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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 "'Defence Trial Brief', ICC-01/12-01/18-2203-Conf, 14 April 2022"

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

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INTRODUCTION

1. The Prosecution has charged Mr Al Hassan with crimes against humanity and war crimes under Articles 7 and 8 of the Rome Statute ('Statute') of the International Criminal Court ('Court'), including torture and other ill-treatment (count 1-5), the passing of sentences without due process (count 6), attacks against historic monuments and buildings dedicated to religion (count 7), sexual and gender-based crimes (count 8-12), and persecution (count 13). Mr Al Hassan is alleged to be criminally responsible for these crimes by way of Article 25(3)(a), 25(3)(c) and 25(3)(d), prescribed by the Statute.[1]

2. On 18 May 2020, the Prosecution filed a Pre-Trial Brief, providing further particulars concerning the nature of the Prosecution's case.[2]

3. In its Fifth decision on matters related to the conduct of proceedings, Trial Chamber X ordered the Defence to "provide an outline of the legal and factual issues that it intends to raise during the presentation of its evidence".[3] This Trial Brief complies with that obligation. Mr Al Hassan does not bear the same obligation as the Prosecution and is, of course, not expected to provide in details how he intends to challenge the charges against him. The Prosecution, under the Statute, bears the

[1] ICC-01/12-01/18-335-Conf-Corr.
[2] ICC-01/12-01/18-819-Conf-AnxA.
[3] ICC-01/12-01/18-1756, para. 11(iii).

burden of proof continuously throughout the case,[4] while the Accused bears no such obligation and, indeed, is presumed innocent, has the right to remain silent and present no evidence or case.[5]

4. The general nature of Mr Al Hassan's case is that he is not guilty of the confirmed charges: he did not make culpable contributions to confirmed incidents, which constitute crimes within the meaning of the Rome Statute. In addition, and as previously given notice of to Trial Chamber X and the parties and participants,[6] Mr Al Hassan raises special defences of duress (Article 31(1)(d) of the Statute), mistake of fact and law (Article 32) and superior orders (Article 33).

5. The Defence introduced lengthy legal and factual submissions during the confirmation of charges hearing. These arguments remain pertinent, in particular as concerns the Prosecution's failure to elucidate and prove core elements of their case as concerns the nature and existence of Mr Al Hassan's alleged culpable contributions to the charged crimes.

6. The Defence's decision to bring evidence or to plead positive defences does not eliminate or lessen the Prosecution's burden to prove each and every element of this case to the standard of beyond reasonable doubt.[7] This includes contextual elements, such as the existence of an armed conflict and the nexus to such a conflict, and the existence of an organisational policy to attack the civilian population. In line with Article 30 of the Statute, the Prosecution must establish the knowledge requirement for both the physical perpetrators and Mr Al Hassan.

7. This brief will focus in particular on the contextual background concerning the events of 2012 and Mr Al Hassan's alleged involvement (Section I); and the relevance of this context to positive defences (Section II), and the procedural and methodological challenges to Prosecution evidence (Section III).

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[4] Statute, Article 66(2) and (3). *See also* Article 67(1)(i).
[5] Statute, Articles 66 and 67.
[6] ICC-01/12-01/18-951-Corr.
[7] ICC-01/04-02/06-2666-Red, para. 12: "The burden of proof is on the Prosecutor and any suggestion that the accused would have to present more convincing evidence than the Prosecutor, or indeed any evidence at all, to prove their innocence would represent an impermissible reversal of that burden."

8. Mr Al Hassan files this Trial Brief confidentially pursuant to regulation 23*bis*(1) of the Regulations of the Court, because its contents could identify protected witnesses or refer to confidential documents. A public redacted version will be filed in due course.

SECTION I: CONTEXTUAL BACKGROUND

A. General factual context

9. This case rests on allegations that pertain to human rights violations, arising from a context of prolonged abandonment of State authority and responsibility in the North of Mali,[8] a region also known as 'Azawad'.

10. The events of 2012 did not arise from a vacuum: they were the fruits of colonisation, corruption and neglect.

11. Azawad is a region where the peoples have had to fend for themselves for decades. As a result, the region has a distinct identity and culture that arises not only from the traditions of its ethnic tribes, but also its unique and challenging topography.[9]

12. This identity was ignored and suppressed during French colonial rule, which attempted to transpose a Western blueprint of secular governance on a region, whose traditions of learning pre-date those of its colonisers. The decision to base governance structures in Bamako – a thousand kilometers from Timbuktu – underscored the physical and cultural distance between the South and North of Mali, and the divide between the region of the governed and the ungoverned.[10]

13. Timbuktu is often used as a colloquial marker to refer to the 'middle of nowhere', the back of beyond. This assimilation does not befit Timbuktu's tradition of culture and wisdom, but it does reflect the stark reality of its geographic position: surrounded by

[8] D-0611, MLI-D28-0006-3098; D-0551, MLI-D28-0006-3087, at 3088.
[9] MLI-D28-0004-8039 at 8063.
[10] MLI-D28-0004-8039 at 8056, 8058.

desert and deserted by the State – left with an inadequate, ill-equipped and ill-adapted education, health care and legal system.[11]

14. In an ill-fated attempt to cure the wrongs of colonialism, the authorities left the North with a parting gift: the promise of eventual self-determination. Azawad would have its own system of governance and security, and would continue to use the Qādī'-system of justice that has long been installed in the North.[12]

15. Successive Malian governments struggled to make this promise a reality. This triggered almost cyclical rebellions, which were, in turn, crushed with arbitrary and indiscriminate force. That Mali has experienced five rebellions from 1963 until the current day speaks to the unresolved perception of injustice in the North.[13]

16. This past cannot be separated from the reality of 2012. It is because of this past that the word 'Touareg' became synonymous with 'rebel' or 'terrorist'. This created a 'catch 22' for Touaregs in the North, who knew that if they stayed, they would be labelled and treated as a rebel or terrorist no matter what they did.[14]

17. Past exactions also led to a form of generational trauma, triggering a fight or flight response[15] once reports came out that the Malian army was once again embarking on a wave of reprisals and ethnic cleansing against its historical enemy.[16] Those that went into exile traversed a dangerous route,[17] giving up livelihoods and lands.[18]

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[11] D-0211, MLI-D28-0006-3042; D-0539, MLI-D28-0005-9317-R01, at 9319.
[12] MLI-D28-0005-9336 at 9336.
[13] D-0539, MLI-D28-0005-9317-R01, at 9319; D-0211, MLI-D28-0006-3042.
[14] D-0243, MLI-D28-0006-3053; D-0511, MLI-D28-0006-2629-R01, at 2632-3633.
[15] P-0065, ICC-01/12-01/18-T-037-CONF-ENG, p.34, line 18 – p.35, line 6 (referring to fear generated by past 'genocide'), ICC-01/12-01/18-T-044-CONF-ENG, p.44, line 10-23; ICC-01/12-01/18-T-050-CONF-ENG, p.21, line 1 – p.22, line 7; P-1086, ICC-01/12-01/18-T-122-CONF-ENG, p.5, line 8 – p.6, line 4; (referring to previous waves of ethnic cleansing of Touaregs that motivated his exile); P-0150, ICC-01/12-01/18-T-106-CONF-ENG, p.6, line 12 – p.7, line 18, p 9, line 3 – p.11, line 5 (referring to history of ethnic cleansing that gave rise to waves of exodus of certain tribes); D-0243, MLI-D28-0006-3053; D-0539, MLI-D28-0005-9317-R01, at 9319; D-0540, MLI-D28-0006-3084; D-0534, MLI-D28-0006-3080 at 4190, ; D-0529, MLI-D28-0006-3075, at 3075-3076.
[16] D-0534, MLI-D28-0006-4188-R01 at 4190, 4191, P-1086, ICC-01/12-01/18-T-122-CONF-ENG, p. 15, line 24 – p.16, line 22; D-0529 MLI-D28-0006-3075 at 3075-3076.
[17] D-0245, MLI-D28-0006-4141-R01 at 4144; P-1086, ICC-01/12-01/18-T-122-CONF-ENG, p.60, lines 1-2; D-0211, MLI-D28-0006-3042.
[18] P-1086, ICC-01/12-01/18-T-122-CONF-ENG, p. 59, line 24 – p.60, line 18; D-0511, MLI-D28-0005-9310 at 9314-9315, (English translation MLI-D28-0006-2629-R01, 2637); D-211, MLI-D28-0006-3042 at 3043; D-0243 at MLI-D28-00006-3053 at 3054.

Touaregs therefore joined Ansar Dine "out of an instinct to survive or in an attempt to gain security".[19]

18. This past also frames the way in which key personalities and groups were viewed. The west may currently view Iyad Ag Ghaly as a 'terrorist', but he entered the fray of 2012 wearing the mantle of a freedom-fighter.[20] A deal maker and historical peace broker – Iyad Ag Ghaly's name and authority resonated with the Touareg community due to his commitment to Azawadi causes rather than his newly minted religious views. He was also known for his close contacts with and acceptance by the Malian state, which had appointed him Consul to Saudi Arabia, and designated him as a diplomatic envoy to negotiate with Al Qaeda in the years leading up to 2012.[21] Tribal leaders like Iyad Ag Ghali and Alghabass Ag Intallah – the son of the Amenokal of the Ifoghas tribe – imbued Ansar Dine with a veneer of legitimacy and authority that exceeded that of the absent Malian state.

19. Sharia did not arrive in Timbuktu overnight: it had been practiced there for centuries.[22] Timbuktu was and continues to be a citadel of Islamic learning, traditions and values. In the absence of effective governance, religious leaders had a long-standing tradition of plugging the gap between impunity and justice in Timbuktu and the North, keeping the peace and ensuring social harmony. Qādī's (Islamic Judges) were imbued with significant formal and *de facto* authority, arising from both historical recognition of the role of the Qādī' in the North, traditional practice, and the Koranic mandate that they speak with the authority of God.[23] Before, during and after 2012, Sheikh Houka Houka would receive and adjudicate complaints from the local population,[24] as did many other religious leaders and Qādī's.[25] The State did not oppose this role: to the contrary, at the beginning of 2012, in order to assuage the stirrings of rebellion, the Malian authorities proposed that each North city should have

[19] P-1086, ICC-01/12-01/18-T-122-CONF-ENG, p.59, lines 19-20; *see also* D-0511, MLI-D28-0005-9310 at 9314-9315, (English translation MLI-D28-0006-2629-R01, at 2637); D-0534, MLI-D28-0006-4188-R01 at 4190 lines 14-16.
[20] D-0511, MLI-D28-2629-R01 at 2636.
[21] P-0152, ICC-01/12-01/18-T-032-CONF-ENG, p.21, line 22 – p.22, line 7.
[22] MLI-D28-0004-8039 at 8078,
[23] D-0219, MLI-D28-0006-3046; D-0511, MLI-D28-0006-2629-R01, at 2632; D-0539, MLI-D28-0005-9317-R01, at 9320; MLI-D28-0004-8743 at 8761.
[24] D-240, MLI-D28-0006-4222-R01, at 4226; D-0539, MLI-D28-0005-9317-R01, at 9320; D-0540, MLI-D28-0006-3084.
[25] D-0219, MLI-D28-0006-3046.

its own Imam and Qādī'.[26] Domestic legislation also contained specific carve-outs to recognise the 'special' status of Northern Mali.[27]

20. Both before and during 2012, the notables and religious leaders were in agreement concerning the importance of taking measures to ensure compliance with Timbuktu's traditional Islamic values.[28]

21. 'Al Qaeda' as a name or group may seem like the benchmark bogeyman, but as described by P-0152, in the North of Mali, it was more akin to an NGO with guns.[29]

22. Al Qaeda did not arrive in the North overnight nor did it take over Timbuktu. Defence witnesses will describe Al Qaeda's long-standing presence in the North of Mali and progressive affiliation with local tribes and communities over the course of several years. Defence witnesses will attest to the Malian State's active collaboration in maintaining this presence, leaving local groups and tribes with no choice but to co-exist and co-operate (Ansar Dine) or risk being ejected (as was the case with the *Mouvement national de libération de l'Azawad* ('MNLA')).[30]

23. After the *coup d'état* in Bamako in March 2012 (an event that is completely absent from the Prosecution's narrative of events), the Malian State disintegrated in the North.[31] Doctors, teachers, police, judges left.[32] As shown in protest videos, locals rightly queried '*où est l'État'*?[33] Following months of food insecurity and drought[34] and in absence of necessary fuel supplies, Timbuktu faced a humanitarian catastrophe.[35]

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[26] MLI-D28-0005-9336.
[27] MLI-D28-0005-8821 at 8823; MLI-D28-0006-3022 at 3022, 3024.
[28] D-0553, MLI-D28-0005-9325-R01, at 9327; ICC-01/12-01/18-T-127-CONF-ENG, p. 55, line 4 – p.57, line 15; P-0004, ICC-01/12-01/18-T-166-CONF-ENG, p.12, line 23 – p.13, line 9.
[29] P-0152, ICC-01/12-01/18-T-032-CONF-ENG, p.79, lines 11-25. *See also* P-0150, ICC-01/12-01/18-T-106-CONF-ENG, p.13, lines 23-24, referring to leaders preaching and distributing aid "in order to obtain support and buy in from the local people"; MLI-OTP-0015-0495 (34:28 -35:15 minute mark, referring to Al Qaeda transforming itself in Timbuktu to an NGO).
[30] D-0511, MLI-D28-0006-2629-R01, at 2633; D-0539, MLI-D28-0005-9317-R01, at 9321-9322. See also P-0152, ICC-01/12-01/18-T-032-CONF-ENG, p.79, lines 11-25.
[31] D-0611, MLI-D28-0006-3098; D-0551, MLI-D28-0006-3087, at 3088.
[32] D-0219, MLI-D28-0006-3046; D-0551, MLI-D28-0006-3087 at 3089.
[33] D-0245, MLI-D28-0006-4141-R01 at 4145 para 26; [redacted]
[34] D-0146, MLI-D28-0006-3335, at 3339.
[35] P-0099, ICC-01/12-01/18-T-147-CONF-ENG, p.7, lines 6-22; P-004, ICC-01/12-01/18-T-166-CONF-ENG, p.70, lines 8-24.

24. The MNLA was waiting in the wings: this group was initially conceived as the MNA – a political group dedicated to achieving social justice for Azawad, but its efforts and entreaties had been rebuffed and its leaders, arrested.[36] The fall of Gaddafi and return of trained soldiers from Libya led to the 'L' – the desire for liberation as a means to bring proper governance and protection to the Azawadi people.[37] The Malian army was ill-equipped to confront them and many soldiers from the north defected, seeing the MNLA as the more legitimate representative of their interests. The MNLA was thus able to arrive at Timbuktu's door-step, with no real confrontation.

25. Rather than staying to protect and assist the population, the Malian army armed and asked the local Berabiche/Arab group (also known as Dina's group) to replace them as the stewards of this disaster zone.[38] The decision to rely on an ethnic-based group was grossly oblivious to the history of confrontation and reprisals between Timbuktu's different tribes and ethnicities.[39]

26. Defence witnesses will describe the manner in which the MNLA and the Berabiche arrived in Timbuktu and carved up the spoils: taking over public and private buildings. This triggered a free for all, with some locals taking advantage of the situation to steal property and weapons.[40] Defence witnesses will describe their fear and panic that there would be a 'settling of scores': that the Songhaï community would be attacked and killed in retaliation for past exactions committed against the Arab population.[41] Rumours circulated of MNLA soldiers committing rape.[42] Neither the MNLA nor the Berabiche were accepted by the local population: given its multi-ethnic composition and internal religious based-discipline (which eschewed theft and harassment), Ansar Dine was thus the 'least-worst' option for restoring security and stability and getting Timbuktu back on its feet.[43] Ansar Dine also promised to protect and help the local population.[44]

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[36] D-0511, MLI-D28-0006-2629-R01, at 2633-2634.
[37] D-0511, MLI-D28-0006-2629-R01, at 2634.
[38] P-0654, ICC-01/12-01/18-T-127-CONF-ENG, p.49 line 4 – p.50, line 4.
[39] P-0654, ICC-01/12-01/18-T-127-CONF-ENG, p.49 line 4 – p.50, line 4.
[40] D-0093, MLI-D28-0006-4212-R01 at 4214; D-0551, MLI-D28-0006-3087, at 3089; D-0528, MLI-D28-0006-3074.
[41] D-0512, MLI-D28-0006-2611-R02, at 2614.
[42] P-0099, ICC-01/12-01/18-T-147-CONF-ENG, p.10, lines 9-15.
[43] P-0065, ICC-01/12-01/18-T-045-CONF-ENG, p.15, lines 18-25.
[44] D-0551, MLI-D28-0006-3087, at 3089; D-0544, MLI-D28-0006-3342-R01.

27. Defence witnesses will describe the way in which the 'Islamists' saved Timbuktu: the MNLA was requested to leave the civilian center of Timbuktu, thus averting the risk of ethnic-based exactions. The Islamists ensured the security and functioning of critical infrastructure, including the hospital and the *Société Énergie du Mali* ('the EDM').[45] Humanitarian aid was received and distributed in a fair manner among the different ethnic communities.[46] A 'green number' was distributed to the local population to afford them a means to request and obtain protection for their property and themselves.[47] The Islamists arranged for fuel and transport for cultivators to ensure the availability of crops and food for the population.[48] Property was taken from the State, because the State had failed to use it to help the population.[49] The Islamists actively sought and obtained the cooperation and collaboration of the local population and authorities in these endeavours, telling locals that they needed their help, to help Timbuktu.[50]

28. From the outset, the Islamists explained that their approach would be based on the Koran, a text known and accepted by the people of Timbuktu. They promised to apply the same rules to themselves,[51] and consulted with local notables, with a view to responding to and accommodating local concerns and practices.[52] The existence of a system of governance and order prevented individuals from resolving disputes by taking matters into their own hands.[53] Locals chose to bring complaints to the Islamic Police.[54] The different groups signed a peace agreement and shared governance arrangement in May 2012, which recognised the application of Sharia as a means for ensuring transitional justice in the North.[55]

[45] D-0544, MLI-D28-0006-3086; D-0093, MLI-D28-0006-3038, para.4; MLI-D28-0006-3087 at 3089; MLI-D28-0006-3325 at 3330: [REDACTED] "Ansar Dine helps us a lot. If we exist today in terms of security… it is thanks to God and Ansar Dine" (Eng translation).
[46] D-0093, MLI-D28-0006-4212-R01 at 4215; D-0315, MLI-D28-0006-3064; D-0213, MLI-D28-0006-3044.
[47] D-0093, MLI-D28-0006-4212-R01 at 4217; MLI-D28-0006-3325 at 3330; D-0544, MLI-D28-0006-3086.
[48] D-0093, MLI-D28-0006-4212-R01 at 4218; D-0315, MLI-D28-0006-3064, at 3065.
[49] D-0544, MLI-D28-0006-3086.
[50] MLI-OTP-0024-0015 at 0028; ICC-01/12-01/18-T-106-CONF-ENG, p.77, line 1 – p.78, line 5.
[51] D-0093, MLI-D28-0006-4212-R01 at 4217.
[52] P-0093, MLI-D28-0006-4212-R01 at 4217-4218.
[53] D-240, MLI-D28-0006-4232.
[54] D-0544, MLI-D28-0006-3342-R01; D-0093, MLI-D28-0006-4212-R01 at 4217.
[55] [REDACTED]; MLI-OTP-0001-4271, at 4272; MLI-OTP-0001-3699.

29. When the MNLA left the airport at the end of June, many members joined Ansar Dine in order to stay in Timbuktu.[56] This led to an influx of less disciplined members, and the injection of private motives that were at odds with the group's approach.[57] When the leaders received complaints or learned of problems between any members and locals, they took steps to discipline the offenders and provided redress to the affected members of the local population.[58]

30. Defence witnesses (corroborated by Prosecution evidence) will describe the way in which the situation in 2012 was better than today.[59] The mortality rate in Timbuktu was the lowest throughout the country and ethnically motivated bloodshed was avoided.[60] As soon as the Malian army entered Timbuktu, this *détente* ended. Ethnic rivalry and violence resurfaced: Arab shops and properties were ransacked, Touareg and Arab residents were forced to flee, those that stayed were 'disappeared' by the Malian army.[61]

31. Throughout the course of 2012, Ansar Dine engaged in good faith efforts to resolve the crisis through negotiations with other groups, third States, and authorities in Bamako (pending the establishment of a stable government). Unlike the MNLA, Ansar Dine affirmed its commitment to the territorial integrity of Mali, and was, for this reason, favoured by the Malian State.[62] Ansar Dine's presence and existence in the North also acted as effective bulwark to Al Qaeda,[63] and helped constrain it from adopting and applying more extreme measures.[64] When it no longer appeared possible to avert conflict, the more moderate elements broke from Ansar Dine, establishing

[56] D-0511, MLI-D28-0006-2629-R01, at 2637; D-D-0605, MLI-D28-0006-3094 at 3096.
[57] D-0512, MLI-D28-0006-2611-R02, at 2614.
[58] *See e.g.*, D-0315, MLI-D28-0006-3064 at 3065; P-0150, ICC-01/12-01/18-T-108-CONF-ENG, p.20, line 17 – p.24, line 17; P-0004, ICC-01/12-01/18-T-165-CONF-ENG, p.75, lines 16-20; ICC-01/12-01/18-T-167-CONG-ENG, p. 13, line 6 – p.15, line 18, p.24, line 17 – p.25, line 2.
[59] D-0511, MLI-D28-0006-2629-R01, at 2636; D-0539, MLI-D28-0005-9317-R01, at 9322; D-0213, MLI-D28-0006-3044.
[60] P-0147, MLI-OTP-0006-3040, at 3041; P-0099, ICC-01/12-01/18-T-147-CONF-ENG, p.8, line 21 – p.9, line 3; P-0608, ICC-01/12-01/18-T-154-CONF-ENG, p. 93, line 24 – p.94, line 7.
[61] ICC-01/12-01/18-T-021-CONF-ENG, p. 8, lines 20 – p.21, line 3 (referring to "cleansing" of Arab population "under the noses of the French and Malian forces"); D-0539, MLI-D28-0005-9317-R01, at 9323.
[62] D-0539, MLI-D28-0005-9317-R01 at 9323.
[63]
[64] D-0511, MLI-D28-0006-2629-R01, at 2636-2637; P-0065, ICC-01/12-01/18-T-050-CONF-ENG ET 20-11-2020, p. 18, lines 14-25.

first the MIA, then the *Haut Conseil pour l'Unité de l'Azawad* ('HCUA"), and committed to peace negotiations with the Malian State.[65]

B. Mr Al Hassan

32. Before 2012, Al Hassan was a regular Touareg, someone who was religious, but not extremist.[66] He attended concerts, helped organise the festival of the desert, and regularly sang and danced with his friends.[67] He had no involvement in political or military groups, although he had friends in the Malian army and the MNLA.[68]

33. As a result of the insecurity and instability in the North, which impeded the supply of medicines, Mr Al Hassan's pharmacy in Zohro shut and he lost his income and livelihood.[69] He had aged parents (his father was [REDACTED]), a two-year old son ([REDACTED]) and, in April 2012, his wife was [REDACTED] months pregnant.

34. With a family and children to feed, he faced the choice of embarking on the dangerous route to exile or finding a way to provide and protect his family in Mali. Ansar Dine was not only the least-worst option, it was the only option at this point. Its authority and legitimacy were also endorsed by Kel Ansar religious leaders.

35. Al Hassan played no role in the arrival of Ansar Dine, the adoption of its rules and polices, or the establishment of its structures. Its existence and presence in Timbuktu were already a *fait accompli* when he started working with the Islamic Police.

36. The Commissioner at the time – Adama – was very outgoing and enjoyed a significant amount of support and acceptance from the local population. Defence witnesses will describe Adama's popularity and the extent to which they appreciated him.[70] His replacement – Khaled – only spoke Arabic and was not known by the local population.[71]

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[65] D-0539, MLI-D28-0005-9317-R01, at 9323; D-0219, MLI-D28-0006-3046.
[66] D-0272, MLI-D28-0006-4181-R01.
[67] D-0211, MLI-D28-0006-3042; D-0243, MLI-D28-0006-3054.
[68] D-0243, MLI-D28-0006-3053; D-0211, MLI-D28-0006-3042, at 3043.
[69] D-0616, MLI-D28-0006-3099; D-0627, MLI-D28-0006-3101; *see also* D-0544, MLI-D28-0006-3086.
[70] D-0213, MLI-D28-0006-3044, at 3045; D-0312; MLI-D28-0006-3062; D-0093, MLI-D28-0006-4212-R01, at 4214; D-0514, MLI-D28-0006-3104; D-0551, MLI-D28-0006-3087, at 3090.
[71] D-0540, MLI-D28-0006-3085; D-0529, MLI-D28-0006-3075, at 3077; D-0605, MLI-D28-0006-3094, at 3095; D-0231, MLI-D28-0006-3048, at 3049; D-0006, MLI-D28-0006-3035, at 3036.

37. Al Hassan's presence in Ansar Dine helped ensure the protection of his family and other members of his community. Defence witnesses will describe Al Hassan lending a helping hand, whenever he could, to help the local population.[72] This included individuals from different ethnic communities. As a local, Mr Al Hassan was known to the local population and was easily located in the office of the Islamic Police.[73] As someone who could speak local languages, Al Hassan was able to help locals explain their concerns and problems.[74] As a member of the 'Shurta' (Islamic Police), Al Hassan was, however, obliged to implement the orders of the Emirs and the judgments of the Islamic Tribunal.

38. In April 2012, Al Hassan's wife, ██████, gave birth to a daughter – ████ █████ experienced difficulties in child-birth, and spent several months recovering.

39. When Ansar Dine left Timbuktu, Al Hassan first went to Zohro and then exile in Libya. His daughter fell ill during the journey through the desert, and died after arrival at Oubari.[75] She was ten months' old.

40. In Libya, he worked in a pharmacy in Oubari.[76] In 2014, he was convinced by a close friend to return to Mali: if he joined the HCUA, he could regularise his position.[77] This was the approach followed by many other Touaregs in exile, joining the groups that had participated in the Algiers Accords, to pave the way back to their eventual integration into Malian structures and society.[78]

41. Al Hassan returned to Zohro, joined the HCUA and brought his family back from Libya.[79] His presence in Zohro was known to both local and international authorities.[80] He continued to engage in work for his community, transporting sick

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[72] D-0605, MLI-D28-0006-3095. D-0544, MLI-D28-0006-3342-R01 at 3345; D-0231, MLI-OTP-0006-3038.
[73] D-0540, MLI-D28-0006-3084; D-0544, MLI-D28-0006-3086; D-0272, MLI-D28-0006-4181-R01.
[74] D-0544, MLI-D28-0006-3086; D-0553, MLI-D28-0005-9325-R01; D-0272, MLI-D28-0006-4181-R01; D-0243, MLI-D28-0006-3053, at 3054; D-0147, MLI-D28-0006-3040 at 3041.
[75] MLI-D28-0006-4209 (English Translation: MLI-D28-0006-4210)
[76] D-0530, MLI-D28-0006-3078.
[77] D-0246, MLI-D28-0006-3058, at 3059; *see also* D-0616, MLI-D28-0006-3099 at 3100.
[78] D-0231, MLI-D28-0006-3048, at 3049; D-0246, MLI-D28-0006-3058; D-0534, MLI-D28-0006-4188-R01 at 4194 lines 30-34; D-0219, MLI-D28-0006-3046.
[79] D-0616, MLI-D28-0006-3099, at 3100; D-0611, MLI-D28-0006-3098.
[80] D-0534, MLI-D28-0006-4188-R01 at 4199; D-0147, MLI-D28-0006-3040.

people,[81] attending and facilitating efforts to reopen the health center in Zohro,[82] while trying to make ends meet through taxi/transport work.[83]

42. In 2016, Hama Ag Mahmoud, a prominent member of the Kel Ansar tribe, asked Mr Al Hassan to join the Congrès pour la justice dans l'Azawad ('CJA'), which he did.[84] Hama ag Mahmoud was a former MNLA leader and was known to be opposed to extremists/Al Qaeda.[85] He also enjoyed a significant amount of respect and authority in the Kel Ansar tribe through his status as a former member of the Malian government.[86] The objective of the CJA was to ensure protection and social and medical services in the area:[87] it was committed to the application of the Algiers Accord for peace and reconciliation in Mali.[88] The CJA had no relationship or affiliation with AQIM or JNIM;[89] it was, to the contrary, the victim of attacks initiated by these groups.

43. Tribal rivalries led to the creation of two wings, split along the lines of Kel Ansar tribes on the east of Timbuktu (Hama), as compared to those on the west (Nasser).[90] Al Hassan continued his affiliation with Hama.[91]

44. In April 2017, Mr Al Hassan was helping a relative take a sick woman to the health center.[92] He also promised a colleague in the CJA that he would help transport a sick cow to be butchered for food. A helicopter – with French forces – arrived and all three (Mr Al Hassan, his relative and his colleague) were hooded, manacled and taken, first, to the base near Timbuktu (where Mr Al Hassan was interrogated and tortured), then Gao (where Mr Al Hassan was interrogated and threatened). They were then taken to Bamako, where they were handed over to the *Securité d'état* (the *Direction générale de la sécurité extérieure* ('DGSE')),[93] an entity known for arbitrary detention, extra-

[81] D-0627, MLI-D28-0006-3101; D-0628, MLI-D28-0003-2049-R01 at 2051.
[82] D-0147, MLI-D28-0006-3040.
[83] D-0211, MLI-D28-0006-3042 at 3043; D-0243, MLI-D28-0006-3053 at 3055.
[84] D-0534, MLI-D28-0006-4188-R01 at 4197; MLI-D28-0005-2589; D-0611, MLI-D28-0006-3098.
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[86] D-0534, MLI-D28-0006-4188-R01 at 4195.
[87] D-0534, MLI-D28-0006-4188-R01 at 4188; MLI-D28-0005-9966.
[88] MLI-D28-0005-9966; D-0611, MLI-D28-0006-3098.
[89] D-628, MLI-D28-0003-2049-R01 at 2050; [89] D-0534 MLI-D28-0006-4188-R01 at 4199.
[90] D-0534, MLI-D28-0006-4188-R01 at 4197-4199.
[91] D-0534, MLI-D28-0006-4188-R01 at 4197-4199.
[92]
[93] .

judicial killings and torture.[94] Mr Al Hassan was interrogated and tortured on the first day of his arrival at the DGSE.[95] Throughout this illegal and incommunicado detention, he was subjected to various ongoing forms of physical and psychological abuse: verbal threats, insufficient food and water, denial of food, denial of medical treatment, physical beatings. Along with other detainees, he was severely beaten. Detainees complained about these conditions.[96] He was never brought before a judge and never given the opportunity to contact his family or a Malian lawyer.

45. While held in this illegal and inherently coercive environment, he was interviewed by International Criminal Court ('ICC') Prosecution investigators 19 times. They told him that he had no right to complain or wish for better detention conditions.[97] When he queried the propriety of interviewing him while held in such a state, the ICC Prosecution investigators told him that the judges had given them the green light to do so.[98] He was told that if stopped his cooperation, the ICC Prosecution would leave: [99] he would thus be taken back to his cell. He was brought to the interviews hooded and handcuffed by the same guards that tortured him.[100]

46. Al Hassan was transferred to the ICC in March 2018.

47. Al Hassan has been detained continuously for over five years. All he wants is to go back to Mali and be a father to his children. He is a community-oriented person, who poses no risk to the people of Timbuktu. The highest religious authority in Timbuktu have given their stamp of approval to his return, and further confirmed the positive impact this would have on peace and reconciliation.[101]

48. The Defence, through this brief, requests the Chamber to make that a reality.

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[94] D-0534 MLI-D28-0006-4188-R01 at 4201, 4202; *see also* [redacted].

[95] [redacted].

[96] [redacted]

[97] *See e.g.,* MLI-OTP-0051-0798 at 0805-0809; MLI-OTP-0051-0967 at 0991-0992.

[98] MLI-OTP-0051-0798 at 0809; MLI-D28-0002-0535 at 0584-0585, 0592.

[99] MLI-OTP-0060-1791 at 1806; See also Dr Porterfield (D-0020), MLI-D28-0002-0535 at 0598 for discussion of psychological implications.

[100] MLI-D28-0002-0535 at 0603-0604.

[101] D-0553, MLI-D28-0005-9325-R01 at 9333; MLI-D28-0005-8901.

SECTION II: AFFIRMATIVE DEFENCES

49. The Defence is not required to prove that Mr Al Hassan acted under duress, superior orders or mistake of law. Before entering a conviction, the Chamber must satisfy itself that the Prosecution has established, beyond reasonable doubt, that Mr Al Hassan bears culpable responsibility for the charged acts, in the sense that he committed them knowingly and intentionally: this burden cannot be reversed or shifted.[102] The existence of superior orders, mistake of law or duress are elements that potentially vitiate knowledge and intent. Article 74 requires the Chamber to base its judgment on all the evidence discussed at trial. The Chamber must therefore assess in its final judgment whether the Prosecution has discharged its burden, to the standard of beyond reasonable doubt, taking into account any evidence or arguments of duress, superior orders, or mistake of law.

A. Mistake of law/facts

50. Article 30 of the Rome Statute provides that a person shall be criminally responsible and liable for punishment for a crime only if the material elements are committed with intent and knowledge. In circumstances where a crime sets out an additional knowledge element,[103] the Prosecution is required to establish, to the standard of beyond reasonable doubt, that both the perpetrator and the accused fulfil this element. The Prosecution must prove that Mr Al Hassan had the intent to engage in the conduct he is charged of, and knowledge of its consequences when committing the *actus reus*.

51. Article 32(1) and (2) of the Statute further specify that mistake of fact and law may be a ground for excluding criminal responsibility if the mistake negates the mental element required by the crime. Moreover, mistake of law will also allow exclusion of criminal responsibility if it falls within the scope of the "superior orders" or "prescription of law" defence under Article 33 of the Statute.

52. In *Lubanga*, the Pre-Trial Chamber explained that mistake of law may be a defence if the accused was "unaware of a normative objective element of the crime as a result of

[102] Article 67(1)(I) of the Statute, referring to the defendant's right not to have imposed on him any reversal of the burden of proof or any onus of rebuttal.
[103] *E.g.,* Article 8(2)(c)(iv) requires the Prosecution to establish knowledge that the proceedings failed to comply with guarantees recognised as indispensable under international law.

not realising its social significance (its everyday meaning)".[104] Examples include circumstances where the accused acted in a way that he honestly believed was lawful, or when he relied on official rules that he believed had to be obeyed.

53. Where an accused erroneously believes an order to be lawful, this mistake of law may relieve the subordinate of criminal responsibility because he cannot be blamed for not having recognised the unlawfulness of the orders he followed.[105] As explained in the *Peleus* trial:[106]

> It is quite obvious that no sailor and no soldier can carry with him a library of international law, or have immediate access to a professor in that subject who can tell him whether or not a particular command is a lawful one.

54. In line with this precept, in *Wintgen*, the defendant was acquitted because he was unaware that reprisals were illegal under international law.[107] The Court took into consideration the practical training received by the defendant, his intellectual capacities and the nature of the crimes. The Court relied in particular on the fact that it could "not be established that the defendant, a low ranking policeman, knew about criminal nature of his behaviour under humanitarian law." In the specific context of war crimes pertaining to unfair trials, Courts have assessed the extent to which the unlawfulness of the trial was of an "unquestionable" nature: in the case of *Latza*, the defendant – a judge in Nazi occupied Norway – was prosecuted for issuing the death penalty: he asserted a mistake of law and was acquitted due to the existence of interpretative doubt under international law concerning the legality of punishing informants.[108]

55. The British Military Court in the *Almelo* trial found the mistake defence to be constituted in such circumstances were "a reasonable man might have believed that

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[104] ICC-01/04-01/06-803-tEN, para. 316.
[105] Kai Ambos, *Treatise on International Criminal Law: Volume I: Foundations and General Part* (Oxford University Press, 2021), p. 500.
[106] *Peleus* Trial (1945), British Military Court in UNWCC, *Law Reports of the Trials of War Criminals*, Vol. 1, pp. 1-21.
[107] *Wintgen* (1949), Dutch Special Court of Cassation, NJ 1949, 540, 981-5; Excerpts in Annual Digest 1949, 484-486.
[108] *Helmuth Latza and 2 others* (1948), *Eidsivating Lagmannsrett* (Court of Appeal) and the Supreme Court of Norway, UNWCC, *Law Reports of the Trials of War Criminals*, Vol. XIV, pp. 49-85.

this officer had been tried according to law, and that they were carrying out a proper judicial execution."[109]

56. In domestic contexts, the mistake of law defence has operated to protect the accused from evolutions in the law that are out of sync with lived experience. For example, although a German court found that a doctor's non-consensual performance of a circumcision had caused bodily harm to a young boy, the doctor should not be punished because he had acted "subjectively with a clear conscience" and was operating under an unavoidable mistake of law.[110] Mistake of fact has been employed to acquit defendants who had a mistake factual belief as concerns the existence of elements that would have established or eliminated consent on the part of a victim.

57. Under Islamic law, to impose legal punishment, it is necessary to demonstrate that the defendant knew that his actions constituted an offence (*'ilm*).[111] It is also a full excuse to argue that the law was uncertain or that the defendant acted on a mistaken belief based on a text from the Koran or a hadith that is subject to different interpretations.[112]

58. In terms of the applicability of the above to Mr Al Hassan, Mr Al Hassan was operating under a mistake of law as concerns the culpable nature of his contributions to the implementation of Sharia, and as concerns the extent to which specific judgments issued by the Islamic Tribunal complied with guarantees that are indispensable under international law.

59. Mr Al Hassan was a pharmacist by profession: he received no training in police work.[113] He grew up in Mauritania and Libya, two countries where Sharia and Hudud punishments form part of the legal system.[114] In 2012, the ICC Prosecution publicly

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[109] *Trial of Otto Sandrock et al. ("Almelo Trial")*, Case No. 3, British Military Court, 24-26 November 1945, UNWCC, *Law Reports of the Trials of War Criminals*, Vol. I (1947), p. 41.
[110] *Dr K* (2012), Landgericht Koeln, 151 Ns 169/11, 7 May 2012.
[111] MLI-D28-0005-2487, at 2504.
[112] MLI-D28-0005-2487, at 2506; [REDACTED]
[113] [REDACTED]
[114] For what concerns Mauritania, Article 5 of the 1991 Constitution provides that "Islam is the religion of the people and of the State" with the preamble referring to Islam as the "sole source of law". The incorporation of Sharia into Mauritanian law is borne out in the Penal Code of 1983 under Section IV: Attacks on the Morals of Islam with Articles 306 to 309 prohibiting heresy, apostasy, atheism, refusal to pray and adultery. Article 341 prohibits alcohol consumption. Rules of evidence are based on Sharia unless otherwise provided for in law as per Article 363 of Mauritania's Code of Criminal Procedure of 1983. Sharia can also be evidenced in

indicated that Libyan criminal proceedings, entailing the application of Sharia principles, were effectively Rome Statute compliant.[115] Even States that do not apply Sharia have provided technical assistance and aid to criminal proceedings involving the use and application of Sharia:[116] the United Nations has itself engaged with criminal proceedings involving Sharia.[117] Corporal punishments and various aspects

Mauritania's Personal Status Code of 2001. For what concerns Libya, Libya was a dual Court system in which Sharia could serve as a source of law. However, after Gaddafi's takeover of power in 1969, Sharia Courts were subsequently incorporated into the Civil Courts. Revision committees composed of religious and legal scholars were set up to review legislation bringing it into line with Sharia. Other laws derived from Sharia were issued dealing with theft and banditry, unlawful sexual relations, unsubstantiated accusations of sexual relations and drinking alcohol. Fixed Islamic punishments (*hudud*) were attached to such crimes. Penalties are set out in the Penal Code and other laws. For certain crimes, severe punishments are imposed such as corporal punishment or the death penalty: *e.g.*: Law No. 52 of 1974 on defamation provides for the punishment of flogging; Law No. 13 of 1425 on Theft and haraba (banditry) provides for punishments of amputation of the right hand and for cross amputation (right hand and left foot). Moreover, in the Libya Penal Code, *see, e.g.*: Article 2, which provides that any person who *"engages in intercourse outside of a legal marriage shall be sentenced to a hundred lashes."* They may also be sentenced to incarceration with lashing. In respect of minors, Article 3 states that if the offender is between 7 and 15 the measures that may be imposed as *"guidance and awareness and reprimands"* and if the offender is between 15 and 18 the measure is *"severe beatings"*.

[115] ICC-01/11-01/11-167-Red, paras. 42-44. See ICC-01/11-01/11-279, para 45 referring to applicable Sharia provisions.

[116] *See* US-Aid Report, 'The Shari'ah in Somalia The Expanding Access to Justice Program in Somalia (EAJ)', March 2020, p. 1: "In Somalia, while outcomes are not always human rights compliant, marginalized groups stand to receive better protection under shari'ah vis-à-vis the customary xeer, both in terms of the rules applied, and their exposure to corruption and power politics in decision-making. This is not simply a failing of the justice system, but a product of the country's fragility, weak and often coopted institutions, and a deeply entrenched culture of violence and discrimination. In other words, there may be opportunities to improve rights-compliance via applied shari'ah, although sustainable gains would require a level of institutional capacity, civic engagement, and rule of law that does not exist in present-day Somalia". *See also* fns. 2 and 3, referring to the position of Sweden, Denmark and the United Kingdom.

[117] The Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD) provides assistance to Iraq through collection and transmission of evidence that may be used in Iraqi criminal proceedings: see Terms of Reference, S/2018/118, paras. 26-31. Although Iraq criminal procedure includes Sharia, the Terms of Reference contains no carve out as concerns proceedings that would entail the application of Sharia principles. *See also* para. 39 concerning UNITAD involvement in capacity building of Iraqi courts. Also the United Nations Support Mission in Libya (UNSMIL), among other tasks, advises the Libyan Government and provides training to Libyan prosecutors (on this, *see, e.g.,* Report of the Secretary-General on the United Nations Support Mission in Libya, 16 September 2013, para. 39, available at https://unsmil.unmissions.org/report-secretary-general-united-nations-support-mission-libya). In close consultation with the Supreme Judicial Council, UNSMIL has been working to provide support to the national committee established to examine the status of the judiciary and submit recommendations on judicial reform (*see* the UNSMIL website at the following link: https://unsmil.unmissions.org/judiciary-capacity-building). Furthermore, the UN Mission, in partnership with the UN Office of the High Commissioner for Human Rights and UNWOMEN, is committed to a specialised programme of training for all judges appointed to the newly established courts and looks forward to working closely with the Libyan Supreme Judicial Council to implement this programme (*see* the UNSMIL website at the following link: https://unsmil.unmissions.org/unsmil-welcomes-appointment-five-women-judges). In Jordan, UN Action also supported a project that developed legal toolkits for legal practitioners and training for Sharia court judges on handling cases of conflict-related sexual violence (*see* Tenth Consolidated Annual Progress Report on Activities Implemented under the UN Action Against Sexual Violence in Conflict Fund, December 2018, available at https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/06/report/un-action-progress-report-2018/20190531-2018-UN-Action-Annual-Progress-Report.pdf).

of Sharia are practised throughout the world,[118] including Mali, and its use in Timbuktu was never condemned in statements by the United Nations ('UN') Security Council.[119] In traditional Sharia proceedings, there is no right to a lawyer or an appeal.[120] Traditional justice processes in Mali, in the years before and after 2012, were also conducted without lawyers.[121] The notion of 'lawful sanctions', as set out in the Convention against Torture, does not explicitly exclude Sharia punishments: this interpretative ambiguity was agreed and maintained to ensure the ratification and participation in subsidiary bodies.[122] Article 7(2)(e) of the ICC Statute retains the same approach as the Convention against Torture.[123]

60. The use of Qādī's to resolve disputes in Timbuktu and Northern Mali pre-existed and post-existed Ansar Dine: within Al Hassan's *milieu*, traditional/Sharia justice was viewed as more legitimate and fair than the corroded and corrupt formal system.[124] The absence of lawyers and Defence counsel was a phenomenon that pre-dated Ansar

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[118] *E.g.:* In the past, Libya was a dual Court system in which Sharia could serve as a source of law, however, after Gaddafi's takeover of power in 1969, Sharia Courts were subsequently incorporated into the Civil Courts. Revision committees composed of religious and legal scholars were set up to review legislation bringing it into line with Sharia. Other laws derived from Sharia were issued dealing with theft and banditry, unlawful sexual relations, unsubstantiated accusations of sexual relations and drinking alcohol. Fixed Islamic punishments (*hudud*) were attached to such crimes. penalties are set out in the Penal Code and other laws. For certain crimes, severe punishments are imposed such as corporal punishment or the death penalty, *E.g.*: Law No. 52 of 1974 on defamation provides for the punishment of flogging; Law No. 13 of 1425 on Theft and haraba (banditry) provides for punishments of amputation of the right hand and for cross amputation (right hand and left foot); Libya Penal Code. *See, e.g.*: Article 2, which provides that any person who *"engages in intercourse outside of a legal marriage shall be sentenced to a hundred lashes."* They may also be sentenced to incarceration with lashing. In respect of minors, article 3 states that if the offender is between 7 and 15 the measures that may be imposed as *"guidance and awareness and reprimands"* and if the offender is between 15 and 18 the measure is *"severe beatings;* Article 5 of Mauritania's Constitution of 1991 provides that "Islam is the religion of the people and of the State" with the preamble referring to Islam as the "sole source of law". The incorporation of Sharia into Mauritanian law is borne out in the Penal Code of 1983 under Section IV: Attacks on the Morals of Islam with Articles 306 to 309 prohibiting heresy, apostasy, atheism, refusal to pray and adultery. Article 341 prohibits alcohol consumption. Rules of evidence are based on Sharia unless otherwise provided for in law as per Article 363 of Mauritania's Code of Criminal Procedure of 1983. Sharia can also be evidenced in Mauritania's Personal Status Code of 2001, see Constitution of 1991; Penal Code of 1983; Code of Criminal Procedure of 1983; Personal Status Code of 2001.

[119] *See* [REDACTED] and resolutions referred to therein.

[120] Silvia Tellenbach, 'Fair Trial Guarantees in Criminal Proceedings Under Islamic, Afghan Constitutional and International Law' (2004) 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, pp. 929-941, p. 939.

[121] MLI-D28-0004-8743 at 8764.

[122] Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff, 1988), p. 119.

[123] See Discussion Paper of the Bureau of the Committee of the Whole, A/CONF.183/C.1/L.53, 6 July 1998, p. 3.

[124] MLI-D28-0004-3482, at 3486; D-0539, MLI-D28-0005-9317, at 9320; D-0553, MLI-D28-0005-9325-R01 at 9327; D-0211, MLI-D28-0006-3042 at 3043; D-0611, MLI-D28-0006-3098.

Dine.[125] Various members of the Islamic Tribunal in Timbuktu indicated that they would follow the Malakite approach that was indigenous to the region.[126] Al Hassan was not a member of the Sharia Committee[127] and Al Hassan also had no means to predict or control the manner in which the Tribunal would interpret and apply Sharia principles in specific cases.

61. In the years before 2012, Al Qaeda members brokered marriages with women from local tribes.[128] These were considered as 'ordinary marriages' and attracted no State or social condemnation.[129] Arranged marriages existed in Timbuktu before, during and after 2012, and were often negotiated by intermediaries and agreed, based on dowries.[130] Temporary marriages, which sought to evade religious strictures concerning pre-marital relations or prostitution, also took place before 2012.[131] Prosecution witnesses have stated that victims of forced marriage or rape did not complain or describe their situation as non-consensual, at the time of the events,[132] and Defence witnesses will testify that they were told that the women and families had given their consent.[133] The head of a ██████████ task force ██████ ████████████████████████████ did not characterise these marriages as being forced/non-consensual[134] – begging the question as to how Mr Al Hassan could have been expected to have reached a different conclusion, as a matter of fact or law, in 2012.

62. Before, during and after 2012, it was typical to bring marriage disputes and complaints before the Qādī' for resolution, and the preferred approach, before, during

[125] P-0654, ICC-01/12-01/18-T-133-CONF-ENG, p.36, lines 20-24; P-0114, ICC-01/12-01/18-T-060-CONF-ENG, p.45, lines 1-6; MLI-D28-0004-3341, at 3389.
[126] See MLI-OTP-0033-5492, in which Abou Tourab refers to the fact that the members of the Judicial Council in Timbuktu followed the Malakite approach; MLI-D28-0006-3335 at 3340 ('Ansar Dine saying that they are Muslims according to the doctrine of Imam Malik').
[127] ██████████████████████
[128] P-0152, ICC-01/12-01/18-T-032-CONF-ENG, p.79.
[129] P-0152, ICC-01/12-01/18-T-032-CONF-ENG, p.80.
[130] D-0539, MLI-D28-0005-9317-R01, at 9321; P-0152, ICC-01/12-01/18-T-032-CONF-ENG, p.80, lines 1-8.
[131] MLI-D28-0004-2942.
[132] ████████████████████████████; P-0538, ICC-01/12-01/18-T-163-CONF-ENG, p.76, line 15; P-0547, ICC-01/12-01/18-T-152-CONF-ENG, p.29, lines 7-9.
[133] D-0213, MLI-D28-0006-3044 at 3045; D-0240, MLI-D28-0006-0422-R01 at 4234; D-0512, MLI-D28-0006-2611-R02 at 2616, 2617, 2618, 2619; D-0272, MLI-D28-0006-4181-R01, at 4185-4186..
[134] ██.

and after 2012, was to encourage reconciliation where possible.[135] The Malian legal system reflects the same approach to marriage and divorce.[136]

63. The Malian authorities routinely used physical force as a means for installing order among the civilian population, before during and after 2012: the means used by Ansar Dine were not more severe.

64. The above factors negate any element of culpable knowledge on the part of Al Hassan.

B. Superior orders

65. Article 33(1) of the Statute provides that "[t]he fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

    1. (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
    2. (b) The person did not know that the order was unlawful; and
    3. (c) The order was not manifestly unlawful.
    4.

66. In relation to the first condition, Article 33(1) provides the possibility that the order be given by a "military or civilian" superior:[137] the provision does not require the superior to exercise *de jure* military or governmental authority, nor is it necessary for the superior to possess democratic or constitutional legitimacy.[138] This is reflected by the deletion of the phrase 'orders of the legitimate authority', which existed in the text proposed in 1996, from the final draft.[139] The term "superior" merely implies a chain of command of which the subordinate is part. The necessary element of a superior-subordinate relationship can exist within dissident armed forces or other organised

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[135] D-0540, MLI-D28-0006-3084; D-0611, MLI-D28-0006-3098; D-0219, MLI-D28-0006-3046; D-0539, MLI-D28-0005-9317, at 9320; P-0150, ICC-01/12-01/18-T-105-CONF-ENG, p. 61, lines 7-24.

[136] MLI-D28-0005-2225 at 2284; MLI-D28-0004-3108.

[137] *See also Prosecutor v. Delalić*, IT-96-21-T, Judgement, 16 November 1998, para. 378.

[138] Kai Ambos, *Treatise on International Criminal Law: Volume I: Foundations and General Part* (Oxford University Press, 2021), p. 498.

[139] 1996 Preparatory Committee II, p. 102.

armed groups, under responsible command, within the meaning of Article 1(1) of the Protocol Additional II to the Geneva Conventions, "since they are organized along hierarchical lines and act according to the principles of order and obedience (…) the mere fact that an insurgent group is labelled 'criminal' or 'terrorist' by the State it is fighting against does not preclude the invocation of the superior order defence."[140]

67. The defence of superior orders and the mode of liability of command responsibility "represent two sides of the same coin":[141] since the Rome Statute extends the obligations of responsible command to leaders of non-State groups, it necessarily extends the perimeters of the defence of superior orders to the body of rules and laws adopted and applied by such non-State groups. The plain wording of Article 33(1) also captures obligations stemming from the issuance of orders by non-Governmental civilians. If the drafters had intended to limit the scope of this article to governmental military or civilian authorities, it would not have been necessary to include the disjunctive phrase "order of a Government or of a superior, whether military or civilian".

68. It follows from the above that the legal obligation does not need to derive from a legitimate constitution order: rather, what matters is that the accused considered that he had no moral choice but to obey. The International Military Tribunal ('IMT') of Nuremberg, in *United States v. Krauch et al.,* recognised that "while an order emanating from a superior officer or from the government is not, of itself, a justification for the violation of an international law (though it may be considered in mitigation), nevertheless, such an order is a complete defense where it is given under such circumstances as to afford the one receiving it of no other moral choice than to comply therewith."[142]

69. In the Italian case of *Kapler,* in acquitting the defendant was acquitted of a specific charge, due to the defence of superior orders, the Court took into consideration the

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[140] Kai Ambos, *Treatise on International Criminal Law: Volume I: Foundations and General Part* (Oxford University Press, 2021), p. 499

[141] Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court* (C. H. Beck/Hart/Nomos, 2008), p. 929.

[142] US Military Tribunal Nuremberg, *United States v. Krauch et al.* (the IG Farben Trial), Judgment of 30 July 1948, p. 1176. *See also*, Canadian Supreme Court, *R. v. Finta* [1994] 1 SCR 701; International Law Commission in 1950 of the Principles of the Nuremberg Charter and Judgment; *see* U.N. General Assembly Official Records, 5th Sess., Supp. No. 12 (A/1316), Principle IV.

mental habit to obey that had been inculcated in the organisation, the fact that an order with the same content had been executed in various combat zones and that it had been issued by the Head of State and Supreme Commander of armed forces, and therefore had great moral strength.[143]

70. The term "order" must also be interpreted broadly to encompass "all oral or written or otherwise expressed demands, addressing a certain person or groups of persons individually or by describing their functions to behave in a specific way".[144] Any form of communication, express or implicit, can be used to establish the existence of an order.[145] The order need not be accompanied by a threat.[146]

71. The second condition provides that the accused must not have known that the order was unlawful: an accused cannot be responsible if they were not aware of the unlawfulness of the orders they obeyed.

72. The third condition is that the order cannot be "manifestly unlawful": this implies that subordinates can only be expected to deviate from such orders if they are aware that the order contradicts a legal obligation which is "simple and [...] universally known, and [...] no doubt can exist with regard to its application."[147] If an issue is not sufficiently settled in law or practice, then the order cannot be "manifestly unlawful".[148] A reasonable person must be able to recognise the manifest illegality of

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[143] Tribunale Militare Territoriale di Roma, sentenza n. 631, 20 July 1948.

[144] Kai Ambos, *Treatise on International Criminal Law: Volume I: Foundations and General Part* (Oxford University Press, 2021), p. 497; Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court* (C. H. Beck/Hart/Nomos, 2008), mn 17; *see also*: Andreas Zimmermann, "Superior Orders", in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court* (Oxford University Press, 2002), p. 969. *See also*: Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford University Press, 2012), p. 293: "The notion of 'order' in Article 33 should be taken to have a broad scope and extend to any written or unwritten communication between a superior and his subordinate within a balance of power, i.e. presupposing that the superior has the right to demand obedience. An order should reach its addressee and clearly state what is expected from the recipient. An order can be directed to an individual or to an entity."

[145] *Id.*

[146] *Prosecutor v. Erdemović*, IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, 7 October 1997, para. 15; Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford University Press, 2012), p. 295.

[147] William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2016), p. 668; *see also*: Andreas Zimmermann, "Superior Orders", in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court* (Oxford University Press, 2002), p. 970; Kai Ambos, *Treatise on International Criminal Law: Volume I: Foundations and General Part* (Oxford University Press, 2021), p. 500.

[148] William A. Schabas, "Art. 33 Superior orders and prescription of law," in *The International Criminal Court: A Commentary on the Rome Statute* (1st ed. 2016), p. 668; *see also* Andreas Zimmermann, "Superior Orders,"

the order- the manifest illegality must therefore be "obvious to a person of ordinary understanding".[149]

73. This condition of manifest unlawfulness is interpreted in a particularly strict manner in the context of soldiers,[150] and the police:[151] for the latter, the very concept of effective policing is predicated on compliance and respect for rules. The notion of a rules-based system of order disintegrates if police are granted too much autonomy to question their duty to obey the system they are entrusted to enforce.

74. The defence of superior orders also plays an essential role in ensuring order and obedience in weakened or fragile states: as explained by Osiel, [152]

> In many countries, people have preconceived loyalties to tribes, clans, and faiths. To allow criminal punishment for following commands of a superior only further weakens the frail system they already have.

75. The defence of superior orders must also be viewed and construed in conjunction with the defence of mistake of law, in particular, as concerns the situation of a person who believed that he was obliged to follow orders.

76. As a member of the Shurta, Mr Al Hassan was obliged to follow the orders of the Emir of the Islamic Police, the Emirate of Timbuktu, and the Islamic Tribunal, that

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in *The Rome Statute of the International Criminal Court* (Cassese et al. eds. 2002), p. 970; Kai Ambos, "Grounds Excluding Responsibility ('Defences'), in *Treatise on International Criminal Law: Vol. 1* (2021), p. 500; *see also* Paola Gaeta, "The Defence of Superior Orders: The Statute of the International Criminal Court *versus* Customary International Law," 10 EJIL 172 (1999), p. 186.

[149] Lauterpacht, as cited by Andreas Zimmermann, 'Superior Orders', in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) p. 970.

[150] *United States v. Huet-Vaughn, 43 M.J. 105, 114-15 (C.A.A.F. 1995)* holding at 107, that the duty to disobey an unlawful order applies only to "a positive act that constitutes a crime [that is] so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness."

[151] *R. v. Finta* [1994] 1 SCR 701: "peace officer and the military orders defences put to the jury here exist under Canadian domestic law and relate to arguments based on authorization or obedience to national law. The rationale for these defences is that a realistic assessment of police or military organizations requires an element of simple obedience; there must be some degree of accommodation to those who are members of such bodies. At the same time, totally unthinking loyalty cannot be a shield for any human being, even a soldier. The defence is not simply based on the idea of obedience or authority of *de facto* national law, but rather on a consideration of the individual's responsibilities as part of a military or peace officer unit. Essentially obedience to a superior order provides a valid defence unless the act is so outrageous as to be manifestly unlawful. Further, an accused will not be convicted of an act committed pursuant to an order wherein he or she had no moral choice but to obey" (…). "The rationale for these defences is that a realistic assessment of police or military organizations requires an element of simple obedience; there must be some degree of accommodation to those who are members of such bodies."

[152] Gary D. Solis, "Obedience of Orders and the Law of War: Judicial Application in American Forums", *American University International Law Review* 15, no. 2 (1999): 481-526 at fn. 157: citing Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline and the Law of War* (Transaction Publishers, 1999), p. 97.

were applying Sharia Law.[153] The Islamic Police were obligated to implement hudud punishments 'because humans do not have the right or do not have any say in these punishments so as soon as the judge pronounces the sentence, the police should execute it'.[154]

77. The specific degree of moral compulsion faced by Mr Al Hassan was further overlaid by the particular emphasis placed on Sharia in the Koran, according to which Sharia is viewed as being the "path to be followed", the "law to be obeyed by every Muslim".[155] The norms of Sharia law come from the Quran and the Sunna and are therefore religious, transcendental, considered as non-derogable and at the top of hierarchy of norms of Islam.[156] They are meant to be the positive law enforceable on

[153] [REDACTED] ; P-0065, ICC-01/12-01/18-T-049-CONF-ENG, p.71, lines 2-21. Referring to the system in general, D-0529, MLI-D28-0006-3075 at 3077, D-0605, MLI-D28-0006-3094 at 3096 para 13.

[154] [REDACTED]

[155] *See* MLI-D28-0005-1247, at 1456: "155. And this is a blessed Book (the Qur'ân) which We have sent down, so follow it and fear Allâh (i.e. do not disobey His Orders), that you may receive mercy (i.e. be saved from the torment of Hell)."; MLI-D28-0005-1247, at 1391: "140. And it has already been revealed to you in the Book (this Qur'ân) that when you hear the Verses of Allâh being denied and mocked at, then sit not with them, until they engage in a talk other than that; (but if you stayed with them) certainly in that case you would be like them. Surely Allâh will collect the hypocrites and disbelievers all together in Hell."; MLI-D28-0005-1247, at 2003-2004: "19. And those who believe in (the Oneness of) Allâh and His Messengers – they are the *Siddîqûn* (i.e. those followers of the Prophets who were first and foremost to believe in them), and the martyrs with their Lord, they shall have their reward and their light. But those who disbelieve (in the Oneness of Allâh – Islâmic Monotheism) and deny Our *Ayât* (proofs, evidences, verses, lessons, signs, revelations, etc.) – they shall be the dwellers of the blazing Fire."

[156] *See e.g.*, MLI-D28-0005-1247, at 1351: "132. And obey Allâh and the Messenger (Muhammad صلى الله عليه وسلم) that you obtain mercy." (Footnote omitted); MLI-D28-0005-1247, at 1378: "69. And whoso obeys Allâh and the Messenger (Muhammad صلى الله عليه وسلم), then they will be in the company of those on whom Allâh has bestowed His Grace, of the Prophets, the *Siddiqûn* (those followers of the Prophets who were first and foremost to believe in them, like Abu Bakr As-Siddîq رضي الله عنه), the martyrs, and the righteous. And how excellent these companions are!"; MLI-D28-0005-1247, at 1515-1516: "71. The believers, men and women, are *Auliyâ'* (helpers, supporters, friends, protectors) of one another; they enjoin (on the people) *Al-Ma'rûf* (i.e. Islâmic Monotheism and all that Islâm orders one to do), and forbid (people) from *Al-Munkar* (i.e. polytheism and disbelief of all kinds, and all that Islâm has forbidden); they perform As-Salât (Iqâmat-as-Salât), and give the *Zakât* and obey Allâh and His Messenger (صلى الله عليه وسلم) . Allâh will have His Mercy on them. Surely Allâh is All-Mighty, All-Wise."; MLI-D28-0005-1247, at 2028: "16. So keep your duty to Allâh and fear Him as much as you can; listen and obey, and spend in charity; that is better for yourselves. And whosoever is saved from his own covetousness, then they are the successful ."; MLI-D28-0005-1247, at 1734-1735: "52. And whosoever obeys Allâh and His Messenger (صلى الله عليه وسلم), fears Allâh, and keeps his duty (to Him), such are the successful. 53. They swear by Allâh their strongest oaths, that if only you would order them, they would leave (their homes for fighting in Allâh's Cause). Say: "Swear you not; (this) obedience (of yours) is known (to be false). Verily, Allâh is Well-Acquainted with what you do. 54. Say: "Obey Allaâh and obey the Messenger (صلى الله عليه وسلم), but if you turn away, he (Messenger Muhammad صلى الله عليه وسلم) is only responsible for the duty placed on him (i.e. to convey Allâh's Message) and you for that placed on you. If you obey him, you shall be on the right guidance. The Messenger's duty is only to convey (the message) in a clear way (i.e. to preach in a plain way)." 55. Allâh has promised those among you who believe and do righteous good deeds, that He will certainly grant them succession to (the present rulers) in the land, as He granted it to those before them, and that He will grant them the authority to practise their religion which He has chosen for them (i.e. Islâm). And He will surely give them in exchange safe security after their fear (provided) they (believers) worship Me and do not associate

Muslims, "an all-embracing body of religious duties, the totality of Allah's commands that regulate the life of every Muslim in all its aspects".[157]

78. Within this belief system, it is virtually inconceivable for a believer, who is not an ulema, to question the authority and dictates of a Qādī'. For over 1400 years, the qādī or judge has been a key figure in Muslim societies across the globe.[158] 'Sometimes a trained scholar, sometimes not, the qādī, performs judicial, administrative, and symbolic functions.'[159] The Qādī in the Islamic tradition occupies a supreme status and are regarded as implementing a divine function on Earth.[160] 'Given his prestigious social status, and his knowledge of the Sharí'ah jurisprudence, the al-qāḍī is perceived as the key institution for the application and preservation of Islamic law.'[161] The Qādī' decides based on the Quran and the Hadith and his decisions are believed to thus represent the will of God through the application of Islamic law to the case at issue.[162]

79. Hence, the implementation of the Qādī's rulings is seen as the implementation of the divine will and not something to be questioned by those with less expertise and knowledge than a Qādī, i.e. the Islamic Police. Denying the implementation of his decisions can arguably constitute an act of disbelief on the part of those tasked to implement or to execute Islamic punishments be it hūdūd, qīsas or t'āzir. An act of disbelief could be considered as apostasy. Apostasy in some regions is punished by death.[163]

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anything (in worship) with Me. But whoever disbelieves after this, they are the *Fâsiqûn* (rebellious, disobedient to Allâh). 56. And perform *As-Salât* (*Iqamat-as-Salât*), and give *Zakât* and obey the Messenger (Muhammad صلى الله عليه وسلم) that you may receive mercy (from Allâh)."

[157] Joseph Schacht, *An Introduction to Islamic Law* (Oxford University Press, 1983).

[158] Rudolph Peters et al. 'Preface' in Rudolph Peters et al (eds), *Dispensing Justice in Islam: Qadis and their Judgements*, Brill, 2006, ix-x.

[159] *Ibid.*

[160] Adel Maged, 'Shari'ah Sources and Reflections on Integrity' in Morten Bergsmo and Viviane E. Dittrich (eds), *Integrity in International Justice* (Torkel Opsahl Academic EPublisher, 2020), p. 109.

[161] *Ibid.*, p. 114.

[162] *See e.g.*, MLI-D28-0005-1247, at 1376: "59. O you who believe! Obey Allâh and obey the Messenger (Muhammad صلى الله عليه وسلم), **and those of you (Muslims) who are in authority**. And if you differ in anything amongst yourselves, refer it to Allâh and His Messenger (صلى الله عليه وسلم) if you believe in Allâh and in the Last Day. That is better and more suitable for final determination." (Emphasis added).

[163] Mauritania's Code of Criminal Procedure of 1983, Article 306.

C. Duress

80. The defences of necessity and duress are predicated on the notion that:[164]

> Although moral involuntariness does not negate the *actus reus* or *mens rea* of an offence, it is a principle which, like physical involuntariness, deserves protection (…). It is a principle of fundamental justice that only voluntary conduct – behaviour that is the product of a free will and controlled body, unhindered by external constraints – should attract the penalty and stigma of criminal liability. Depriving a person of liberty and branding him or her with the stigma of criminal liability would infringe the principles of fundamental justice if the person did not have any realistic choice.

81. Article 31(1)(d) of the Statute codifies this situation of necessity and/or duress and provides that "[t]he conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

5. (i) Made by other persons; or
6. (ii) Constituted by other circumstances beyond that person's control."

82. Article 31(1)(d) therefore sets out three requirements which excludes criminal responsibility. At the time of the person's conduct:

- they or another person faced a threat of imminent death or of continuing or imminent serious bodily harm, made by other persons or due to circumstances beyond their control;
- they took necessary and reasonable acts to avoid this threat; and
- they intended not to cause a greater harm than the one sought to be avoided.

83. The first condition can concern either the accused himself, or another person. This allows the defendant to take necessary and reasonable steps to safeguard himself from peril and also family members. The threat does not need to be explicitly stated.

[164] *R. v. Ruzic*, [2001] 1 S.C.R. 687, 2001 SCC 24.

84. The phrase "other circumstances" encompasses situations "from other sorts of endangerment by natural forces or technical menaces".[165] This element embodies the separate defence of necessity (as compared to duress). The Canadian Supreme Court explained the distinction between necessity and duress as follows:[166]

> Duress by threats is applicable where an accused is threatened by someone to commit a crime or else risk being physically injured or killed. Duress of circumstances, which is analogous to our defence of necessity, is available where an accused commits a crime to avert death or serious injury, but no person is demanding that he do so.

85. In *Ongwen*, intersectionality of the duress and capacity arguments has been discussed by Amici, arguing that it must be "how a particular individual perceived the circumstances in which she or he acted, even if this perception may have been inaccurate". Further, "[…]for circumstances under a person's control to constitute a threat depends on how the individual constructs his or her understanding of those circumstances."[167]

86. In terms of imminence, in the *Ongwen* case, the Trial Chamber established that the words 'imminent' and 'continuing' refer to the nature of the threatened harm, and not the threat itself. The Statute does not refer to an 'imminent threat of death or a 'continuing or imminent threat' of serious bodily harm. Rather, the threatened harm is to either be killed immediately ('imminent death'), or to suffer serious bodily harm immediately or in an ongoing manner ('continuing or imminent serious bodily harm').[168] This is consistent with the approach adopted in the Abdul-Hassein case, in which the United Kingdom court of appeal quashed the conviction of Shiite Muslims, who hijacked a plane to avoid being deported back to Iraq.[169] The Court explained that although it was necessary to demonstrate that the risk entailed an "imminent peril of death of serious injury (…) the execution of the threat need not be immediately in prospect":[170] as put by the Court, "if Anne Frank had stolen a car to escape from Amsterdam and been charged with theft, the tenets of English law would not, in our

[165] Albin Eser, "Article 31", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Oxford University Press, 2008), mn. 54.
[166] *R. v. Ruzic*, [2001] 1 S.C.R. 687, 2001 SCC 24, at para 68.
[167] ICC-02/04-01/15-1930, paras. 41, 48.
[168] ICC-02/04-01/15-1762-Red, para. 2582.
[169] *R. v. Abdul-Hussain et al.* [1998] EWCA Crim 3528.
[170] *Ibid.*, p. 11.

judgment, have denied her a defence of duress of circumstances, on the ground that she should have waited for the Gestapo's knock on the door."[171] What matters is that the risk is in existence and affects the mind of the defendant at the time he commits the criminal act/s in question.[172]

87. The second element of duress prescribed by Article 31(1)(d) is that the person concerned must have had a necessary and reasonable reaction to avoid the threat. The *Ongwen* Chamber found that "the person is not required to take all conceivable action to avoid the threat, irrespective of considerations of proportionality or feasibility. The Chamber must specifically consider what, if any, acts could 'necessarily and reasonably' avoid the threat, and what the person should have done must be assessed **under the totality of the circumstances** in which the person found themselves."[173]

88. The case of *Breyer v. Ashcroft* is instructive as concerns the proper construction of the 'totality of circumstances'.[174] In that case, the Court considered the circumstances of a dual US-German citizen, who joined the Waffen-SS during World War II. The Court concluded that he had enlisted voluntarily, at the age of 17, but having done so, was obligated to remain for the duration of the war, including after he turned 18. He was told that his family would be harmed if he did not return from leave. During his service, he took steps to minimise the degree of his participation, although he did not ask to be transferred to a different section or unit. He did not always carry a weapon and told other guards that he could not shoot a prisoner. He was stationed at Buchenwald and Auschwitz was aware of the existence of a mass murder campaign, although he never personally harmed a prisoner . Although he failed to return from a scheduled leave at the end of 1944, he then tried to rejoin his unit. He claimed he did so due to fear that he would be shot as a deserter. He remained with the unit until his capture by the Soviets. The Court found that the totality of circumstances did "not paint a picture of a person committed to serve". His initial volition did not therefore undermine the overall conclusion that his service was not voluntary.

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[171] *Ibid.,* p. 12.
[172] *Ibid.*, p. 11.
[173] ICC-02/04-01/15-1762-Red, para. 2583 (emphasis added).
[174] *Breyer v. Ashcroft,* 350 F.3d 327, 328-31 (3d Cir. 2003).

89. Drawing on domestic precedents, the availability of State mechanisms for protection from the risk is also an important consideration, as is the converse situation, namely the absence of such mechanisms, or even the further risk that seeking protection from the State would *compound* the risk.[175] It is also a cardinal principle of human rights law that an individual cannot be required or expected to displace themself to a (third) non-national State.[176] Forced exile is also tantamount to forced deportation and transfer, and is a form of ethnic cleansing, which it takes place along ethnic lines.[177] The principle that an individual cannot be required or expected to choose exile thus constitutes the flip-side of the protection against ethnic cleansing. An individual cannot voluntarily choose to be ethnically cleansed - the choice of going into exile to avoid a massacre cannot be framed as a reasonable or voluntary choice.

90. The third element of duress provided in Article 31(1)(d) entails demonstrating that the person did not intend to cause a greater harm than the one sought to be avoided. This general subjective requirement does not require the Defence to establish that the person actually avoided the greater harm, but only that he/she intended to do so. To evaluate whether one intended harm is 'greater' than another, it is necessary to take into account the character of the harms under comparison.[178]

91. Duress, therefore, involves the lack of choice or willpower in the face of a threat of immediate harm, and the fact that the person under threat could not have been reasonably expected to resist the threat.[179] The affirmative defence of duress is

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[175] In *R. v. Ruzic*, [2001] 1 S.C.R. 687, 2001 SCC 24, the Court accepted the defendant's explanation that she had not sought police protection because "she believed that the police in Belgrade were corrupt and would do nothing to help her"; *see also* *Public Prosecutor v Ng Pen Tine and Another* [2009] SGHC 230, para. 160: "[…] I believe that the 2nd accused feared the consequences that would flow should he have alerted the respective authorities. Alerting them would not only have been ineffective in dissipating any threat on the lives of both the 2nd accused and his family in Johore, it could even have compounded matters. As a general rule, there could be situations where no amount of police protection would be effective to counter the threats levied at the accused and the accused's family members."

[176] Article 9 Universal Declaration of Human Rights protects 'freedom from exile', providing that "No one shall be subjected to […] exile".

[177] It is interesting to note that the ICRC has recently declared in the Ukraine/Russia crisis that it had not been involved with any forced evacuation of transfer of civilians from Ukraine to Russia as acting against people's will is in violation of its principle (on this, *see* ICRC, 'Ukraine: As Humanitarian crisis deepens, parties urgently need to agree on concrete measures; misinformation risks lives', 29 March 2022; IFRC, 'Red Cross in Ukraine: Your Questions Answered'). The ICRC had been accused of complicity in Russia's forced deportation of Ukrainians and thus the Russian policy of ethnic cleansing.

[178] ICC-02/04-01/15-1762-Red, para. 2584.

[179] Kai Ambos, *Treatise on International Criminal Law: Volume I: Foundations and General Part* (Oxford University Press, 2021), pp. 345, 347, *see also* fns. 419, 433.

defined as an excusatory defence, and is generally accepted for all crimes, including murder.

92. Mr Al Hassan's role in the Islamic Police in 2012 must be viewed in light of the totality of circumstances that existed at the time. His conduct in the Islamic Police was not voluntary since his actions were spurred on one hand, by the need for protection to ensure his survival and that of his family *vis-à-vis* the ethnic cleansing conducted by the Malian army, and on the other, the real risk that disobedience to Al Qaeda emirs would have engendered severe harm. Caught between the frying pan and the fire, like many others, he chose the least-worst option.

93. In 2012, Mr Al Hassan faced the threat of imminent death or injury from the Malian army. The Malian army threatened, killed, disappeared and tortured members of the Touareg community, indiscriminately.[180] At the beginning of 2012, Al Hassan lost his source of income,[181] while his wife was pregnant. He did not have the financial means to relocate and exile would have required a dangerous journey and exposed his family to both severe security threats and risks *en route*, and humanitarian and health risks on arrival in refugee camps. Given that his wife was █ months pregnant in April 2012, it was not a safe and reasonable option in his particular circumstances.

94. Touaregs who remained in the North of Mali had no choice but to either join the MNLA or Ansar Dine.[182] Kel Ansar religious leaders in Zohro gave their edict to the youth of Zohro: given allegation that MNLA members had engaged in criminality, they should join Ansar Dine not the MNLA.[183] When Ansar Dine arrived in Timbuktu, the leaders promised to help and protect the local population from crime. Working with Ansar Dine protected Al Hassan and his family from the risk of death or injury from the Malian army, and was the least-worst option in the circumstances.

95. When Al Hassan joined the Islamic Police, there was an Ansar Dine-MNLA agreement that was poised to usher in a more moderate form of Azawadi governance,

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[180] *See* below fn. 193.
[181] D-0616, MLI-D28-0006-3099; D-0627, MLI-D28-0006-3101; *see also* D-0544, MLI-D28-0006-3086.
[182] *See* above fns. 19, 56.
[183] MLI-D28-P-0616, MLI-D28-0006-3099; *See also* P-0654, ICC-01/12-01/18-T-133-CONF-ENG ET 15-09-2021, p. 84, line 25 – p. 85, line 16; P-0065, ICC-01/12-01/18-T-050-CONF-ENG ET 20-11-2020, p.18, lines 14-25.

based on goals of protection and self-determination.[184] It was agreed that Koranic principles, following the Malakite interpretation, would ensure the rule of law.[185] This period coincided with a calm and lenient period as concerns Ansar Dine governance in Timbuktu.[186] When the agreement dissolved, the MNLA was expelled from Timbuktu. From this point onwards, Ansar Dine was the only choice: it was no longer feasible for Mr Al Hassan to leave Ansar Dine and seek the protection of the MNLA.

96. Moreover, if Al Hassan had subsequently renounced his position in the Islamic Police or refused to obey orders, he would have been punished as a traitor, banished or compelled to flee into exile.[187] This was a founded and not fanciful risk. Members who disobeyed were publicly flogged,[188] and traitors or perceived spies were put on trial,[189] and executed if found guilty.[190] Exile and banishment would have continued to expose Mr Al Hassan and his family to harm. Throughout 2012, the Malian army continued to attack and kill persons they suspected of being associated with Ansar Dine or Al Qaeda.[191] This included a group of innocent Dawa preachers near the Mauritanian border.[192] The risk presented by the Malian army is further demonstrated by the army's actions upon arrival in Timbuktu: several innocent 'teint clair' were tortured, disappeared and killed.[193] And, when Al Hassan and his family did in fact flee and go into exile, his daughter fell ill during the journey, and died.[194] Al Hassan's torture at the hands of the Malian authorities in the DGSE further bolsters the reasonable foundation to conclude that he faced a real risk of death and physical injury, if he were to have left the protection of Ansar Dine.

[184] D-0219, MLI-D28-0006-3046; MLI-OTP-0001-4271, 4272.
[185] MLI-OTP-0001-4271, 4272.
[186] D-0512, MLI-D28-0006-2611 at 2614; P-0641, ICC-01/12-01/18-T-139-CONF-ENG, pp.57, 60 P-0065, ICC-01/12-01/18-T-049-CONF-ENG, p.44.
[187]
[188] P-0065, ICC-01/12-01/18-T-049-CONF-ENG, p.18, line 15 – p.19, line 12 (commenting MLI-D28-0004-3531 which is a screenshot of MLI-OTP-0018-0147)
[189] P-0099, ICC-01/12-01/18-T-146-CONF-ENG, p. 8, lines 7-12 ; P-0065, ICC-01/12-01/18-T-049-CONF-ENG, p. 15, line 2 – p.16, line 25, p.18, lines 7-21; P-0150, ICC-01/12-01/18-T-116-CONF-ENG, p.7, lines 1-5.
[190] P-0065, ICC-01/12-01/18-T-049-CONF-ENG, p. 15, line 2 – p.16, line 25, p.18, lines 7-21.
[191] P-1086, ICC-01/12-01/18-T-122-CONF-ENG, p. 17, lines 17-25 – p.18, lines 1-7.
[192] P-99 MLI-D28-0004-8029; P-0654, ICC-01/12-01/18-T-133-CONF-ENG, p.66, line 6 – p.71, line 5.
[193] D-0511, MLI-D28-0006-2629-R01, at 2637; D-0539, MLI-D28-0005-9317-R01, at 9319; D-0528, MLI-D28-0006-3073 at 3074; P-0623, ICC-01/12-01/18-T-030-CONF-ENG, p.16, lines 2-6; P-0065, ICC-01/12-01/18-T-050-CONF-ENG, p.60, lines 22–25.
[194] MLI-D28-0005-2589.

97. Where possible, Mr Al Hassan took steps to protect the local population.[195] His presence and participation further facilitated constructive dialogue and assistance to the local population.[196] His specific contributions to the implementation of Islamic justice were also inter-changeable: if he had not been there, someone else – potentially of a less gentle nature – would have stepped into his shoes.

98. In the totality of circumstances, his conduct was necessary and reasonable: it therefore lacks moral or penal blameworthiness.

SECTION III: EVIDENTIARY ISSUES

99. The evidence underpinning the Prosecution case is fundamentally contaminated and unreliable. The version presented in Court does not correspond to lived reality in Timbuktu.

100. Although the Prosecution had over eight years to investigate and bring its case, many witnesses were interviewed several years after the fact. By that point, their evidence had been irrevocably contaminated. Rumours had calcified as fact and memory and recollections had been tainted by exposure to media and NGO narratives.

101. Timbuktu experienced victor's justice. The media, funded by the same victors, presented a distorted or exaggerated picture of events and honed in on negative aspects, while ignoring the positive.[197] The pragmatic reality was also that after the Malian army returned to Timbuktu in 2013, anyone who spoke favourably (or truthfully) of the Islamists risked being labelled a terrorist or terrorist sympathiser.[198]

102. This was no small risk. The French and Malian forces 'neutralised' key persons of interest and several others were arbitrarily arrested, detained and tortured –

[195] D-0544, MLI-D28-0006-3086; D-0553, MLI-D28-0005-9325-R01; D-0272, MLI-D28-0006-4181-R01; D-0243, MLI-D28-0006-3053, at 3054; D-0147, MLI-D28-0006-3040 at 3041.
[196] *Id.*
[197] [REDACTED]. See also P-0150, ICC-01/12-01/18-T-106-CONF-ENG, pp.6-7, regarding the public exaggerating and fabricating accounts.
[198] [REDACTED].

due to a real or perceived association with Ansar Dine.[199] The ongoing 'fight against terrorism' in the North, coupled with the ICC Prosecution's silence regarding the crimes of the Malian army and DGSE, has equally had a chilling effect on Defence investigations.

103. Spurred by the constraints of donor funding, NGOs pressed victims to supply details that would conform to funding conditions.[200] Armed with good intentions, NGOs encouraged and according to [REDACTED], even 'harassed'[201] individuals to describe their experiences as 'rape' or 'sexual violence', even if the accounts lacked credibility or reliability.[202] Through public awareness campaigns, NGOs disseminated language and terminology that assisted victims to reframe their experiences along the 'right' lines.[203] To satisfy the requirements of judicial complaints, NGOs resorted to problematic interrogation and identification techniques with vulnerable individuals: using highly suggestive questions, and video-evidence and photographs of specific perpetrators, without installing necessary safeguards to eliminate confirmation bias or contamination, or ensure true memory recall.[204]

104. The Prosecution piggy-backed off these flawed processes, using the same NGO intermediaries and interpreters, who had tainted the evidence in the first place, to finesse Prosecution evidence.[205]

105. The evidence of key insider witnesses was also collected after they had been exposed to severe forms of psychological and physical mistreatment at the hands of domestic authorities. The ICC Prosecution also partnered with the DGSE – the entity responsible for the arbitrary detention and torture of Mr Al Hassan – and relied upon them to identify and constrain potential suspects and witnesses. The fruits of DGSE interrogations were used to shape the contours and content of this case. The

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[199] P-0160, ICC-01/12-01/18-T-066-CONF-ENG, p. 63, lines 11-24; P-0065, ICC-01/12-01/18-T-045-CONF-ENG, p.54, line 8-25 – p. 55, line 1-11; P-0641, ICC-01/12-01/18-T-140-CONF-ENG, p.12, lines 23-25 – p.13, lines 1-7; P-0099, ICC-01/12-01/18-T-148-CONF-ENG, p.44, lines 1-25; MLI-D28-P-0006/D-0006, MLI-D28-0006-3035.
[200] D-0524, MLI-D28-0006-3071 at 3072.
[201] [REDACTED]
[202] D-0240, MLI-D28-0006-3050, at 3051-3052; D-0524, MLI-D28-0006-3071, at 3072.
[203] D-0240, MLI-D28-0006-4222-R01 at 4236; D-524, MLI-D28-0006-3071, at 3072; MLI-D28-0004-7042 at 7056; P-0547, ICC-01/12-01/18-T-153-CONF-ENG, p.18, line 13 – p.20, line 13.
[204] MLI-OTP-0039-0574 at 00:06:45:24; MLI-OTP-0039-0574 at 00:19:25-00:19:56; D-524, MLI-D28-0006-3071, at 3072.
[205] P-0524, MLI-OTP-0080-4653; MLI-OTP-0080-4697; D-0524, MLI-D28-0006-3071, at 3072.

Prosecution interrogated several individuals (including Mr Al Hassan and ███), while they were still held in an inherently coercive environment. Even though the detained witnesses described symptoms of physical and psychological trauma,[206] substantive interviews were conducted with no prior assessment as to the witness's physical and psychological capacity. The reliability and quality of interview responses were irrevocably undermined by conditions of uncontrollable stress, generated by both environmental factors and interrogation techniques.[207]

106. As will be explained by Dr. Charles Morgan III, a leading expert on the impact of stress conditions on cognitive capacity and recall, stress generates chemical changes in the brain, which impacts on both cognitive functioning and compliance.[208] This causal relationship exists irrespective as to whether the stress was generated intentionally or unintentionally.[209] It can also be generated by extrinsic environmental factors. This chemical consequence can be amplified through specific interrogation techniques, which replace true recollection with learned memories.[210] The quality and reliability of Prosecution evidence was thus fundamentally tainted through these processes.

107. Defence expert Nikolaous Kalantzis will attest significant the methodological errors, which vitiate the Prosecution's attempt to buttress its weak evidential foundation with expert evidence.[211] Dr Brian Sommerlad will also describe the inconsistency and incompatibility between Prosecution witnesses' accounts of their injuries, and the photographic evidence lead to support them.[212]

[206] On the physical and psychological trauma suffered from Al Hassan, *see*, respectively, MLI-D28/0002-0500 and MLI-D28-0002-0535. The other witnesses went through similar traumas.
[207] MLI-D28-0005-9967, at 9975; D-0502, MLI-D28-0005-9967-R01 at 9969-9978.
[208] MLI-D28-0005-9967-R01, at 9973.
[209] MLI-D28-0005-9967-R01, at 9973.
[210] MLI-D28-0005-9967-R01, at 9975.
[211] MLI-D28-0005-9928-R01, at 9946.
[212] MLI-D28-0006-2778-R01.

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Dated this 10th Day of October 2023
At The Hague, The Netherlands