

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/12-01/18**

Date: **13 July 2020**

TRIAL CHAMBER X

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
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

Notice of Affirmative Defences

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

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**The Office of the Prosecutor**

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Legal Representatives of the Victims

Seydou Doumbia
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Legal Representatives of the Applicants**Unrepresented Victims****Unrepresented Applicants
(Participation/Reparation)****The Office of Public Counsel for Victims****The Office of Public Counsel for the Defence****States Representatives****Amicus Curiae****REGISTRY**

Registrar

Peter Lewis

Counsel Support Section**Victims and Witnesses Unit**

Nigel Verrill

Detention Section**Victims Participation and
Reparations Section****Other**

1. For the sake of preserving Mr. Al Hassan's rights, and without prejudice to ongoing litigation concerning Mr. Al Hassan's fitness to stand trial, the Defence for Mr. Al Hassan asserts the following affirmative defence of duress (Article 31(d)), in addition to mistake of fact or law, and superior orders pursuant to Articles 32 and 33, respectively, which Counsel has ascertained arise from the record of the proceedings.¹
2. This notice is without prejudice to the Prosecution's obligation to prove all elements of the charged offences, to the standard of beyond a reasonable doubt. This necessarily includes all contextual elements, and mental elements.

Duress (Article 31(d))

3. The affirmative defence of duress while not a justification for committing a crime, serves as an excuse when a defendant committed a crime because they were facing the threat or use of physical force. A defendant may face an imminent threat of death or serious harm through the actions or words of another person. This threat does not need to be explicitly stated. And, while the threat must occur in the present, rather than the past, certain circumstances create a threat of future harm that supports the defence. Duress can arise from a threat to someone close to the defendant.
4. The Defence will present evidence that alleged acts committed during the temporal jurisdiction of the charges would have been committed under duress.
 - a. The duress would have been caused by the presence of Al Qaeda in the North of Mali.
 - b. The duress would have come from a continuing threat of imminent death and imminent threat of serious bodily harm against Mr. Al Hassan and against his immediate family members.
 - c. The continuing threat of imminent death and imminent serious bodily harm was beyond Mr. Al Hassan's control.
 - d. Mr Al Hassan's alleged intended conduct is not alleged to have caused a greater harm than the one which was avoided.

¹ During the Status Conference on 30 June 2020, the Prosecution confirmed that they were on notice as concerns the intention to raise defences under Articles 31(d) and 33 of the Statute: ICC-01/12-01/18-T-015-CONF-ENG, p. 25.

5. The Defence intends to question all witnesses on these issues barring Prosecution witnesses testifying exclusively on technical issues not related to the content of the charges.

Mistake of Fact or Law (Article 32)

6. The disclosure obligations set out in Rule 79 are restricted to affirmative defences set out in Article 31(1), and not those set out in Articles 32 (which also stem from the operation of the burden of proof, and Article 30 of the Statute).
7. The Defence nonetheless provides formal notice of its intention to raises issues arising from Article 32, including that Mr. Al Hassan lacks the necessary element of knowledge and intent, for the charged crimes:
 - a. He did not know that the procedures applied by the Islamic Police and the Islamic Tribunal lacked the guarantees considered by law to be indispensable to a fair trial;
 - b. He was not aware that the sanctions ordered by the Islamic Tribunal would not constitute lawful sanctions;
 - c. He was not aware that certain measures constituted ‘sentencing’;
 - d. He was not aware that the persons, who were the subject of proceedings before the Islamic Tribunal, had the status of protected persons, nor was he aware of the nexus to an armed conflict;
 - e. He was not aware, factually or legally, that marriages in Timbuktu constituted a prescribed form of ownership;
 - f. He was not aware that the application of certain rules was contrary to international law;
 - g. He was not aware of the protected status of mausoleums, or that removal of elements of these mausoleums constituted “an attack”, nor was he aware of the nexus to an armed conflict; and/or

- h. In case the Chamber provides notice concerning the potential recharacterization of ‘mutilation’, he was not aware that Dedou Maiga was in the power of an ‘adverse party’.

Superior Orders (Article 33)

- 8. The defence of superior orders arises from the following:
 - a. Mr. Al Hassan was under a legal obligation to obey the orders of the Emir of the Islamic Police/Hesbah, the Presidency, the Shura Council, and the Islamic Tribunal;
 - b. Mr. Al Hassan did not know that the orders were unlawful; and
 - c. The orders were not manifestly unlawful.



Melinda Taylor
Counsel for Mr. Al Hassan

Dated this 13th Day of July 2020
At The Hague, The Netherlands