
9 was previously communicated to the parties by email in paragraphs 333, 460, 464 and
10 467 of its final brief.
11 My first question is: Do all these descriptions of P-0580's daughter, or to the name
12 previously communicated to the parties by email, refer to the same person as P-0580's
13 seven-year-old daughter, reference to paragraph 287 of the confirmation decision?
14 This is the first question.
15 And, secondly, the Prosecution refers to P-0580's eldest daughter in its trial brief at
16 paragraph 142. The Prosecution makes no mention of this eldest daughter in its
17 closing brief, but, rather refers only to P-0580's seven-year-old daughter. Does this
18 mean that the relevant parts of the confirmation decision that have been
19 communicated to the parties by email refer to P-0580's seven-year-old daughter?
20 I would like to give the floor to the Prosecution first.
21 If you need to go into private session, please do so with the Presiding Judge's leave.

22 PRESIDING JUDGE MINDUA: [10:43:54](Interpretation) Prosecutor, the floor is
23 yours. If you feel that we need to move into private session, you should let me
24 know.

25 MR DUTERTRE: [10:44:05](Interpretation) First of all, your Honour, thank you for

1 that question, because that will allow me to clarify something which it seems was not
2 clear in our submissions. So thank you for this opportunity.

3 I think that part of my answer can be given in open court and part in closed session.
4 That would allow us to remain in open court for as long as possible, although of
5 course the court officer will have to do some extra work.

6 So I shall start in open session and then we can move into closed session and then
7 perhaps return to public session if the Chamber agrees.

8 PRESIDING JUDGE MINDUA: [10:44:51](Interpretation) Yes, absolutely. Please
9 proceed.

10 MR DUTERTRE: [10:44:53](Interpretation) Indeed, your Honours.

11 As regards the first part of the question, the daughter of P-0580, who is mentioned in
12 the Prosecutor's final brief, is the same as the daughter of P-580 who is referred to in
13 the preliminary decision of Chamber I, or rather, in the decision of
14 Pre-Trial Chamber I. I refer there to the decision confirming the charges. And there
15 I would refer to the specific charges 1, 2, 3, 4, 5 and 6.

16 So if I could now ask for us to move into closed session, please, your Honour.

17 PRESIDING JUDGE MINDUA: [10:45:39](Interpretation) Certainly.

18 Court officer, could you take us into private session, please.

19 (Private session at 10.45 a.m.)

20 THE COURT OFFICER: [10:45:54] We are in private session, Mr President.

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

- 1 (Redacted)
- 2 (Redacted)
- 3 (Redacted)
- 4 (Redacted)
- 5 (Redacted)
- 6 (Redacted)
- 7 (Redacted)
- 8 (Redacted)
- 9 (Redacted)
- 10 (Redacted)
- 11 (Redacted)
- 12 (Redacted)
- 13 (Redacted)
- 14 (Redacted)
- 15 (Redacted)
- 16 (Redacted)
- 17 (Redacted)
- 18 (Open session at 10.48 a.m.)
- 19 THE COURT OFFICER: [10:48:31] We're back in open session, Mr President.
- 20 PRESIDING JUDGE MINDUA: [10:48:37](Interpretation) Thank you.
- 21 Prosecutor, you have the floor.
- 22 MR DUTERTRE: [10:48:42](Interpretation) Thank you, your Honour.
- 23 Now, as regards the second part of your question, the position of
- 24 the Office of the Prosecutor is that the daughter of P-0580, who is referred to in
- 25 the decision confirming the charges, is the seven-year-old daughter and not

1 the elder -- eldest daughter. It's true that the Prosecution does refer to the eldest
2 daughter of P-0580 in its trial brief, that is because in an interview with
3 the Prosecution, Witness P-0642 had -- had recounted how their eldest daughter had
4 been detained and whipped. However, the violence which was suffered by
5 the eldest daughter is not included in the charges and the reference to the eldest
6 daughter, therefore, your Honours, was meant simply to demonstrate the scale of
7 the violence and the type of harassment that was suffered by the family of P-0580
8 and P-0642.

9 So this is -- this completes my answer to your first question, the two parts of that first
10 question. I hope that I have provided sufficient clarification.

11 JUDGE AKANE: [10:50:19] Thank you, Mr Prosecutor.

12 I will now turn to the Legal Representative of the Victims. Would you like to make
13 some observations in relation to this question, if any, Mr Nsita?

14 MR LUVENGIKA: [10:50:40](Interpretation) Thank you, your Honour, for offering
15 us the floor. However, the Legal Representatives for Victims do not have any
16 specific comments to make on this point. Thank you.

17 JUDGE AKANE: [10:50:55] Thank you very much.

18 Now I'd like to give the floor to the Defence.

19 Ms Taylor.

20 MS TAYLOR: [10:51:11] If I may just set myself up just a little bit.

21 Thank you very much, Mr President, your Honours. I believe I can answer in open
22 session, if I refer to the youngest daughter as the first daughter and the eldest
23 daughter as the second daughter. If that would be convenient for the Chamber.
24 And I won't refer to the specific age, but I will refer to the young age of the first
25 daughter on the understanding that the Chamber is aware of her age.

1 PRESIDING JUDGE MINDUA: [10:51:52] That's fine.

2 MS TAYLOR: [10:51:53] Mr President, your Honours, it is the submission of
3 the Defence that the name of the first daughter, as mentioned in our closing brief, is
4 the same and is in fact the first daughter, the youngest. But it is also our position
5 that the facts are fundamentally different such that the incidents addressed in our
6 brief and in the evidence do not correspond to the facts confirmed by the Chamber
7 concerning the youngest daughter.

8 I will first go through the facts as confirmed by the Chamber and then
9 the developments afterwards.

10 As the Prosecutor has addressed you today, at the time of the confirmation decision,
11 the Pre-Trial Chamber only had the statement of 580 and the Chamber's decision was
12 framed on the basis of his evidence.

13 And in that decision, at paragraph 301, they made the following findings concerning
14 that daughter: First, that she was very young. Second, that she visited P-580 when
15 he was detained by Hamed Moussa and then locked up the place where women were
16 detained. And it was after she was taken to the police and thrown into the prison for
17 women that she was assaulted twice. She was then taken to a hospital and whipped
18 20 times. So they're the confirmed facts concerning this youngest daughter.

19 And when the Chamber confirmed these incidents, they placed particular emphasis
20 on her young age and the fact that the physical violence had taken place while she
21 was detained, so that was a key component of the confirmed incident concerning her.

22 And when this Trial Chamber issued the self-contained set of charges, they described
23 the incidents as follows: "Acts of violence and other forms of ill-treatment
24 committed against P-580's daughter, who was arrested in Timbuktu, detained and
25 sentenced by the *Hesbah* to whipping, which sentence was carried out ..." in certain

1 time periods.

2 So again, this indicates the gravamen of the incident pertained to her detention and
3 sentencing by *Hesbah*. It's our position that the Chamber can't replace the names of
4 the two daughter, but they also can't use the new facts for the youngest daughter.
5 And first, that's because there's been no notice of such a fundamental change in
6 the charges and it would exceed the Chamber's competence to mould the charged
7 facts to fit the evidence. And second, P-642's testimony doesn't prove the confirmed
8 charges, irrespective of whether you base it on the youngest or the eldest daughter.
9 Now, in terms of the issue of notice, Article 74 prescribes that the Chamber can only
10 be based on facts and circumstances confirmed by the Pre-Trial Chamber. And
11 the Appeals Chamber judgment issued on 1 July 2021 in this case, and that's the filing
12 1562, paragraph 1, confirmed that Article 74(2) binds the Trial Chamber to the facts
13 and circumstances described in the charge, and they use that word "binds"
14 deliberately.

15 And we have a host of case law from the Appeals Chamber confirming that there's
16 a fundamental distinction between changing the legal characterisation of the facts and
17 circumstances of the charges and confirming or changing the facts themselves.

18 And for the latter, resort has to be had to Article 61(9). I refer to
19 the Appeals Chamber's judgment in Lubanga, 2205, the number, paragraph 94.
20 In that same judgment, the Appeals Chamber cautioned in particular that to give
21 the Trial Chamber the power to introduce new facts would usurp the power
22 of the Prosecutor and would violate the proper distribution of powers within the
23 Statute, effectively, the Chamber would become a Prosecutor. And that was at
24 paragraph 94.

25 Now, I am aware that in the judgment issued in this case, the 1 July judgment,

1 the Appeals Chamber did say in case of ambiguity the Chamber could look at the
2 DCC, that is the Document Containing the Charges, to see if there's an ambiguity, but
3 here there was no ambiguity in the Decision Confirming the Charges. And these
4 additional new facts concerning the first daughter were never in the Prosecution's
5 own charges. So you can't extrapolate from the charges because these new facts
6 simply weren't there.

7 Similarly, the fact that the new facts are similar to other facts or that they fall within
8 the charged time period or location is neither relevant nor sufficient. As stated by
9 the Appeals Chamber in Lubanga, the fact that new facts "... 'have come to light
10 during the trial and build a unity, from the procedural point of view, with the course
11 of events described in the charges' does not cure a breach of Article 74(2)
12 of the Statute."

13 And that's paragraph 92 of the judgment with the number of 2205.

14 Now, these principles have to be interpreted in a way that's consistent with our right
15 to timely notice. The Prosecution could have amended the charges after they
16 interviewed P-642, after they received slightly different facts concerning her, but they
17 chose not to do so, they wanted to have their cake and eat it too. They wanted to
18 rely on the more serious allegations from P-580, but at the end, they dropped P-580
19 with no notice to the Defence and no ability for us to recalibrate our investigation or
20 case. Even then, they made no application or no notice that they were going to rely
21 on new facts rather than the confirmed incidents.

22 Now, in terms of my second aspect that P-642's evidence doesn't relate to the
23 confirmed charges, this applies irrespective of whether you assume it's the first
24 daughter or the second daughter. If we assume it's the youngest daughter,
25 the charges were predicated on the fact that she was punished for not wearing a veil

1 and that she suffered the mistreatment at the BMS itself and was flogged. But
2 P-642's evidence does not confirm or relate to any of those charged incidents.
3 At transcript 156, page 14, line 1, when asked what happened to her daughter, she
4 said, "I couldn't tell you." So we have none of those confirmed details that were
5 fundamental components of the charged incidents.
6 She also provided absolutely no evidence concerning the eldest daughter. None.
7 The Prosecutor didn't even pose a single question to her on that point. There's
8 therefore absolutely no basis for this Chamber to issue findings on either the first
9 daughter, given that the evidence does not correspond to the confirmed charges and
10 constitutes entirely new incidents which were never confirmed, nor is there any basis
11 for the Chamber to enter a conviction in relation to the second daughter, given that
12 we had no evidence come out at trial. And the Prosecution itself today has
13 confirmed that they're not bringing charges in relation to the eldest daughter.
14 Thank you very much.

15 JUDGE AKANE: [10:59:41] Thank you very much.

16 Back to President. Thank you.

17 PRESIDING JUDGE MINDUA: [10:59:50](Interpretation) Thank you very much,
18 Judge Akane, for your question.

19 I would also thank the parties and participants for their contributions.

20 I will now turn to Judge Prost, who has a second question to put.

21 Judge Prost.

22 JUDGE PROST: [11:00:08] Thank you, President.

23 I have a similar question for clarification, and it has been framed in a way that it can
24 be presented in public session, but should either -- any of the parties or participants
25 need to go to private session for a response, please seek leave from

1 the Presiding Judge.

2 The confirmation decision in paragraphs 610 and 611, referred to the place where
3 P-538 was detained on several occasions. The Chamber also notes that in
4 paragraph 261 of the Prosecution trial brief, the Prosecution placed the location of
5 P-538's alleged rape by multiple men at this same place. In its final brief,
6 the Prosecution stated that P-538 was temporarily detained in a place, and that's in
7 quotations, which the witness described and called by a particular name and raped by
8 multiple different men.

9 I'd just like to clarify what the Prosecution's position is as to the place where P-538
10 was detained during her alleged final detention. And if you can please specify
11 the evidence supporting that position.

12 Thank you.

13 PRESIDING JUDGE MINDUA: [11:01:45](Interpretation) Prosecutor, you have
14 the floor.

15 MR DUTERTRE: [11:01:50](Interpretation) Thank you, your Honour.

16 I'm going to answer in public without going into private session. Mentioning
17 the place that the judge was -- took the precaution not to mention it, but I would
18 believe we can do so subject to the control of the Chamber.

19 Now, where it concerns the second question, your Honour, your Honours, concerning
20 P-538, the position of the Prosecution is that the last location where P-538 was
21 detained corresponds to *Hotel la Maison* which served as the headquarters for
22 the Islamic tribunal which applied rules and sanctions which did not exist in a secular
23 state and where only criminal law applied from the Malian state applied.

24 During the testimony, P-538 testified that she was informed Chachacha -- that she was
25 locked up in Chachacha and that's where they rendered justice. And she also

1 clarified that Chachacha was a neighbourhood which was next to the Abaradjou
2 neighbourhood.

3 Now, a first you point is that it's not just P-538 who spoke about the Chachacha
4 location. Two witnesses, P-557 and 520 also referred to a neighbourhood Chachacha
5 or Chechecha.

6 First of all, P-557 testified that he was taken to a hotel in a neighbourhood called
7 Chachacha and he explained that that's where he -- that's where people were tried.
8 So in terms of the location, that corroborates what P-538 said, who said that she was
9 locked up at Chachacha and that it was there where they rendered justice. So, in
10 terms of the location, it's compatible.

11 Now, P-520 also mentioned a neighbourhood called Chachacha, which was situated
12 around the Yobou Tao market. And P-520 added: Abaradjou and Chachacha is
13 the same thing.

14 You have it in the transcript 149, lines 20 to page 36, line 9.
15 So transcript 149, page 36, lines 20, to page 37, line 9.

16 I have the other references for P-557, but I didn't want to interrupt the answer for too
17 long.

18 And so, if we put in parallel P-520 and P-538, according to which Chachacha was
19 a neighbourhood which was next to Abaradjou neighbourhood, that is also
20 compatible.

21 And I would state that *Hotel la Maison* is well situated in the Abaradjou
22 neighbourhood and you have the maps in annex to the brief which make it possible to
23 locate them.

24 To put it in other terms, what P-55 -- 538, 520 and 557 say with regards to Chachacha
25 is the location and the location of the tribunal *Hotel la Maison* are coherent. They are

1 also in accordance with the reality in the field. As I said, there are the maps, but also
2 you can see it in the reports of the two experts, P-55 and P-57 and OTP 0060-1920,
3 page 1932.

4 I come to a second point, and that's the description of the building in Chachacha as
5 made by P-538 is corroborated by the evidence. P-538 testified that there were
6 several rooms in the Chachacha building and indicated that the room in which that
7 person was detained was on the ground floor and she said that it was on the floor in
8 which the judgments were made.

9 And as detailed in the report of experts 55 and 57, there was indeed several rooms on
10 the bottom floor of *Hotel la Maison*. There were photographs, there were drawings,
11 maps. And several witnesses, including P-626, D-202 and P-50, indeed mentioned
12 that the tribunal was on the higher floor. And you will see it in videos, as well as
13 the interactive media tendered into evidence.

14 Now, at this stage, I should say that the Defence contest the account of P-538
15 concerning the last detention, in referring to the testimony of D-202, according to
16 which nobody remained in the building of the tribunal overnight. But D-202 admits
17 himself that he never spent the night there, so is not able to know what happened in
18 that place during the night when he wasn't there.

19 In total, the evidence in the case file indicates that the Chachacha building described
20 by P-538 during her testimony does correspond with *Hotel la Maison*.

21 Now, certainly in the trial brief, the Prosecution refers to the written statement of 538,
22 and that's the available evidence.

23 At the present stage, the Prosecution is of course referring to the statement under oath
24 given in the courtroom before your Chamber. And I have to stress that the evidence
25 does not demonstrate any bad faith on the part of P-538. Her testimony with regards

1 to the location of the last place of detention and the -- it figures, it corroborates with
2 the evidence.

3 And the testimony concerning the forced marriage as well with a member of
4 Ansar Dine and AQIM is coherent with and is corroborated with documentary
5 evidence. And I mention it because we could go into something that is identifying,
6 but it's in the case file of evidence and our written brief, final brief.

7 And the Defence had the opportunity to cross-examine P-538 on all the points that
8 were of relevance to them.

9 By way of conclusion, the Chamber will appreciate -- access in all sovereignty
10 the testimony of this victim, taking of course into account the fact that this is a person
11 who is illiterate and for whom VWS recommended at the time special measures to be
12 put into place for the testimony, including the use of short questions and simple
13 questions and language so it's easy to understand.

14 I would like to thank you your Honours, your Honour.

15 JUDGE PROST: [11:11:45] Thank you very much, Mr Dutertre.

16 I turn to the Legal Representative of Victims to see if there's any comment that you
17 wish to make on this particular question.

18 MR LUVENGIKA: [11:12:03](Interpretation) I would like to thank you, your Honour.

19 The legal representatives for this second question do not have any particular
20 observations to make. Thank you.

21 JUDGE PROST: [11:12:17] Thank you very much.

22 I turn then to the Defence.

23 Ms Taylor, you have the -- *la parole*.

24 MS TAYLOR: [11:12:26] Thank you very much, Mr President, your Honours.

25 Your Honours, it's our submission that there are two possible judicial responses to

1 this issue, and I'll go through each of them in turn.

2 The first, it's clear that P-538's testimony deviated in a material manner from
3 the confirmed facts and circumstances. And we can see that the location of detention
4 is a material fact if you look at the charges. In particular, the Prosecution pleaded in
5 their Document Containing the Charges, expressly, that she was imprisoned at the
6 *gouvernorat*. And that was paragraph 802 of the document of the charges.

7 Then, at paragraph 813, they argue that the Pre-Trial Chamber had to put specific
8 emphasis on the fact that she was detained in the *gouvernorat* in order to find that her
9 husband was in fact a member of Ansar Dine and not a member of the MNLA, as
10 stated in her statement.

11 So it's clear that the location of her detention, as pleaded by the Prosecutor, was
12 a fundamental aspect of the confirmed charges.

13 This change, this deviation in this material fact was never notified to the Defence
14 timelessly through an amendment, nor through disclosure, it only came out in her
15 testimony. Even today the Prosecutor has confirmed that in their trial brief they
16 continued to state that she was detained at the *gouvernorat*.

17 And I've gone through the preparation log, which was the only information that we
18 had, and even in the preparation log, when she reviewed her statements, she did not
19 change the location of her detention. We can, however, see at page 20 that she was
20 shown the video MLI-OTP-0018-0249, which is a video of the *Hotel la Maison*, so she
21 saw all the rooms, she saw all the locations in this video during the preparation
22 session, and it's there that she says, "Oh, this building is the Chachacha." Even then
23 she doesn't say she's detained there. So this is something that we first heard, this
24 new material fact, was on the stand.

25 And we submit, your Honours, that this -- this mutation, this evolution in her

1 testimony must also be construed in light of other changes and inconsistencies in her
2 account. I draw your attention to the changes in the name of her husband,
3 the changes in the association of the group to which he belonged. And I would also
4 like to underscore that this was a witness whose name was not disclosed to
5 the Defence prior to the trial. It was a late disclosure witness. And as we've set out
6 in our brief, as a result of that, we were unable to cross-examine P-150 and P-626 on
7 this aspect. And that shows why this aspect, the location, is a crucial aspect for her
8 account because there were witnesses who could clearly controvert it. And without
9 this material aspect we were deprived of the ability from doing so.
10 And even today they've referred to D-202 testifying that he left each night. But he
11 also testified at transcript 204, page 29, lines 18 to 24, "when people leave
12 the courthouse, I would personally lock the courthouse [and] take away the keys with
13 me."
14 Now, when she testified, P-538 said that she was there for more than one night. She
15 never said she was taken in or out. So it's clearly implausible that she's not there
16 during the day and suddenly comes in just after everyone leaves each and every night.
17 That's a clearly implausible account and, in any case, it's an account we should have
18 had when other witnesses who could have talked about it were on the stand.
19 So for these reasons, not only do we have no timely notice, we also have clear
20 concrete prejudice, and these two factors mean that you can't rely on this for your
21 judgment.
22 My second point is that, given that she said on the stand under oath that she was
23 testified at the Chachacha and that it was the justice, that means that you can't now
24 refer on her statement, you can't go beyond her sworn evidence and assume or infer
25 that she actually meant somewhere else. And that's because the Statute and Rules

1 are quite clear as to when the Chamber can have recourse to a written account. And
2 this isn't one of them. Her statement is not in evidence under Rule 68, and even
3 today the Prosecutor is averring that it's not the *gouvernorat*. So we submit that
4 there's no basis or foundation for the Chamber in its judgment to conclude that it
5 could be the *gouvernorat*, given her sworn evidence.

6 So on the basis of these two factors, first the material mutation in her evidence for
7 which we received no timely notice, coupled with a clear prejudice given our clear
8 inability to investigate or cross-examine witness who could have clearly controverted
9 her account. And two, the absence of any timely or confirmed facts
10 concerning -- that would correlate to her sworn testimony, there's no basis to convict
11 in relation to her detention. Thank you very much.

12 JUDGE PROST: [11:18:05] Thank you very much, Ms Taylor.

13 Presiding Judge.

14 PRESIDING JUDGE MINDUA: [11:18:11](Interpretation) I would like to thank
15 Judge Prost for her question. And of course I thank the parties and participants for
16 their interventions.

17 As such, we are coming to the end of the presentations of the oral submissions,
18 the final submissions of the parties and participants. I see that there are no more
19 requests for the floor.

20 And before adjourning, I would like once again to thank the parties and
21 the participants for their spirit of cooperation and for the good understanding
22 between us that has reigned throughout this trial. The Chamber can only thank you
23 for that.

24 In accordance with Rule 142 of the Rules of Procedure and Evidence, the Chamber
25 will withdraw in order to deliberate in private. The parties and participants and

1 the public will be informed at the appropriate time of the date when the judgment
2 will be rendered.

3 Before concluding our session, as usual, I would like to thank the parties and
4 participants, the interpreters and the court reporters, our public in the gallery, our
5 public from afar. And, of course, our security officers. I wish everyone a very good
6 day. We are going to adjourn.

7 Court is adjourned.

8 THE COURT USHER: [11:20:11] All rise.

9 (The hearing ends in open session at 11.20 a.m.)