SEPARATE AND PARTLY DISSENTING OPINION OF JUDGE ANTOINE KESIA-MBE MINDUA

I. INTRODUCTION

1. As this case has progressed, the need to underscore what it *is not about* has become increasingly apparent to me. Because it also involves matters of society and religion, I wish to ensure that no room is left for potential critics to claim that the decision we now deliver passes any value judgement whatsoever on a particular people, custom, religion, society, legal system or community.

2. The Rome Statute was born of compromise between the various societal, as well as judicial, cultures of the world. I note that its Preamble recognizes that diversity by pluralizing the word "culture" in its opening lines: "The States Parties to this Statute, [c]onscious that all peoples are united by common bonds, *their cultures* pieced together in a shared heritage […]". Not only does the Rome Statute recognize the plurality of cultures; it also places them on an equal footing.

3. The decision we now give on Mr Al Hassan's criminal responsibility does not address the matter of whether it is legitimate for the Tuareg people to organize themselves in a bid to take control of a territory by force of arms and defend their rights, in particular their right to self-determination. The Trial Judgment does, however, mention that Ansar Dine was calling for the independence of northern Mali and wanted to establish on that territory an Islamic State where its interpretation of sharia would be applied in lieu of the Malian Constitution.[1] Humanitarian law, as a rule, governs only the *jus in bello*: it determines, once an armed conflict has begun, which acts are permissible and which are not, irrespective of who initiated the conflict, the initiator's motives or indeed the legitimacy of its initiation. That notwithstanding, I wish to offer an aside on the matter here. I wish to point out as a matter of principle that it is legitimate for this people, or any other people, to take up arms against their government, to the extent, of course, that international law is respected.[2]

[1] Trial Judgment, para. 436.
[2] I would point out that the United Nations Charter enshrines the right of peoples to self-determination. United Nations Charter, article 1(2): "The Purposes of the United Nations are: […] To develop friendly relations among

4. It is therefore appropriate, for the purposes of this Opinion, to flesh out six points: (i) Ansar Dine/AQIM's armed struggle viewed through the lens of international law; (ii) the international obligations of armed groups vis-à-vis local populations; (iii) the international obligations of Ansar Dine/AQIM; (iv) the existence of the international crimes committed; (v) the nature of the penalties pronounced by the groups; (vi) Sharia and its impact in Muslim countries and in Timbuktu; (vii) the issue of mistake of law; (viii) the problem of duress; and lastly (ix) the relative positive contribution made by Al Hassan and the armed groups, notwithstanding the serious crimes committed.

II. ANSAR DINE/AQIM'S ARMED STRUGGLE IN NORTHERN MALI AND INTERNATIONAL LAW

5. As said above, this trial is concerned with examining the conduct of one man, Al Hassan. He is on trial for the acts he committed while he was a member of the Islamic Police, and of its leadership, in Timbuktu. As well as acts which he committed personally, the charges against him encompass some acts of his fellow Ansar Dine/AQIM members to which he is alleged, in particular, to have contributed within the meaning of article 25(3)(d). The acts were committed with the aim of enforcing in Timbuktu the rules and prescriptions imposed by the armed groups through their institutions: the "*Hisbah*", the Islamic Police and the Islamic Court. Specifically, the acts are regarded as international crimes, and the ICC Prosecutor regards the rules themselves as criminal. The same applies to the penalties instituted by the armed groups to punish violations of the rules and prescriptions.

6. Accordingly, notwithstanding that the Chamber's task is to try Mr Al Hassan solely for his acts and hence to adjudicate on his individual responsibility, it struck me as essential first to examine whether it was legitimate for those armed groups to embark on an armed conflict and set up institutions, in the form of laws and mechanisms, in Timbuktu. I cannot determine the legality of Mr Al Hassan's acts if I do not determine their basis in law, for if Mr Al Hassan acted in accordance with the law and rules in force, he cannot be considered culpable, provided necessarily that the

nations based on respect for the principle of equal rights and *self-determination* of peoples, and to take other appropriate measures to strengthen universal peace".

laws, rules and prescriptions he was obeying were themselves compliant with the Constitution, the laws of Mali and, of course, international law.

7. The use of force by States, and specifically aggressive war,[3] has been outlawed under international law since the Kellogg-Briand Pact of 1928. In that vein, the use or threat of force was condemned in international law once and for all by the United Nations Charter, article 2(4) of which provides that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations". The only exception to this rule is article 51, concerning self-defence, which provides that

> [n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

8. The UN Charter is therefore clear as to the *jus ad bellum* – the right to use force or enter into war – as far as States are concerned.

9. Although the aforementioned provisions of the United Nations Charter apply primarily to States, they also bind non-State actors from a given State, which are clearly prohibited, for example, from attacking a foreign State. In any event, the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, lays down the conditions under which armed groups are to operate and how they must protect victims and civilians not taking part in hostilities. However, to qualify as such, "[a]n armed group must have a minimum degree of organization to be able to comply with all the rules of international humanitarian law applicable to non-international armed conflicts".[4] Only on that basis can an armed group become subject to the rights and duties attaching to that status under the international law of armed conflict.

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[3] See USA, Office of the Historian, *The Kellogg-Briand Pact*, 1928, Office of the Historian, Foreign Service Institute, United States Department of State, available at https://history.state.gov.milestones

[4] Anne-Marie La Rosa and Carolin Wuerzner, "Armed groups, sanctions and the implementation of international humanitarian law", IRRC, No. 870, June 2008, available at https://international-review.icrc.org/sites/default/files/irrc-870_9.pdf

10. While it is generally accepted today that international humanitarian law (IHL) is binding on organized armed groups, it is less clear why that is so and how the binding force of IHL on organized armed groups is to be construed.[5] Generally speaking, it is accepted today that IHL is binding on organized armed groups – that is, those armed groups that are sufficiently organized to render them a party to an armed conflict.[6] Both conventional and customary IHL make it abundantly clear that IHL applies to "each party" to a non-international armed conflict[7] and that "each party to the conflict must respect and ensure respect for international humanitarian law".

11. Needless to say, the question that arises here is that of the position of non-State armed groups in public international law, a system conceived for and by States. In other words, what place do armed groups occupy, mainly in the light of *jus ad bellum* and *jus in bello*? It seems to me that, while armed groups essentially trigger the application of *jus ad bellum,* they are not themselves endowed with a right to peace. Since the State is the principal and primary subject of international law and the basis for all international lawmaking, *jus in bello* confers rights and obligations on armed groups, but only in the context of an unequal relationship with the State. Thus, for example, this inequality before the law is strikingly illustrated by the regulation of detention practised by armed groups in non-international armed conflicts. The fact is that, despite the significant role that they play in modern-day conflicts, armed groups constitute an "anomaly" in a legal system that continues to be State-centric.[8]

12. Accordingly, there is no *jus ad bellum* that specifically applies to international law governing non-international armed conflicts (NIACs). As a result, the regulation of

[5] See Jann Kleffner, "The applicability of international humanitarian law to organized armed groups", IRRC, Volume 93, Number 882, June 2011, pp. 443-461 (19 pages), p. 443; available at https://international-review.icrc.org/sites/default/files/irrc-882-kleffner.pdf

[6] For the required degree of organization, see e.g. ICTY, *The Prosecutor v. Boškoski and Tarčulovski*, Case No. ICTY-IT–04–82-T, Judgment (Trial Chamber), 10 June 2008, paras. 194-205. Also cited by Jann Kleffner, "The applicability of international humanitarian law to organized armed groups", *op. cit.*, *idem*, p. 444.

[7] Common article 3 to the four 1949 Geneva Conventions. See also Additional Protocol II, art. 1(1), which assumes that binding force inasmuch as it "develops and supplements Article 3 common to the Geneva Conventions ... without modifying its existing conditions of application", albeit with the caveat that Additional Protocol II only applies to a specific type of organized armed groups, namely those that meet the high threshold of exercising control over territory sufficient to enable them to carry out sustained and concerned military operations and to implement the Protocol. See also Jann Kleffner, "The applicability of international humanitarian law to organized armed groups", *op. cit.*, *idem*, p. 444.

[8] See Zakaria Daboné, "International law: armed groups in a state-centric system", IRRC, Volume 93, Number 882, June 2011, pp. 395-424 (30 pages), p. 395, available at: https://international-review.icrc.org/sites/default/files/irrc-882-dabone.pdf

the use of force falls to the domestic law of States, which, as noted above, therefore serves as a kind of *jus ad bellum*. Yet, insurrections are prohibited under domestic law.[9] This is because the international legal order presents the State as the entity without which it cannot exist. The State has a firm grip on international law: "Contemporary international law is clearly the work of states; every last word conforms to their wishes.[10]

13. Armed or rebel groups are made up of individuals who have taken up arms against their government and over whom the State on the territory of which they operate wishes to maintain special control thanks to its internal laws. On the one hand, therefore, the State wishes to deal with the use of force by such rebel groups according to its internal law. As such, armed groups do not benefit from the same status as government forces. In internal law, or in the language of the public authorities, the members of armed groups simply refuse to obey the law. In fact, as far as the State is concerned, they are merely "bandits" under ordinary law, terrorists, "stateless persons" who can be punished for the mere fact of having taken up arms against it. On the other hand, in international law, no instrument places insurgents on an equal footing with government troops. Armed groups therefore have relatively low status in international law, when it applies.[11]

14. And yet, precisely because of this inequality of status and treatment between the State and the rebel armed group, armed groups are not prohibited under international law from using force against other armed groups or even against the government authorities. This statement follows from the general observation that traditional international law, which is profoundly state-centric in ideology, made no provision, in whatever shape or form, for NIACs.[12] In this way, armed groups have a more explicit place in situations of *jus contra bellum* (thus clearly a right against the use of force) and are set apart from international *jus ad bellum* (which refers to the "mere" regulation of recourse to armed force).[13] However, once the armed group fulfils the conditions laid down in international humanitarian law, it is subject to IHL, and IHL is therefore applicable to it.

[9] See Zakaria Daboné, "International law: armed groups in a state-centric system", *op. cit.*, *idem*, p. 397.
[10] See Zakaria Daboné, "International law: armed groups in a state-centric system", *op. cit.*, *idem*, pp. 395-396.
[11] See Zakaria Daboné, "International law: armed groups in a state-centric system", *op. cit.*, *idem*, p. 397.
[12] See Zakaria Daboné, "International law: armed groups in a state-centric system", *op. cit.*, *idem*, p. 399.
[13] See Zakaria Daboné, "International law: armed groups in a state-centric system", *op. cit.*, *idem*, pp. 407-408.

15. In any event, the right of peoples to self-determination is a pillar of contemporary international law. Since the entry into force of the United Nations Charter in 1945, the right of peoples to self-determination has constituted the legal and political basis of the process of decolonization, which witnessed the birth of over 60 new States in the second half of the twentieth century. This was a historic victory even if it coincided with the will of certain great powers to break up the "exclusive preserve" of colonial (primarily European) empires of the time. During the later decades, several dozen states were created on this basis, concretizing the right to self-determination of peoples officially considered colonized or not.[14]

16. In practice, the creation of a new country does not always correspond to objective and legal criteria. In fact, the right to self-determination can be manipulated by several powers (regional or international) or by powerful private interests. Thus, a new country can be created and recognized by a single other country or by a group of countries. A country can even be created against the will of the majority of its people, as was the case with Bosnia. In other words, one must treat the "right to self-determination" with great care.[15]

17. Accordingly, the right of peoples to self-determination is a fundamental right, as once underscored by the delegations to the Third Committee. The great waves of decolonization and independence have passed, but Timor-Leste's recent admission as the 191st State to join the General Assembly (upon separating from Indonesia) showed, if it needed showing, that the right to self-determination remained relevant.[16]

18. This trial requires the Chamber to pass judgment on the acts committed by the members of the armed groups in Timbuktu to cement their power and doctrine. Although the Court can pass judgment on their acts, it cannot rule on the legitimacy or otherwise of the armed struggle which the MNLA, Ansar Dine/AQIM and others undertook in their desire to separate from Mali and create a new State, under Sharia,

[14] See Melik Özden and Christophe Golay, "The right of peoples to self-determination and to permanent sovereignty over their natural resources seen from a human rights perspective", part of a series of the Human Rights Programme of the Europe-Third World Centre (CETIM), Geneva, October 2010, 64 pages, available at https://www.cetim.ch/legacy/en/documents/bro12-auto1-A4-an.pdf

[15] See Melik Özden and Christophe Golay, "The right of peoples to self-determination and to permanent sovereignty over their natural resources seen from a human rights perspective", *op. cit.*, *idem*.

[16] See United Nations, "*Le droit des peuples à l'autodétermination en tant que droit inaliénable mobilise l'attention de la Troisième Commission*", UN, Office of the High Commissioner for Human Rights, 28 October 2002, available at https://www.ohchr.org/fr/press-releases/2009/10/default-title-553

in the north of the country. I therefore fully understand the Malian government's concern to fight for the reunification of its national territory; but I also understand those groups attempting to fight for the self-determination of particular peoples or ethnic groups. This position in international law applies to Mali as it does to all other United Nations member States. That notwithstanding, the belligerents, be they of the State or non-State variety, must comply with international law and must respect fundamental human rights.

III. INTERNATIONAL OBLIGATIONS OF ARMED GROUPS

19. Like most lawyers, I take the view that armed groups have clear obligations under international humanitarian law and international human rights law. There are, broadly speaking, four theories in support of this view. According to Jann Kleffner, a first explanation of why and how IHL binds organized armed groups, referred to by some as the majority view, holds that IHL is binding on them because the State of which their members are citizens has accepted a given rule of IHL. According to this interesting and paradoxical construction, the capacity of a State to legislate for all its nationals entails the right of the State to impose upon them obligations that originate from international law, even if those nationals form an armed group and take up arms to fight that State or (an)other organized armed group(s) within it.[17] In my opinion, this line of argument, based on the personality of the belligerents, is entirely sound.

20. Second, the binding force of IHL on individuals has been recognized for a long time. It also follows from its applicability to individuals under international criminal law: since individuals are punished for war crimes specifically, and international crimes generally, it is clear that they bear duties that flow directly from IHL. Such duties apply to all individuals, whether they possess the formal status of combatants in an international armed conflict as members of the armed forces of a party to such an armed conflict, whether they are members of armed forces in a NIAC as members of armed groups, or whether they are merely civilians.[18]

[17] See Sandesh Sivakumaran, "Binding armed opposition groups", International and Comparative Law Quarterly, Vol. 55, 2006, pp. 381-39, also cited by Jann Kleffner, "The applicability of international humanitarian law to organized armed groups", *op. cit.*, *idem*, p. 445.
[18] See Jann Kleffner, "The applicability of international humanitarian law to organized armed groups", *op. cit., idem*, pp. 449-450.

21. The third explanation of the binding force of IHL on organized armed groups draws on the exercise of *de facto* governmental functions by such groups. As Jean Pictet puts it, "[I]f the responsible authority at their head exercises effective sovereignty, it is bound by the very fact that it claims to represent the country, or part of the country". This approach finds support in the principle of effectiveness[19] as an element of both statehood and the recognition of governments.[20]

22. Also according to Jann Kleffner, a fourth explanation that is occasionally offered for why IHL applies to organized armed groups is that they are bound by customary IHL because of the international legal personality that they possess. The Darfur Commission of Inquiry put it in the following terms: "[A]ll insurgents that have reached a certain threshold of organization, stability and effective control of territory, possess international legal personality and are therefore bound by the relevant rules of customary international law on internal armed conflicts".[21]

23. Lastly, the fifth reason why international humanitarian law applies to armed groups is their own consent. Another basis for asserting that organized armed groups are bound is that they have expressed their consent to be bound by a relevant rule. Indeed, IHL occasionally reflects a consent-based approach to the binding force of IHL as much as it seems to suggest at other times that such consent is irrelevant. On the one hand, common article 3 categorically declares that "each Party to the conflict shall be bound to apply, as a minimum" the substantive obligations in sections 1 and 2. The consent, or absence thereof, of an organized armed group is considered immaterial.[22]

24. On the other hand, common article 3 encourages the parties to a NIAC to conclude "special agreements" through which all or part of the other provisions of the Geneva Conventions are brought into force. In addition, it is by no means exceptional that organized armed groups unilaterally declare their acceptance of rules of IHL, for instance in the form of "Deeds of Commitment" made under the auspices of Geneva

[19] See Roger Pinto, "*Les règles du droit international concernant la guerre civile*", in Collected Courses, vol. 114, 1965-I, p. 528.
[20] See Jann Kleffner, "The applicability of international humanitarian law to organized armed groups", *op. cit., idem*, p. 451.
[21] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General pursuant to Security Council Resolution 1564 of 18 September 2004, 25 January 2005, para. 172, available at http://www.un.org/News/dh/sudan/com_inq_darfur.pdf (last visited 15 June 2011).
[22] See Jann Kleffner, "The applicability of international humanitarian law to organized armed groups", *op. cit., idem,* p. 456.

Call to ban anti-personnel mines and to further the protection of children from the effects of armed conflict. Such special agreements also pertain to national liberation movements, a distinct sub-species of organized armed groups that has gained express recognition and regulation in Additional Protocol I.[23]

25. It is thus clear that, in a non-international armed conflict – or internal conflict – international humanitarian law applies. As is known, international humanitarian law aims to limit the methods and means of warfare, and to protect people who are not, or no longer, taking part in the hostilities. When collective violence erupts in a country, the ICRC uses well-established legal criteria to assess whether or not that violence is characterized as an armed conflict. This characterization enables the ICRC to remind the parties to the conflict of their legal obligations. Examples of recent non-international armed conflicts to which IHL certainly applies include the hostilities that broke out in northern Mali in early 2012 between armed groups and the Malian armed forces, and the fighting in Syria between armed groups and Syrian government forces.[24]

26. It is apparent that IHL requires that two criteria be met for there to be a non-international armed conflict: the armed groups involved must show a minimum degree of organization and the armed confrontations must reach a minimum level of intensity. It might be added that the armed groups in question must meet a certain threshold of stability and have a clear command structure, and their members must openly carry weapons and perhaps also wear military uniforms (if they have the means for it). The fulfilment of these criteria is determined on a case-by-case basis, by weighing up a number of factual indicators.[25]

27. The level of intensity of the violence is determined in the light of indicators such as the duration and gravity of the armed clashes, the type of government forces involved, the number of fighters and troops involved, the types of weapons used, the number of casualties and the extent of the damage caused by the fighting. The level of organization of the armed group is assessed by looking at factors such as the

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[23] See Jann Kleffner, "The applicability of international humanitarian law to organized armed groups", *op. cit., idem*, p. 456.
[24] See ICRC, "Internal conflicts or other situations of violence – what is the difference for victims?", Interview, ICRC, 10 December 2012, available at https://www.icrc.org/en/article/internal-conflicts-other-situations-violence-victims
[25] See ICRC, "Internal conflicts or other situations of violence – what is the difference for victims?", *op. cit., idem.*

existence of a chain of command, the capacity to transmit and enforce orders, the ability to plan and launch coordinated military operations, and the capacity to recruit, train and equip new fighters. I should stress that the motivation of an armed group is not considered a relevant factor.[26] The parties to non-international armed conflicts are at minimum required to comply with article 3 common to the Geneva Conventions and with rules of customary IHL. These rules guarantee humane treatment to each person that finds him- or herself in the power of the enemy and require that persons wounded in the hostilities, including wounded enemy fighters, be collected and cared for without discrimination.[27] In order to enjoy reciprocity, therefore, armed groups generally claim the application of IHL; to do so redounds to their advantage. They therefore recognize their international obligations.

IV. INTERNATIONAL OBLIGATIONS OF ANSAR DINE/AQIM

28. It is clear that, under international humanitarian law, each party to a conflict is required to comply with the provisions of the international law of armed conflict and to ensure that the members of its armed forces and other persons or groups acting under its instructions and orders or under its control also comply.[28] In this respect, international humanitarian law makes no distinction between the obligations of States and those of the armed groups concerned. Moreover, article 3 common to the Geneva Conventions, which reflects the minimum rules applicable to all armed conflicts, stipulates specifically that the parties to the conflict, without distinction, must comply with certain rules set forth in that article.[29]

29. According to Anne-Marie La Rosa and Carolin Wuerzner, when armed groups have a high level of control over part of a territory, the State has little or no control in that

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[26] See ICRC, "Internal conflicts or other situations of violence – what is the difference for victims?", *op. cit., idem.*
[27] See ICRC, "Internal conflicts or other situations of violence – what is the difference for victims?", *op. cit., idem.*
[28] Rule 139 of the ICRC Customary Law Study confirms the applicability of this provision for international and non-international armed conflicts – see Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, ICRC and Cambridge University Press, Geneva and Cambridge, 2005, Vol. 1, pp. 495-8, also cited by Anne-Marie La Rosa and Carolin Wuerzner, "Armed groups, sanctions and the implementation of international humanitarian law", *op. cit.*, *idem*.
[29] See for example *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits*, Judgment of 27 June 1986, [1986] ICJ Rep., para. 218. It states that: "Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity' (*Corfu Channel*, Merits, ICJ Reports 1949, p. 22, paragraph 215 above)." Cited by Anne-Marie La Rosa and Carolin Wuerzner, "Armed groups, sanctions and the implementation of international humanitarian law", *op cit.*, *idem*.

region and probably cannot ensure that the law is implemented and observed or carry out law enforcement duties. In the event of violations it may therefore be extremely difficult for the State to impose sanctions on members of armed groups.[30] However, when armed groups have such a high level of territorial control, they usually also have the necessary financial and military means to maintain control over long periods.

30. This makes their actions sustainable, which is a prerequisite for prosecuting and punishing serious violations of international humanitarian law while honouring all essential judicial guarantees to the full.[31] For, lastly, although armed groups, as we know, cannot be party to treaties of humanitarian law, it is nevertheless their responsibility to respect and to ensure respect for that body of law in all circumstances, even if in practice they are reluctant to be bound by the international obligations of the party they are fighting or by any laws which that party may have adopted.[32]

31. In any case, allowing armed groups that are party to non-international armed conflict the opportunity to make a unilateral declaration stating their commitment to comply with international humanitarian law can be a useful tool for ensuring compliance in actual practice.[33] The reality is that, although the great majority of declarations by non-State armed actors are limited to general statements of respect for international humanitarian law and do not include any concrete provisions regarding implementation mechanisms such as sanctions, they are a way for these groups to demonstrate and confirm that they are prepared to be bound by international humanitarian law and to ensure that it is implemented.

32. In summary, there is an obligation for all subjects of international law, pursuant to article 1 of the Geneva Conventions, to "respect" the Conventions and even to "[TRANSLATION] ensure that they are respected" "in all circumstances", since such an obligation arises not just from the Conventions themselves but from the general principles of humanitarian law to which the Conventions merely give specific

[30] See Anne Marie La Rosa and Carolin Wuerzner, "Armed groups, sanctions and the implementation of international humanitarian law", *op. cit., idem*.
[31] *Idem.*
[32] *Ibidem*.
[33] 10 Article 96(3) of Protocol I (1977) additional to the Geneva Conventions of 1949 provides for this possibility for groups that fall within the scope of application set out in article 1(4) of the Protocol to make a general declaration on respect for international humanitarian law.

expression". Thus, common article 1 is based on customary law and guarantees that every State, irrespective of whether it has ratified a treaty, has obligations that must be shouldered; this provision is regarded by scholars as possessing a quasi-constitutional character.

33. Accordingly, in a non-international armed conflict, each party is bound to apply, as a minimum, the fundamental humanitarian provisions of international law contained in article 3 common to all four Geneva Conventions. Those provisions are developed in and supplemented by Geneva Protocol II of 1977. Both common article 3 and Geneva Protocol II apply with equal force to all parties to an armed conflict, government and rebels alike. In addition, government troops and rebel forces must also apply a number of other specific treaty rules relating to internal conflicts, namely: article 19 of the 1954 Cultural Property Convention and its Second Protocol of 1999 (the latter protocol has not yet entered into force at the time of writing); Protocol II to the Conventional Weapons Convention, on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996; the Ottawa landmines treaty of 1997. The rules of customary international law certainly apply as well, in particular the basic principles of the law of armed conflict, namely distinction, proportionality, military necessity, limitation, good faith and humane treatment.[34]

34. As noted above, the right of peoples to self-determination is a fundamental right. The great waves of decolonization and independence have passed, but the recent admission of Timor-Leste as the 191st State to join the General Assembly in 2002, and of South Sudan as the 193rd member of the United Nations in 2011, for example, showed, if it needed showing, that the right to self-determination remained relevant.[35] The realization of that right begins, first, with an "occupation", as in the case of other rebel armed groups. This is because occupation of a portion of territory enables a group to exercise authority over it and thereby show that its power is effective.

[34] *Non-international armed conflict*, ICRC, Geneva, 30 pages, p. 4, available at https://www.icrc.org/sites/default/files/external/doc/en/assets/files/other/law10_final.pdf
[35] See United Nations, *Le droit des peuples à l'autodétermination en tant que droit inaliénable mobilise l'attention de la Troisième Commission*, UN, Office of the High Commissioner for Human Rights, 28 October 2002, available at https://www.ohchr.org/fr/press-releases/2009/10/default-title-553

35. There are a number of challenging issues associated with the concept of occupation. They include categorizing occupations in general; establishing what constitutes "occupation" for the purposes of IHL; determining when occupation begins; and establishing how legal rights, such as the right to life, are extended to inhabitants of occupied territory. In general, the term "occupation" has been used to describe a wide range of activity that fundamentally involves territory being put under the control of a foreign state, international organization, or entity that has no sovereign title. Adam Roberts has identified 17 types of occupation, ranging from wartime and post-war to peacetime.[36] Other possible categories include control of all or part of a territory by forces acting under the authority of the United Nations and occupation by a non-State entity.[37]

36. Article 42 of the 1907 Hague Land Warfare Regulations sets out the legal test for occupation: "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."[38]

37. Human rights norms, including the right to life, are specifically protected in the Hague Regulations,[39] the Fourth Geneva Convention,[40] and article 75 of Additional Protocol I. This is also reflected in the Geneva Convention IV Commentary, which states: "[i]t must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests." Consequently, such rights are binding even on the armed groups occupying a territory. Thus, international human rights law also protects the rights of persons in occupied territory. In the 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*,[41] the International Court of Justice held that the two sets of legal regimes apply together, in the sense that human rights law applies in times of war

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[36] See Adam Roberts, "What is military occupation?", in *British Yearbook of International Law*, Vol. 55, No. 1, 1984, pp. 249-305, p. 261, available at https://doi.org/10.1093/bybil/55.1.249

[37] See Kenneth Watkin, "Use of force during occupation: law enforcement and conduct of hostilities", IRRC, Volume 94, Number 885, Spring 2012, pp. 267-315, p. 269, available at https://international-review.icrc.org/sites/default/files/irrc-885-watkin.pdf

[38] See Kenneth Watkin, "Use of force during occupation: law enforcement and conduct of hostilities", *op. cit.*, *idem*, p. 270.

[39] See Hague Regulations, art. 46: "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated".

[40] See Fourth Geneva Convention, article 27(1), article 48 *et seq*.

[41] See ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 226, p. 240, para. 25, available at https://www.icj-cij.org/docket/files/95/7495.pdf

and humanitarian law acts as a form of *lex specialis* for determining what constitutes an arbitrary deprivation of the right to life under human rights law during hostilities.[42] Further, as the Court stated in the 2004 *Wall* case.[43]

38. From the foregoing, it is entirely plain to see that the international obligations of armed groups are also those of Ansar Dine/AQIM. If they are obligated to respect and ensure respect for international humanitarian law and international human rights law, it follows that they must also be accorded the right to set up appropriate institutions and lay down necessary rules. The armed groups occupying a territory, as Ansar Dine/AQIM were doing, must as *de facto* authorities be entitled to maintain public order, police the territory and perhaps also administer justice, where they have the means and capacity to do so. It is worth underscoring that the justice so administered must be independent and impartial and must follow due process in responding to any crimes.

V. THE EXISTENCE OF THE CRIMES COMMITTED IN NORTHERN MALI

39. Under no circumstances does this Separate Opinion seek to cast doubt on or minimize the crimes committed. Those appalling acts, which the Chamber has found to be established as such, largely took place as described in the main Trial Judgment. Given the victim-centred nature of this International Criminal Court, it is no more than par for the course that we acknowledge the victims in Timbuktu and northern Mali such as they have been acknowledged generally by the Chamber. It cannot be said often enough that they deserve to be acknowledged and to receive full reparations for the harm suffered.

40. And so, having heard so many witnesses and victims recount the events that occurred in Timbuktu between April 2012 and January 2013, telling *inter alia* of the punishments imposed on them and the suffering endured by the civilian population while the city was under the control of the armed groups, I acknowledge the negative impact – from a psychological, physical and economic perspective – on the people of Timbuktu specifically and of Mali in general. Some people in particular suffered

[42] See Kenneth Watkin, "Use of force during occupation: law enforcement and conduct of hostilities", *op. cit.*, *idem*, p. 274.
[43] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004, pp. 45-46, para. 105, available at https://www.icj-cij.org/docket/files/131/1671.pdf (hereafter *Wall* case) and https://www.icj-cij.org/case/131

more than others, for example P-0565 and P-0557,[44] Khudi Bint Ibrahim,[45] 'Abdallah Bin Mukha,[46] Bint Bint Ibrahim,[47] Ikhmad Bin Muhammad,[48] Al-Husayn Bin 'Umar[49] and Halimamah Bint Muhammad.[50] Nor do I overlook Sallaka Bent Al-Khair,[51] Madou Traoré,[52] Foma,[53] Azahara Abdou,[54] P-0636,[55] P-0570,[56] Fadimata Mint Lilli,[57] P-0520,[58] P-0610,[59] P-0538[60] or the unfortunate Dédéou Maiga,[61] who had his right hand amputated. All this suffering deserves to be acknowledged and redressed.

41. However, although during this trial our gaze has never wavered from the victims, we must not overlook the fact that our prime duty was to seek the truth and determine whether the Accused before us, the Judges of the Chamber, was the person culpable, the person responsible for all the suffering referred to above. The person on trial is Mr Al Hassan, a member of the Islamic Police leadership in Timbuktu at the material time. Our ultimate duty was therefore to try one man, Al Hassan. To say that the Accused is not guilty does not in any way mean that the victims do not exist, or that their suffering is diminished. It simply means that he is not the person truly responsible, or one of the persons truly responsible, truly culpable, whom we are actively seeking. Nor does any of this detract from the acknowledgment that Al Hassan played a role in Timbuktu within the Police and in relation to the judicial authorities put in place by Ansar Dine/AQIM.

[44] Trial Judgment, paras. 769-799.
[45] Trial Judgment, paras. 811-818.
[46] Trial Judgment, paras. 811-818.
[47] Trial Judgment, paras. 811-818.
[48] Trial Judgment, paras. 811-818.
[49] Trial Judgment, paras. 811-818.
[50] Trial Judgment, paras. 811-818.
[51] Trial Judgment, paras. 838-852.
[52] Trial Judgment, paras. 838-852.
[53] Trial Judgment, paras. 853-855.
[54] Trial Judgment, paras. 856-861.
[55] Trial Judgment, paras. 862-868.
[56] Trial Judgment, paras. 873-888.
[57] Trial Judgment, paras. 889-901.
[58] Trial Judgment, paras. 911-933.
[59] Trial Judgment, paras. 947-955.
[60] Trial Judgment, paras. 956-972.
[61] Trial Judgment, paras. 819-837.

VI. JUDICIAL AUTHORITIES AND NATURE OF THE PENALTIES PRONOUNCED BY ANSAR DINE/AQIM

42. What in fact happened when the armed groups overran Timbuktu and other population centres in northern Mali is that the lawful authorities of the State and of the country's legitimate Government withdrew to Bamako. The city of Timbuktu was left, so to speak, to its own devices. We also know that the armed groups, Ansar Dine/AQIM, stayed in the city and its outskirts from April 2012 to January 2013. During that time, the city's inhabitants, and specifically the civilian population, nevertheless remained entitled to observance of their fundamental rights. They were entitled to safety, public order and justice – things which, unfortunately, they could no longer get from their legitimate authorities. The city of Timbuktu was in fact "occupied" by Ansar Dine/AQIM, although throughout this period there was no longer any armed combat in the city.

43. As mentioned above, under international law, article 42 of the 1907 Hague Regulations states that a "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised".[62] Furthermore, according to their common article 2, the four Geneva Conventions of 1949 apply to any territory occupied during international hostilities. They also apply in situations where the occupation of State territory meets with no armed resistance.[63] Admittedly, those provisions were adopted to apply to the contracting powers – States – in 1907 and 1949. But to my mind, international law is a branch of law that is constantly evolving. There has been a definite shift in the applicability of those legal provisions since the early 20th century.

44. *Jus in bello* now tends to narrow the distinction between international and internal armed conflict. Although the 1907 and 1949 rules were supposed to apply only to military occupation by a foreign power in the time-honoured Westphalian tradition, that is to say by a foreign State, I consider that they now also apply to non-international armed conflict where part of the national territory is occupied, even unlawfully, by an armed group, as in the case of Ansar Dine/AQIM. The armed groups were, therefore, duty-bound to take the place of the missing State authorities.

[62] See ICRC, "Occupation and international humanitarian law: Questions and answers", ICRC, Geneva, 4 August 2004, available at https://www.icrc.org/en/article/occupation-international-humanitarian-law-questions
[63] See ICRC, "Occupation and international humanitarian law: Questions and answers", *op. cit.*, *idem.*

The reasons, to my mind, are plain: not only had the leaders of the armed groups become *de facto* authorities; they were also required to respect the aforesaid fundamental human rights of the inhabitants of Timbuktu, on top of which, for the reasons stated above, Ansar Dine/AQIM are, like all groups, duty-bound to respect and ensure respect for international humanitarian law.

45. At any rate, the legality of any particular occupation is regulated by the United Nations Charter and the law known as *jus ad bellum*. Once a situation exists which factually amounts to an occupation the law of occupation applies – whether or not the occupation is considered lawful. Hence, as regards the applicability of the law of occupation, it makes no difference whether an occupation has received Security Council approval, what its aim is, or indeed whether it is called an "invasion", "liberation", "administration", "occupation",[64] or "rebellion".

46. Clearly, as the international law of occupation is primarily motivated by humanitarian considerations, it is solely the facts on the ground that determine its application.[65] And that is also the approach I adopt. Moreover, the duties of the occupying power, which are now regarded, where possible, as applying to armed groups in a similar position, are spelled out primarily in the 1907 Hague Regulations (articles 42-56) and the Fourth Geneva Convention (GC IV, articles 27-34 and 47-78), as well as in certain provisions of Additional Protocol I and customary international humanitarian law, as I have already mentioned.

47. This raises two questions. What power or authority is tasked with policing an occupied territory? And what power or authority is supposed to administer justice? It bears emphasizing that the primary legal authority on this point is article 43 of the Hague Regulations of 18 October 1907, which provides:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.[66]

In addition, article 64 of the Fourth Geneva Convention of 12 August 1949 provides:

> The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they

[64] See ICRC, "Occupation and international humanitarian law: Questions and answers", *op. cit.*, *idem*.
[65] See ICRC, "Occupation and international humanitarian law: Questions and answers", *op. cit., idem*.
[66] Art. 43 of the Hague Regulations of 18 October 1907.

> constitute a threat to its security or an obstacle to the application of the present Convention. […][67]

48. It thus follows from article 43 of the Hague Regulations of 18 October 1907 that the remit of the police is that conferred on it by the laws of the occupied territory. Conventionally speaking, the remit of the police in an occupied territory is to:

- protect the persons living in the occupied territory against illegal acts;[68]
- respect and protect human dignity;
- maintain and uphold the human rights of all persons;
- not inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment;
- ensure the full protection of the health of persons in their custody;
- not commit any act of corruption; and
- as best they can, prevent and rigorously oppose any violations of the law or the code.

49. Needless to say, in my opinion, this question can be answered without a shadow of a doubt: policing power fell to Ansar Dine/AQIM.

50. As to the power or authority that is supposed to administer justice in the occupied territory, article 43 of the Hague Regulations of 18 October 1907 again applies. That is to say that it is the responsibility of the occupying authority or power to restore and ensure public order and safety while respecting the laws in force in the occupied territory. To administer justice, therefore, it must set in operation the judicial bodies it finds in the occupied territory. Only if the occupying power is absolutely prevented from doing so may it set up a judicial system, through judicial bodies of its own making, to administer justice with due regard for the laws in force.

51. Article 64 of the Fourth Geneva Convention of 12 August 1949, referred to above, also provides:

> […] Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws. The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying

[67] Art. 64 of the Fourth Geneva Convention of 12 August 1949.
[68] United Nations Office on Drugs and Crime, "Policing – The Integrity and Accountability of the Police – Criminal Justice Assessment Toolkit", New York, 2008, p. 3.

> forces or administration, and likewise of the establishments and lines of communications used by them.[69]

52. In that connection, article 65 of the Convention specifies:

> The penal provisions enacted by the Occupying Power [in our case, Ansar Dine/AQIM] shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effect of these penal provisions shall not be retroactive.[70]

It must be pointed out, however, that, in case of a breach of the penal provisions promulgated by it by virtue of the second paragraph of article 64 of the Convention, the occupying power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country.[71] Lastly, the courts shall apply only those provisions of law which were applicable prior to the offence, and which are in accordance with general principles of law, in particular the principle that the penalty shall be proportioned to the offence.

53. As regards criminal procedure, no sentence shall be pronounced by the competent courts of the occupying power except after a regular trial. In addition, accused persons who are prosecuted by the occupying power shall be promptly informed, in writing, in a language which they understand, of the particulars of the charges preferred against them, and shall be brought to trial as rapidly as possible. The protecting power shall be informed of all proceedings instituted by the occupying power against protected persons in respect of charges involving the death penalty or imprisonment for two years or more; it shall be enabled, at any time, to obtain information regarding the state of such proceedings. Furthermore, the protecting power shall be entitled, on request, to be furnished with all particulars of these and of any other proceedings instituted by the occupying power against protected persons.[72]

54. To my mind, Ansar Dine/AQIM were therefore right to go about setting up what they regarded as suitable institutions, not only to ensure order and justice, but to do so as best they could within the Islamic norms prescribed by Islam. For instance, they instituted the *Hisbah,* the Islamic Police and the Islamic Court to do what they considered just. Those mechanisms were not, therefore, created for the purpose of

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[69] Art. 64 of the Geneva Convention of 12 August 1949.
[70] Art. 65, *Idem*.
[71] Art. 66, *Ibidem*.
[72] Art. 71, *Ibidem*.

committing crimes. The armed groups also decided to use punishments applied in many Islamic countries which are members of the United Nations, such as Saudi Arabia, Kuwait, Bahrain, the United Arab Emirates, Qatar, Oman, Yemen, Iran, Pakistan, Sudan, Nigeria, Brunei, Libya, Indonesia and Malaysia.[73]

55. It was out of a concern to comply with the rules of Sharia, which proceed from God's will – rules of which the inhabitants of Timbuktu also availed themselves – that the armed groups decided to implement certain rules and prescriptions. For instance, Ansar Dine/AQIM enacted what they, necessarily, saw as appropriate measures to restore morality to the city, an aim shared to some extent by Timbuktu's *Comité des moeurs* [Morality Committee], particularly with respect to alcohol and women's dress.[74] The armed groups also decided to use punishments which are applied in one form or another by States that claim adherence to Islam, including flogging, amputation and the death penalty.[75] Are such punishments lawful? As a rule, international humanitarian law holds that the authorities occupying a territory must apply the laws and regulations of that territory unless those laws and regulations pose a danger to their security. Nor can the authorities change or violate the Constitution of the country. Ansar Dine/AQIM does not appear to have clearly changed the Constitution of Mali, but the fact remains that their application of Sharia seemed fairly rigoristic by comparison with Malian law and could have suggested that they had amended the country's Criminal Code and Criminal Procedure Code. However, such legislative activities are the preserve of a National Assembly or a Parliament that is truly representative.

56. In any event, it must be pointed out that Sharia is applied differently from one country to another and sometimes from one region of the same State to another, as in Indonesia.[76] Capital punishment notwithstanding, it seems that Mali did not actually apply flogging or, for that matter, amputation. But many Muslims regard flogging, amputation and the death penalty as appropriate where the Qur'an, the Muslim holy book, provides for them. It is therefore difficult for a Muslim, and

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[73] See Sahadath, "*Top 15 des pays qui appliquent la charia*", *Le Magazine*, 11 October 2022, available at https://www.map24.com/top-15-des-pays-qui-appliquent-la-charia/
[74] Trial Judgment, para. 413.
[75] See Trial Judgment, paras. 657-659, 670-733.
[76] See AFP, "*En Indonésie, des femmes pour flageller les femmes, comme en Malaisie*", Times of Israel, 29 January 2020, available at https://fr.timesofisrael.com/en-indonesie-des-femmes-pour-flageller-les-femmes-comme-en-malaisie/

especially for a person who is secular or not highly educated, to say that those punishments are illegal or unlawful. In this connection, witness P-0065 said in evidence before the Chamber:

> [TRANSLATION] They pointed to arguments from the Qur'an, and no imam would reject something that finds justification in the Qur'an. But everyone will have their own interpretation of a Qur'anic verse, and here, a decision was being applied to something which was not the result of a religious debate or dialogue.[77]

So, are such sanctions lawful under international law, or not?

57. What is meant by the phrase "unlawful sanctions" in international law? Black's Law Dictionnary defines "sanction" as a penalty or coercive measure that results from failure to comply with a law,[78] and "unlawful" as "not authorized by law" or "criminally punishable",[79] suggesting that the phrase "unlawful sanctions" might be understood to mean coercive measures that result from violation of the law. But international law bases its approach to the subject of "sanctions" much more on the international sense, as in "international sanctions", meaning coercive measures applied against States, non-State entities or individuals that constitute a threat to international peace and security.[80] As a result, the phrase "unlawful sanctions" can be understood in international law to mean coercive measures taken in violation of internationally recognized and duly established legal norms.

58. Is the death penalty an unlawful sanction, and if so, why? The chief point to be made is in fact that its lawfulness or otherwise depends on the body of law at issue, that is, on the internal law of each State. Thus, for example, the death penalty is a lawful sanction in the United States of America, the Democratic Republic of the Congo, Japan, Iran, Saudi Arabia and many Muslim countries. Conversely, capital punishment can be said to constitute an unlawful sanction in the States which have opted to abolish it. Such States have also ratified the relevant international legal instruments calling for the explicit or implicit abrogation of the ultimate punishment, including the Universal Declaration of Human Rights of 10 December 1948, the International Covenant on Civil and Political Rights of 16 December 1966 and the UN Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, of 15 December 1989. The

[77] P-0065: T-046, p. 17.
[78] Bryan A. Garner, Black's Law Dictionnary, The state of America, Eighth Edition, 2004, p. 1368.
[79] *Idem*.
[80] See article 41 of the United Nations Charter.

Statute of the International Criminal Court does not authorize the ICC to apply the ultimate punishment, but nor does it prohibit the States Parties from doing so in their respective jurisdictions.

59. Moreover, article 3 of the Universal Declaration of Human Rights provides: "Everyone has the right to life […]".[81] And, as we know, the utmost penalty that may be imposed on the perpetrator of an international crime under the Rome Statute of the International Criminal Court is life imprisonment. Article 77 provides:

> Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute: […] Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or […] A term of life imprisonment when justified by the extreme gravity of the crime and [of] the individual circumstances of the convicted person.[82]

Hence, the Rome Statute of the International Criminal Court does not permit the application of the death penalty, even for international crimes.

60. Furthermore, article 6 of the International Covenant on Civil and Political Rights of 16 December 1966 provides that "[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant." [83] Lastly, article 1 of the UN Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, of 15 December 1989 provides:

> No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.[84]

61. It is therefore apparent that all these instruments do not expressly state that capital punishment is prohibited, although, implicitly, it can be inferred from them that its abolition is internationally encouraged – an interpretation that finds support when the above-mentioned legal provisions are read in conjunction with those of other relevant legal instruments.

62. For instance, article 68 of the Fourth Geneva Convention provides:

> The penal provisions promulgated by the Occupying Power in accordance with Articles 64 and 65 may impose the death penalty on a protected person only in cases where the person is guilty of espionage, of serious acts of sabotage against the military installations of the Occupying Power or of intentional offences which have caused the

[81] Article 3 of the Universal Declaration of Human Rights of 10 December 1948.
[82] Article 77 of the Rome Statute of the International Criminal Court of 17 July 1998.
[83] Article 6 of the International Covenant on Civil and Political Rights of 16 December 1966.
[84] Article 1 of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, of 15 December 1989.

> death of one or more persons, provided that such offences were punishable by death under the law of the occupied territory in force before the occupation began. The death penalty may not be pronounced against a protected person unless the attention of the court has been particularly called to the fact that since the accused is not a national of the Occupying Power, he is not bound to it by any duty of allegiance. In any case, the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence.[85]

It is thus clear that capital punishment is not proscribed in the Geneva Conventions specifically or in international law generally.

63. Given all that, the international obligation placed upon those States which have ratified those instruments means that they are duty-bound to honour their obligation, notwithstanding any right accorded to them under a reservation formulated at the time of ratification or on the occasion of a moratorium they were granted. In States which have not ratified those instruments, however, application of the death penalty cannot in principle constitute an unlawful sanction, especially if their respective domestic laws do not prohibit it. Since Malian criminal law provided for the penalty[86] before the armed groups came to Timbuktu, it was therefore open to them to apply it under the appropriate conditions referred to above.

64. But what of amputation? Is it an unlawful sanction and, if so, why? Exactly what amputation (of the hand) is, as applied in Timbuktu, must be spelled out in order to answer this question. Amputation does not have a clearly formulated legal definition but is understood to mean the removal of a limb, especially a finger, hand or foot.[87] It is a feature of the criminal codes of some Muslim countries which are members of the United Nations, such as Iran[88] and Mauritania, and is practised there to this day. The predominant legal view is of course that amputation of the hand can be considered an act of torture, for the pain and suffering it inflicts on the victim. On

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[85] Article 68 of the Geneva Convention of 12 August 1949.

[86] Mali has the death penalty on its books, under article 8 of the 1961 Criminal Code as amended by an order of 1 December 1973. However, the last execution was on 21 August 1980. Mali has not ratified the international treaty abolishing the death penalty, but on 15 December 2011 the President of Mali pledged that a Tunisian man who had been sentenced to death would not be executed and would be transferred to Tunisia. See Sophie Fotiadi, "*Peine de mort: Mali*", *La peine de mort dans le Monde*, 2024, available at https://www.peinedemort.org/zonegeo/MLI/Mali

[87] See Dorland, *Dorland's Illustrated Medical Dictionary*, Elsevier Health Sciences, 2011, p. 67.

[88] See CSDH, "*Rapport annuel 2020 – l'amputation et le fouet sont largement pratiqués en Iran*", *Répression*, *CSDH Actualités*, 9 January 2021, available at https://csdhi.org/actualites/repression/30556-rapport-annuel-2020-lamputation-et-le-fouet-sont-largement-pratiquees-en-iran/. See also AFP, "*Iran: un homme condamné pour vol amputé des doigts, selon Amnesty*", *Le Point*, 29 July 2022, available at https://csdhi.org/actualites/repression/30556-rapport-annuel-2020-lamputation-et-le-fouet-sont-largement-pratiquees-en-iran/

that view, the act (torture) is widely punishable under international law. Nonetheless it is a lawful criminal penalty in the States in which it is practised.

65. It should be noted however that, according to the *Comité de soutien aux droits de l'homme en Iran* [Committee for the Support of Human Rights in Iran] (CSDH), "[TRANSLATION] whipping and amputation are among the cruellest punishments routinely employed by the Iranian regime".[89] For example, Pouya Torabi, a man in his thirties, was transferred to hospital on an emergency basis after his fingers were cut off in the presence of several officials and a doctor at Tehran's Evin Prison on 27 July.[90] And yet, as the CSDH puts it, the International Convention against Torture and the International Covenant on Civil and Political Rights, which are themselves based on the Universal Declaration of Human Rights, prohibit inhuman punishment such as the amputation of limbs.[91] In June 2022, the United Nations High Commissioner for Human Rights, undoubtedly relying on her interpretation of the relevant international legal instruments, expressed concern about the situation and urged Iran to discontinue all forms of corporal punishment.[92]

66. Specifically, article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, for example, states that

> the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[93]

67. Furthermore, article 1(2) of the Declaration on the Protection of All Persons from Being Subjected to Torture and Cruel, Inhuman and Degrading Treatment provides that torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.[94] Article 2 of the Declaration further provides:

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[89] See CSDH, "*Rapport annuel 2020 – l'amputation et le fouet sont largement pratiqués en Iran*", *op. cit., idem*.
[90] See also AFP, "*Iran: un homme condamné pour vol amputé des doigts, selon Amnesty*", *op. cit., idem*.
[91] See CSDH, "*Rapport annuel 2020 – l'amputation et le fouet sont largement pratiqués en Iran*", *op. cit., idem*.
[92] See also AFP, "*Iran: un homme condamné pour vol amputé des doigts, selon Amnesty*", *op. cit., idem*.
[93] Art. 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984. The Convention entered into force on 26 June 1987, in accordance with the provisions of article 27.
[94] Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly on 9 December 1975 (resolution 3452).

> Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights.[95]

68. In addition, article 5 of the Universal Declaration of Human Rights provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".[96] Similarly, article 7 of the International Covenant on Civil and Political Rights provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation".

69. Again it seems that amputation as a criminal penalty may, implicitly, amount to torture on a certain reading of the above-mentioned legal provisions. But would an amputation performed under anaesthesia, painlessly as it were, also be torture, given that the end result is the removal of the appendage in question? Does not a pain-free execution, which some consider legal and not an act of torture, result in deprivation of life? Amputation takes us into yet another grey area of international law, because of the deference owed to those United Nations member States whose religion or law prompts them to set store by it. As with the death penalty, the unlawfulness of amputation of the hand by way of punishment thus appears to depend on the position of the State in which it is performed. That notwithstanding, if the State has duly ratified the above-mentioned legal instruments, then to administer the amputation becomes *ipso facto* an unlawful sanction and constitutes torture and inhuman and degrading treatment. Under the ICC Statute, however, amputation is wholly reprehensible under any circumstances. Personally, I also consider it to be wholly unacceptable: it is obvious torture and a serious violation of fundamental human rights.

70. Lastly, is flogging an unlawful sanction and, if so, why? It is worth noting that flogging is primarily understood to mean the act of whipping the human body with a strap, flexible rod, whip, chicote or other similar implement.[97] It should be underlined that flogging is a feature of the criminal codes and a practice in some

[95] Art. 2 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
[96] Art. 5 of the Universal Declaration of Human Rights of 10 December 1948.
[97] See Jacques Boileau, "*Histoire des flagellants où l'on fait voir le bon et le mauvais usage des flagellations parmi les chrétiens*", Amsterdam, F. Vander Plaats, 1701, reprinted with an introduction and notes by Claude Louis-Combet, Montbonnot-Saint-Martin, J. Millon, 1986.

Muslim countries which are members of the United Nations, such as Iran,[98] the United Arab Emirates,[99] Indonesia,[100] Malaysia[101] and Mauritania.[102] It is therefore a lawful punishment in those countries. Be that as it may, absent a legal definition clearly established by an internationally recognized legal instrument, the view generally taken by Western-trained legal minds is that flogging can be classified as an act of cruel, inhuman and degrading treatment inflicted on the victim by means of a whip. That appears to be the characterization adopted by some UN officials, although it is rejected by the authorities of the countries in question.

71. Insofar as it falls into the category of acts of cruel, inhuman and degrading treatment, flogging can generally be considered an unlawful sanction, since such practices are prohibited by a number of international legal instruments, again including the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, article 2 of which provides:

> Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights.[103]

72. The same picture emerges, for example, when article 5 of the Universal Declaration of Human Rights[104] is read together with article 7 of the International Covenant on

[98] In May, a woman arrested for having an extra-marital relationship was sentenced by a criminal court in Tehran to two years of washing corpses in a morgue and 74 lashes. The man was sentenced to 99 lashes. See Amnesty International, "Iran: Authorities amputate a man's hand in shocking act of cruelty", Latest, Amnesty International, added on 18 January 2018, available at https://www.amnesty.org/en/latest/news/2018/01/iran-authorities-amputate-a-mans-hand-in-shocking-act-of-cruelty/
[99] See Lawyers UAE, "Criminal Justice in Dubai: Types of Crimes, Punishments, and Penalties", Lawyers UAE, Amal Khamis Advocates & Legal Consultants, 2024 UAE, available at https://www.lawyersuae.com/criminal-justice-crimes-punishments-and-penalties/
[100] In Aceh, where the veil is compulsory for women, adultery and sexual relations outside marriage or with a person of the same sex are punished. The consumption of alcohol and gambling are prohibited. Cinema is banned to prevent "[TRANSLATION] un-Islamic" behaviour. Offenders receive 10 lashes for a public display of affection, 40 for drinking alcohol and more than 100 for same-sex relations or relations with a minor. See AFP, "*En Indonésie, des femmes pour flageller les femmes, comme en Malaisie*", Times of Israel, 29 January 2020, available at https://fr.timesofisrael.com/en-indonesie-des-femmes-pour-flageller-les-femmes-comme-en-malaisie/
[101] Terms of imprisonment of 30 to 40 years and flogging, which violates the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, were introduced as alternative sentences to the discretionary death penalty and to replace life imprisonment. See Amnesty International, "Malaysia 2023", Amnesty International Report 2023/2024, Amnesty International 2024, available at https://www.amnesty.org/en/location/asia-and-the-pacific/south-east-asia-and-the-pacific/malaysia/
[102] See Pr. Mustapha Ely, "*Le code pénal mauritanien: horreur et mode d'emploi. Lapidation,…culs de jatte et morts en sursis*", *C.R.I.DE.M*, cridem.org, available at https://cridem.org/imprimable.php?article=698735
[103] Art. 2 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.
[104] Art. 5 of the Universal Declaration of Human Rights of 10 December 1948: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

Civil and Political Rights[105] and article 1(1) of the declaration on the protection of all persons from being subjected to torture and cruel, inhuman and degrading treatment or punishment.[106] But once again, we must be circumspect in our assessment. The matter falls squarely into the grey area of international law, for there are United Nations member States that apply flogging. It is only on a particular reading of the international instruments that flogging may be said to be unlawful. Other than that, it finds recognition in the holy Qur'an and is part of the legal arsenal of many countries and hence lawful. And that is why it was applied by Ansar Dine/AQIM in Timbuktu. Nonetheless it is worth pointing out that, at the International Criminal Court, flogging, amputation and the death penalty are not applied. They are entirely unlawful.

73. What remains to be discussed is deprivation of liberty, another punishment frequently used by the armed groups in Timbuktu. For present purposes, deprivation of liberty might mean arrest and transfer to a police station, placement in police custody at the station or in a holding cell, preventive detention, or a penalty involving deprivation of liberty pronounced by a court. In the context of a NIAC, deprivation of liberty is often tantamount to punishment, in that it is the government that detains individuals on the grounds that taking up arms (without authorization) is in itself an act leading to punishment. For persons in the hands of armed groups, the overriding fear is that they will be subject to private justice. The unstructured nature of recent NIACs, which have seen the concept of the group and its characteristics (such as its organized, disciplined and hierarchical nature) crumble, has resulted in the extreme subjectivization of the rules governing the deprivation of liberty. The question whether it is lawful to detain someone is grounded in the very "right" of the parties to an armed conflict to deprive anyone of liberty, especially during an NIAC.[107]

74. It arises before the issue of the capture itself and the implementation of a detention regime. IHL is silent on this point, and we shall endeavour to explain why. Any

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[105] Art. 7 of the International Covenant on Civil and Political Rights of 16 December 1966: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

[106] Art. 1 of the declaration on the protection of all persons from being subjected to torture and cruel, inhuman and degrading treatment: "[Torture] does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners."

[107] See Zakaria Daboné, "International law: armed groups in a state-centric system", *op. cit., idem*, pp. 414-415.

discussion of lawfulness would no doubt have resulted in blockages: it is theoretically difficult to have States accept the idea that armed groups can act lawfully after having taken up arms.[108] In the context of NIACs, the deprivation of liberty is one of the best fields for highlighting the inequality of the parties to the conflict in international law. That inequality can be felt in the two main branches of law relative to the subject: IHL and international human rights law.

75. And yet, when it comes to IHL, the starting point is that the belligerents are equal in law. Were this not to be the case – were the law not, as a minimum, to raise the non-State party to the conflict to a certain rank – it would be utopian to hope for any compliance with humanitarian law. Here one speaks about equality in terms of rights and duties, and not in terms of the effect on status in general.[109] In any case, the Chamber has found that penalties involving deprivation of liberty were imposed by the armed groups under the head of "*tazir*".[110] All things considered, the rules and punishments applied in Timbuktu can only be understood in the light of both Sharia and international humanitarian law.

VII. SHARIA AND ITS IMPACT IN MUSLIM COUNTRIES AND TIMBUKTU

76. In Islam, sharia denotes the body of divine laws and rules that Muslims live by. It is based on the Qur'an, the Sunnah and the teachings of scholars, and thereby lays down the codes of conduct and ethical norms to be followed. It is considered a fundamental of Muslim law, for it enables Muslims to live in keeping with religious principles and heed God's commandments.[111] As regards its application, the differences in the way Sharia is interpreted and applied in different countries and cultures can give rise to debate and controversy. In some Muslim countries, it is considered the principal source of law and is applied in the Islamic courts. Other Muslim countries use a mixed legal system which incorporates principles of both sharia and other systems of law.[112]

77. The Trial Judgment handed down by the Chamber obviously discusses the rules, offences and penalties applied in Timbuktu and which are regarded as unlawful.

[108] See Zakaria Daboné, "International law: armed groups in a state-centric system", *op. cit., idem*, p. 415.
[109] See Zakaria Daboné, "International law: armed groups in a state-centric system", *op. cit., idem*, p. 423.
[110] Trial Judgment, para. 662.
[111] See Islam-Oumma.fr, "*Comprendre la charia en Islam: son importance et son application*", *Islam-Oumma.fr*, 15 February 2023, available at https://www.islam-oumma.fr/charia/
[112] See Islam-Oumma.fr, "*Comprendre la charia en Islam: son importance et son application*", *op. cit., idem*.

Those penalties are, on the whole, regarded by the majority of the Judges of the Chamber as torture. As far as crime is concerned, it is worth specifying that classical Muslim law distinguishes several categories of offence. At issue in the case of the Saudi blogger, explains Guillaume Dye, is the category of fixed penalties, "*Hadd*" or "*Hudud*", which are penalties prescribed by the Qur'an and the Surah.[113]

78. As regards the various offences and their punishment, this category includes "[TRANSLATION] theft, adultery, brigandage, armed insurrection, accusation of adultery, alcohol use, murder and physical injury". Such offences were also routine in Timbuktu. The punishments imposed in such cases, be it in Muslim countries generally or in Timbuktu specifically, vary according to the offence and can include the death penalty. "[TRANSLATION] Alcohol consumption may be punished by administering slaps to the face, 40 lashes of the whip or a beating with sandals".[114] Similar penalties were applied by Ansar Dine/AQIM in Timbuktu.[115] When it comes to adultery and theft, the answer is more complicated. In the case of theft, "[TRANSLATION] it all depends on the nature of the theft and the amount involved, but generally, it is amputation". As for adultery, Dye explains, there are two types:

> [TRANSLATION] ordinary adultery, which involves an extramarital relationship and for which the Qur'an prescribes flogging, namely about 80 lashes of the whip. The second case is that of adultery between unmarried individuals, for which Sharia prescribes stoning[,][116]

as it is the more serious form.

79. But, Dye points out, the legal tradition seeks to make the application of these punishments as rare as possible: "[TRANSLATION] To that end, the legal emphasis is on proof. Proof of adultery, for example, requires the testimony of four men who witnessed the act clearly and from close up". And of course, in cases of armed robbery or murder, "[TRANSLATION] beheading by sword is also one of the methods envisaged by Sharia".[117] It is practised, for example, in Saudi Arabia, as in the case of a Burmese woman executed on 12 January 2015.[118]

[113] See Aline Glaudiot, "*Charia: quelles sanctions physiques pour quels délits?*", RTBF, *Actus*, 6 February 2015, available at https://www.rtbf.be/article/charia-quelles-sanctions-physiques-pour-quels-delits-8900393
[114] See Aline Glaudiot, "*Charia: quelles sanctions physiques pour quels délits?*", *op. cit., idem.*
[115] See Trial Judgment, paras. 685-688: for example, the flogging of P-0638 (Trial Judgment, para. 688).
[116] See Aline Glaudiot, "*Charia: quelles sanctions physiques pour quels délits?*", *op. cit., idem.*
[117] See Aline Glaudiot, "*Charia: quelles sanctions physiques pour quels délits?*", *op. cit., idem.*
[118] See franceinfo with AFP, "*Arabie Saoudite: l'auteur de la vidéo d'une décapitation publique a été arrêté*", franceinfo, 18 January 2015, available at https://www.francetvinfo.fr/monde/proche-orient/arabie-saoudite-l-auteur-de-la-video-d-une-decapitation-publique-a-ete-arrete_800349.html

80. Regarding the application of Sharia[119] itself, Philippe Hensmans would begin by pointing out that "[TRANSLATION] sharia – the body of rules, of social and cultural norms specific to Islam – is a matter of interpretation". The biggest pitfall, as he sees it, would be to think of Islam as homogeneous: "[TRANSLATION] Not all Muslim countries apply sharia". So much so that even Islam in Europe is characterized by a multiplicity of currents and movements that are tied, to a greater or lesser extent, to Muslim immigrants' countries of origin. If we are to understand the outlook for Islam in Europe, it could be helpful to look closely at the case of the Balkans.[120] Hence Hensmans's point that Sharia applies only when the State expressly authorizes it or "[TRANSLATION] when the laws in force in the country and sharia are merged together", as in Saudi Arabia, Yemen, Iran, Kuwait, Bahrain, the Arab Emirates, Qatar, Oman, Afghanistan, Pakistan, Indonesia, Libya, Sudan, Somalia and "[TRANSLATION] partly in Egypt and in some northern states of Nigeria that are home to Boko Haram. Those countries rely on sharia to varying degrees".[121]

81. In reality, it all depends on the interpretation: whether it is a Wahhabi or Salafi interpretation, in other words a very rigoristic interpretation which probably did not exist in classical times, and so on. All these fundamentalist conceptions – the full-face veil, etc. – are things which have almost never existed in Islam. It is apparent that some Muslims and non-Muslims do not know the actual, concrete facts of what Islam is and what it really calls for. Bearded men are going into neighbourhoods and forcing fathers to veil their daughters in the name of the Qur'an, and so forth. All sorts of dubious things are being done in the name of the Qur'an. The situation is somewhat complex. It all depends on how the scriptures are interpreted. It is possible to have an intelligent, traditional interpretation that does not entail brutality.[122]

82. Admittedly, in contrast to international humanitarian law and international human rights law, which are constantly evolving, some countries apply the centuries-old body of rules and norms of Sharia to the letter. Those countries, he says, do not

[119] See Aline Glaudiot, "*Charia: quelles sanctions physiques pour quels délits?*", *op. cit., idem*.
[120] See Jørgen S. Nielsen, "European Islam: Trends and Prospects", *Oasis 28*, 27 March 2019, last updated 22 April 2022, available at https://www.oasiscenter.eu/en/islam-in-europe-trends-and-prospects
[121] See Aline Glaudiot, "*Charia: quelles sanctions physiques pour quels délits?*", *op. cit., idem*.
[122] See Jean-Jacques Rouchi, "*Même avec une interprétation traditionnelle, la charia n'est pas forcément sanglante*", *Atlantico*, 25 October 2011, available at https://atlantico.fr/article/decryptage/charia-libye-tunisie-interpretation-traditionnelle-intelligente-non-violente-jean-jacques-rouchi

factor in changes in mores and society. The other problem is that they attach a literal construction to figurative precepts: "[TRANSLATION] To wage holy war is a figurative precept which the Islamic State, for example, takes literally".[123] It is apparent, in this regard, that Jihad admits of several meanings.[124]

83. "[TRANSLATION] Conversely", he explains, "[TRANSLATION] some corporal punishments enshrined in sharia are no longer in use in some countries", like the punishment of amputation for theft, which "[TRANSLATION] has been abolished in many countries, to give offenders a chance to turn over a new leaf". Dye confirms: "[TRANSLATION] There are, and have been, more radical dynasties under which corporal punishment very likely was and continues to be a routine practice", and again, "[TRANSLATION] it is all a matter of interpretation".[125]

84. As a result, many in the West have wondered whether Sharia is compatible with human rights. It is a practical question which is increasingly cropping up in Europe, particularly for women, and which the Parliamentary Assembly of the Council of Europe (PACE) has decided to try to answer.[126] However, as I have already said, our Chamber did not see fit to address this question in a meaningful way, despite the fact that the punishments imposed under the rules of Sharia merit examination.

85. The reason for the question is that there are territories in greater Europe where Sharia (or "[TRANSLATION] Islamic law") is applied – a state of affairs which poses a human rights problem insofar as those States are parties to the European Convention on Human Rights (ECHR) but also apply or adhere to a system of Islamic justice that is inconsistent with the Universal Declaration of Human Rights (UDHR) and the ECHR.[127] The question is an interesting and crucial one, and to answer it, regard should first be had to the appropriate sources.

86. Needless to say, the Islamic sources are of cardinal importance given that, in most Arab-Muslim countries, Islam is the State religion, and Sharia, God's Law, is seen either as the fundamental law of the State and the legal system of general application

[123] See Aline Glaudiot, "*Charia: quelles sanctions physiques pour quels délits?*", *op. cit., idem*.
[124] See Sami A. Aldeeb Abu-Sahlieh, *Le jihad dans l'islam, Interprétations des versets coraniques relatifs au jihad à travers les siècles*, Centre of Arab and Islamic Law, St-Sulpice, 25 February 2016, 262 pages, p. 7, available at https://www.ugr.es/~mreligio/materiales/Aldeeb.Sami_2016_Le-jihad-dans-lislam.pdf
[125] See Aline Glaudiot, "*Charia: quelles sanctions physiques pour quels délits?*", *op. cit., idem*.
[126] See European Centre of Law and Justice, "Can Sharia Law Prevail Human Rights?", Youtube, viewed on 23 June 2024, available at https://eclj.org/religious-freedom/pace/la-charia-est-elle-compatible-avec-les-droits-de-lhomme-?lng=en.
[127] See European Centre of Law and Justice, "Can Sharia Law Prevail Human Rights?", *op. cit., idem*.

(by countries that refer to themselves as Islamic States, such as Saudi Arabia, Pakistan and Sudan) or (in most other Arab countries, such as Egypt) as a – if not the principal – source of law. In this connection, the relationship between Sharia and human rights has been the subject of a great deal of scholarship, which generally concludes that they are incompatible.[128]

87. Three Council of Europe countries – Albania, Azerbaijan and Türkiye – have ratified both the European Convention on Human Rights and the Cairo Declaration on Human Rights in Islam, a sharia-compatible declaration of human rights. Furthermore, the Russian Federation and Bosnia and Herzegovina have not signed the Cairo Declaration, but they belong to the Organization of the Islamic Conference as observers and are also signatories of the ECHR.

88. The Cairo Declaration of 5 August 1990 states *inter alia* that "Islam is the religion of unspoiled nature". It does not contain a right to freedom of religion and does not confirm the equality before the law of all people regardless of their religion; lastly, article 25 states that "Islamic [Law] is the only source of reference for the [interpretation] or clarification of any of the articles of this [d]eclaration".[129] Immediately preceding that, article 24 of the Declaration states that "[a]ll the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah".[130]

89. Some stated principles of Islamic law contravene principles which have the status of human right, foremost among them religious freedom. Under Sharia, Muslims are not entitled to leave their religion for another religion or for atheism. To do so is an act of apostasy which entails civil death (whereupon succession to their estate is set in train) and carries the death penalty[131] in some Muslim countries.[132]

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[128] See Selim Jahel, "*Les droits fondamentaux en pays arabo-musulmans*", *Revue Internationale de Droit Comparé*, Vol. 56, No. 4, 2004, pp. 787-796, p. 790, available at https://www.persee.fr/doc/ridc_0035-3337_2004_num_56_4_19308

[129] See European Centre of Law and Justice, "Can Sharia Law Prevail Human Rights?", *op. cit., idem.*

[130] The "Declaration on Human Rights in Islam" was adopted on 5 August 1990 in Cairo, Egypt, at the 19th Islamic Conference of Foreign Ministers of the Member States of the Organization of the Islamic Conference. The text was printed in *Vers un système arabe de protection des droits de l'homme: la Charte arabe des droits de l'homme*, published in May 2002 in Lyon by the Arab Center for International Humanitarian Law and Human Rights Education (ACIHL) and the *Institut des Droits de l'Homme de Lyon*; available at https://oic-iphrc.org/fr/data/docs/legal_instruments/OIC_HRRIT/942045.pdf

[131] See European Centre of Law and Justice, "Can Sharia Law Prevail Human Rights?", *op. cit., idem.*

[132] See Quentin Müller, "*Blasphème et apostasie: que dit le Coran ?", Marianne*, 6 August 2023, available at https://www.marianne.net/societe/laicite-et-religions/blaspheme-et-apostasie-que-dit-le-coran

90. The Grand Chamber of the European Court of Human Rights had occasion to answer the compatibility question in 2003. It "concur[red] in the Chamber's view that sharia is incompatible with the fundamental principles of democracy, as set forth in the Convention".[133]

VIII. MISTAKE OF LAW (ARTICLE 32(2) OF THE STATUTE)

91. Article 32(2) of the Rome Statue provides that

> [a] mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

It is worth reiterating that this provision of the Statute is to be understood and interpreted in accordance with the general rules of interpretation and the supplementary means of interpretation laid down by articles 31 and 32, respectively, of the 1969 Vienna Convention on the Law of Treaties. The following analysis is undertaken in good faith, seeking first to grasp the ordinary meaning of the words and the context of the article, having due regard to the Preamble to the Statute and considering the intention of the parties and other *travaux préparatoires*.

92. As we know, there is in law a principle that *nemo censetur ignorare legem* – no one is supposed to be ignorant of the law. Hence ignorance of the law should not, ordinarily, constitute a ground for exempting an offender from punishment. However, there is an exception to the rule, for we know that in the criminal law, which must be strictly construed, an offence is not complete until at least three constituent elements are present: the material element, the mental element and the concurrence of, or causal nexus between, the two; to this is sometimes added the harm suffered.[134] When the mental element is lacking, it is therefore difficult, if not impossible, to say that an offence has been committed, as the Model Pénal Code explains.[135] Considering the gravity and complexity of the crimes falling within the ICC's jurisdiction *ratione materiae*, the drafters of the Statute rightly found it

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[133] ECtHR, *Refah Partisi (the Welfare Party) and Others v. Turkey*, [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003, § 123.

[134] See Model Penal Code, para. 1, 13(5); see UMN Libraries, "4.1. Criminal Elements", Criminal Law, University of Minnesota, available at https://open.lib.umn.edu/criminallaw/chapter/4-1-criminal-elements/

[135] See University of Missouri, Model Penal Code Selected Provisions, University of Missouri,-Kansay City, available at https://www1.law.umkc.edu/suni/crimlaw/mpc_provisions/model_penal_code_default_rules.htm. See also Elizabeth Tanaka, "Model Penal Code (MPC) 1.13 General Definitions", Tanaka Criminal Law Casebook, H20 Search Casebook, available at https://opencasebook.org/casebooks/6141-tanaka-criminal-law-casebook/resources/4.2-model-penal-code-mpc-113-general-definitions/

necessary to include this important statutory provision. It is an exception that exists under international as well as national law.

93. We know that in the criminal law, which must be strictly construed, an offence is not complete until its four constituent elements are present: the material element, the mental element, harm and causation. When the mental element is lacking, it is therefore difficult, if not impossible, to say that an offence has been committed. Considering the gravity and complexity of the crimes falling within the ICC's jurisdiction *ratione materiae*, the drafters of the Statute rightly found it necessary to include this important statutory provision. It is an exception that exists under international as well as national law.

94. In French law, for example, article 122-3 of the Criminal Code provides:

> "[TRANSLATION] Criminal responsibility does not attach to a person who establishes that he or she believed, by a mistake of law which he or she was not in a position to avoid, that he or she could lawfully do the act."

This provision says in essence that a mistake of law is a misapprehension of a rule of law which led a person wrongly to believe that he or she could lawfully do an act. Mistake thus enables an individual who has violated a law or regulation to be declared not criminally responsible for the offence committed where the law or regulation was not sufficiently accessible. This ground for the absence of responsibility follows from the requirement placed on lawmakers to draft clear and precise legislation and make that legislation available to all.[136] If proven, mistake of law constitutes a ground for the absence of criminal responsibility. Obviously, the mistake in question must necessarily relate to a rule of law and must not, therefore, be a mistake of fact; that is to say that it must pertain not to the existence of the facts (act) but to the legal rule. In particular, the mistake must relate to the existence, interpretation or scope of the rule.[137]

95. Furthermore, the mistake which absolves from punishment must be one that could not have been overcome – could not have been avoided – in order for the actor to be able to rely on it. It must therefore be an unavoidable mistake due to incorrect information, such as from a public authority, as is often the case when the competent

[136] See Germain Isa, "*L'erreur de droit ou de fait, cause d'irresponsabilité pénale ?*", *L'erreur de droit ou l'erreur de fait endroit pénal*", Cours de droit.net, 2024, available at https://cours-de-droit.net/l-erreur-de-droit-ou-l-erreur-de-fait-en-droit-penal-a128191222/

[137] See Brunop, "*Erreur de droit, définition, conditions et consequences*", *Exprime Avocat E/A*, *Articles droit pénal*, 4 March 2023, available at https://www.exprime-avocat.fr/erreur-de-droit-definition-conditions-et-consequences/

authority has provided incorrect information, for example about the mistaken issuance of an international licence.[138] In addition, the mistake must consist of a mistaken belief in the right to act. Hence the actor must not have been unsure of the lawfulness of his or her act. He or she must show that he or she believed it was lawful to do the act alleged.[139] The actor must have genuinely believed that the act was lawful and must have done everything in his or her power to find out. Lastly, it must be noted that mistake of law operates only in relation to offences of intent, whereas for offences that do not require intent, the person who made the mistake remains criminally responsible.[140]

96. Likewise, in the law of the ICC, an offence is complete only if the internal or mental element – of the offences that require intent, of course – is fulfilled, in other words if *mens rea* is established. As said before, the mental element or *mens rea* is the culpable intent, criminal intent, dishonesty or intent to commit a blameworthy act: in Latin, *intentio maleficii* or *animus nocendi*, denoting the volition to commit an offence in the knowledge that the law prohibits it.[141] It is not sufficient to do the material act that is prohibited; the act must be done with the criminal volition to violate the law. Thus, for example, the offence of murder does not consist merely of killing another person; the killing must be done with the criminal intent to violate the law, *viz.* knowingly. An executioner who by virtue of the law kills a person sentenced to death commits the material act of killing, and intentionally so, but does not seek to violate the law; on the contrary, the executioner complies with and gives effect to the law.

97. In domestic criminal law, a theft, for example, is committed when a person dishonestly takes a thing belonging to another. But although a person who, out of confusion, takes a thing that does not belong to him or her commits the material act of taking, and intended for that matter to do so, nonetheless he or she lacks the dishonest intent. In such a case, no theft can be said to be committed. So we see that the absence of the mental element prevents the completion of the offence. A person who is merely confused, therefore, commits no theft, because the internal, i.e.

[138] See French Court of Cassation, Criminal Division, 11 May 2006, 05-87.099.
[139] See Court of Cassation, Criminal Division, 13 May 2003, no. 02-84.028).
[140] See Brunop, "*Erreur de droit, définition, conditions et consequences*", *op. cit., idem.*
[141] See Simon France, "The Mental Element", (1990) 20 VUWLR MONOGRAPH 3, New Zealand Legal Information Institute, pp. 43-56, at p. 43, available at http://www.nzlii.org/nz/journals/VUWLawRw/1990/12.pdf

mental, element of the offence is lacking. In practical terms, a legal dispute over whether a mistake of law is relevant or not will boil down to a dispute regarding the mental element required for the offence. This is because knowledge of the law is not generally required of an accused for his or her conviction. The mere misappreciation or ignorance of the law is not sufficient. Only when knowledge of the law is required does the article 32(2) provision apply.[142]

98. Accordingly, mistake of law may be defined as a wrong or absent perception or awareness of the legal reality. Thus, in order to be taken into account, the misunderstanding of the law or mistake of law must clearly negate the mental element or *mens rea*, one of the constituent elements of the offence. The accused must have honestly believed that a legal provision was not applicable; in other words, the actor must have been genuinely unaware of the legal provision or its finer points. For example, he or she might wrongly believe that a treaty does not exist or is not applicable, or might evaluate the law incorrectly or make a mistaken legal evaluation. Plainly, therefore, someone who is fully aware of the situation and knows the constituent circumstances but nevertheless believes that the prohibition is not applicable to his or her conduct or the amendment is not "in accordance with the relevant provision" under article 8(2)(b)(xx) evaluates the legal situation incorrectly.[143] Such a person must be excused, as a matter of course, for lack of the volitional element.

99. I naturally agree with the majority of the Chamber that the Pre-Trial Chamber in *Lubanga* was right to clarify that when criminal responsibility requires that the accused committed a crime with intent and/or knowledge in relation to the legal characterization of his or her conduct, a mistake of law which negates the mental element may be a defence. Thus, mistake of law is a ground for excluding criminal responsibility only when knowledge of a legal characteristic is required by the requisite mental element of the offence. Although mistake of law specifically concerns the factors which relate to a legal element of the crime, the Chamber's assessment of whether such a ground constitutes a ground for excluding criminal responsibility necessitates analysis of the factual circumstances which prove or fail

[142] See Otto Triffterer and Jens Ohlin, "Article 32 Mistake of fact or mistake of law", in Kai Ambos (Editor), Rome Statute of the International Criminal Court, Article-by-Article Commentary, Fourth Edition, Hart Beck Nomos, Oxford and Baden-Baden, 2022, 3064 pages, pp. 1382-1404, p. 1388.
[143] See Otto Triffterer and Jens Ohlin, "Article 32 Mistake of fact or mistake of law", *op. cit., idem,* p. 1395.

to prove the requisite mental element.[144] I believe it is clear from the evidence that Mr Al Hassan could not have been aware that he was committing crimes within the meaning of articles 7(1) and (2) and 8(2) of the Statute, with all their finer points, when he was taking part, for example, in floggings, since to him those acts were precisely the reverse: they consisted of delivering what he and most of the people around him at the material time – not only the leaders and other members of Ansar Dine/AQIM but also members of the population – saw as justice. That in my view is also why, although he had the right under article 67(1)(g) of the Statute not to "testify or to confess guilt", and was so informed by the ICC investigators who interviewed him, Mr Al Hassan nonetheless spoke unprompted and candidly, in his statement to them, about his role in the floggings.

100. Accordingly, with respect to the floggings which Ansar Dine/AQIM imposed on the townspeople as punishment for non-compliance with the new rules, I consider that a mistake of law under article 32(2) of the Statute is applicable to the conduct of the accused, and that he therefore cannot be held responsible for the offence. The mistake of law is readily accounted for, on the evidence before the Chamber, by the very circumstances surrounding the events. The Accused's personal circumstances bear out such misunderstanding of the Court's statutory provisions. I therefore agree with the Defence when it places reliance on Al Hassan's good-faith ignorance of the law and on his deeply Muslim background.

101. I thus believe that, as the Defence suggests, Al Hassan should not be held criminally responsible for his conduct, on the ground that he made a mistake of fact or law. In my opinion, Mr Al Hassan's lived experiences and life circumstances meant that he could not reasonably be expected to know that the punishments prescribed by Sharia would constitute criminal acts for which he might be held culpable.[145] I also agree with the Defence in drawing attention to the fact that Mr Al Hassan was a pharmacist and had received no training in police work.[146] Like the Defence for the Accused, I also observe that the international community has repeatedly refrained from condemning Sharia practices and punishments.[147]

[144] Trial Judgment, para. 1772.
[145] Defence Brief, paras. 57-63. See also Final Defence Brief, paras. 218, 406-412, 530, 609; Defence Response Brief, para. 81; Defence Closing Statements, T-215, p. 35).
[146] Defence Brief, para. 59.
[147] Defence Brief, para. 59.

Furthermore, like the Defence, I note the pre- and post-2012 use of *qadis* and arranged marriages in Timbuktu and take the view that Al Hassan could not have envisioned that his role and participation in Ansar Dine/AQIM's imposition of rules and punishments in that connection would be unlawful. Considering all these facts and circumstances, I believe that Mr Al Hassan doubtless knew that his and Ansar Dine/AQIM's actions might differ from what was done in other climes, given the diversity of cultures, religions and laws among the peoples of the world, but he could not have envisioned, or had culpable knowledge, that those actions might constitute criminally unlawful acts.[148] I therefore find the Defence's submissions and reading of the evidence on the issue of mistake of law persuasive. Mistake of law excludes Al Hassan's responsibility, as does duress.

IX. DURESS (ARTICLE 31(1) OF THE STATUTE)

102. As regards duress as a ground for excluding individual responsibility, I note that the Majority refers to the Appeals Chamber's judgment in *Ongwen* and adopts the standard laid down therein. In this regard, I would recall that article 21 of the Statute establishes a hierarchy of norms: the Court is required to apply, "[i]n the first place", the Statute; it "*may*" then "apply principles and rules of law as interpreted in its previous decisions". The use of the modal "may" instead of "shall" indicates that the judges are not bound by such previous decisions and, where they consider that a decision of the Appeals Chamber conflicts with their interpretation of the Statute, are entitled not to apply it. In my opinion, the Appeals Chamber in *Ongwen* interpreted article 31(1)(d) of the Statute too narrowly, at the risk of rendering it meaningless. What is more, the *Ongwen* and *Al Hassan* cases are too inherently different for the same reasoning to apply to both.

103. Before considering Mr Al Hassan's particular circumstances, however, it is worth briefly reviewing the exact content of article 31(1)(d), a provision in pressing need of proper construction for being one of the most tangled in the Rome Statute. Here again, as with mistake of law, use will be made of the means of interpretation afforded by the 1969 Vienna Convention on the Law of Treaties. Since the general

[148] Defence Brief, paras. 60-62; Final Defence Brief, para. 296, referring notably to P-0605's evidence (MLI-OTP-0062-2888-R02, pp. 2902-2903).

rules laid down at article 31 of the Convention on the Law of Treaties do not appear to be of much assistance, the better course is to turn to the supplementary means of interpretation under article 32 of the Vienna Convention. In that vein, I agree with Kai Ambos that the *travaux préparatoires* tend to show that, at the eleventh hour and for lack of a clear consensus, the delegations blended what are in fact two concepts – necessity and duress proper – and adopted them under the name "duress". That conclusion finds support in the Rome Statute's enumeration of the four constituent elements of this ground of exclusion: (i) the type of conduct for which criminal responsibility is to be excluded; (ii) the elements of duress; (iii) the action that must be taken to avoid or escape the danger or threat; and (iv) the mental element that accompanies the action.[149] It is therefore important, at this point, to revisit the actual concepts of necessity and duress.

104. Legal scholars regard necessity as one of the objective grounds for excluding responsibility. It is worth recalling that the objective grounds arise out of factors extrinsic to the act and are external to the actor, whereas the subjective grounds for excluding responsibility relate to the accused's state of mind.[150] Necessity is thus generally defined as an act done to protect a person or property from a present or imminent danger. This makes it a concept closely akin to that of self-defence, since in both cases the offence appears necessary to avoid a peril. Unlike in self-defence, however, the peril involved is not an attack. The danger must be present, not past or future; otherwise put, necessity supposes not a mere fear of a possibility, but a real and immediate danger. Furthermore, the peril must not be the result of wrongdoing on the part of the person pleading necessity. Duress, on the other hand, is a subjective ground for excluding criminal responsibility. Unlike the objective grounds, the subjective grounds are intrinsic to the perpetrator of the offence. They are often referred to as *causes de non-imputabilité*, since the perpetrator's lack of free will bars *imputation* – attribution of responsibility for the offence – to him or her. The

[149] See Kai Ambos and Albin Eser, "Article 31 Ground for excluding criminal responsibility", in Kai Ambos (Editor), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, Four Edition, Beck Hart Nomos, Oxford, Baden-Baden, 2022, 3,064 pages, pp. 1347-1381, p. 1372.
[150] See Clémence Michaud, "*Les grands principes de la responsabilité pénale*", *Alter Avocats*, 1 December 2023, available at https://alter-avocats-bordeaux.fr/les-grands-principes-de-la-responsabilite-penale/

volitional element of the offence is made out, but, at the time of the act, the actor lacked *discernement* [mental capacity].[151]

105. Insight into both concepts can, again, be gleaned from the French Criminal Code. Under article 122-7 of the Criminal Code, necessity is a ground for excluding the criminal responsibility of

> [TRANSLATION] a person who, faced with a present or imminent danger to himself or herself, to another person or to property, does an act necessary to protect the person or property, except where the means used are disproportionate to the seriousness of the threat.

It is therefore a justification, by the same token as, for example, self-defence or prescription of law, in that no penalty attaches because objective circumstances justify the commission of an otherwise punishable act. Ordinarily, necessity is not to be confused with duress or *force majeure*, which, like mistake or mental disorder, is a *cause de non-imputabilité*. In such cases, no penalty attaches because of subjective factors which are peculiar to the perpetrator of the offence. In the case of necessity, the actor considers the circumstances and chooses to commit the offence because it is the most suitable way of averting the danger. In that of duress, the actor has no choice and, having lost all free will, commits the offence involuntarily. Thus, for example, a firefighter who breaks down the front door of a house with an axe to confront the fire inside acts out of necessity, whereas a motorist who crashes through the same front door with his or her vehicle as a result of skidding on an oil patch whose presence was unforeseeable is acting under duress.[152]

106. It must also be pointed out that duress is the second subjective ground for excluding criminal responsibility. Like the absence of *discernement*, it applies only to the person who was subjected to it. A co-perpetrator or accessory to the offence who was in no way acting under duress therefore remains criminally responsible. Again, to take a comparative law approach, reference can be made to French law. Thus article 122-2 of the French Criminal Code, for example, provides for this ground of exclusion in the following terms: "[TRANSLATION] Criminal responsibility does not attach to a person who acted under the influence of a force or duress which he or she was unable to resist."

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[151] See Theo Guillaumette, "*Chapitre 2: Les causes d'exonération de la responsabilité pénale*", Université Paris Dauphine, *Studocu*, 2018-2019 academic year, available at https://www.studocu.com/fr/document/universite-paris-dauphine/droit-penal/chapitre-2-les-causes-dexoneration-de-la-responsabilite-penale/6451612

[152] See Dalloz, "*L'état de nécessité*", *Dalloz Actu Etudiant*, Dalloz 2024, 24 October 2019, available at https://actu.dalloz-etudiant.fr/focus-sur/article/letat-de-necessite/h/f9462bbc5d260fc1ed4250909cc2544a.html

107. There are two types of duress: physical and mental. Physical duress can be external or internal; so can mental duress. External physical duress results from a force extraneous to the actor, whose conduct is consequent on a natural force, for instance that of an animal. In the case of internal physical duress, the doer of the criminal act must be the victim of an internal impulse that destroys his or her freedom. Such is the case of a train passenger who pays for a particular destination and asks to be woken up but passes the destination without a valid ticket, simply because he or she is not woken up in time. The passenger is not criminally responsible.[153] Conversely, mental duress results from a force acting on the individual's will through fear of danger. Here the actor violates the law, knowing that it is the law, simply because he or she has been compelled to act involuntarily. French courts take the view that internal mental duress does not operate to exclude criminal responsibility. However, for external mental duress to exclude the actor's criminal responsibility, it must have the same attributes as physical duress: it must be one which a "*bon père de famille*" – ordinary and reasonable person – would be unable to resist, and it must be unforeseeable, *viz.* not the result of the actor's own wrongdoing.[154]

108. In a nutshell, the idea here is that the actor's will, expressed and conscious though it may have been, was not free. In any event, the law calls for a distinction to be made between external duress – extraneous force – and internal duress; but it bears noting that this conventional distinction is in fact somewhat hollow, for the effects and attributes of duress are the same in both scenarios.[155]

109. As mentioned, the law of the Rome Statute is rather tangled in this regard. Hence the decisive role to be played by the Court's jurisprudence, which, as I see it, is still in its infancy and is poised to develop at a very rapid pace. As regards duress, therefore, it is clear that the blameworthy conduct must be a crime within the ICC's jurisdiction *ratione materiae*. That condition is relatively straightforward. As to the elements of duress, there appear to be four. The basic condition is that there must be a threat of imminent death to one's own bodily integrity or that of another person.

[153] See Germain Isa, "*La contrainte, une cause d'irresponsabilité pénale*", in *La contrainte, une cause d'irresponsabilité pénale ou d'atténuation de la responsabilité*, *Droit pénal*, Cours de droit.net, 2024, available at https://cours-de-droit.net/contrainte-droit-penal/
[154] See Germain Isa, "*La contrainte, une cause d'irresponsabilité pénale*", *op. cit., idem*.
[155] See Theo Guillaumette, "*Chapitre 2: Les causes d'exonération de la responsabilité pénale*", *op. cit., idem.*

The threat need not be unlawful, as in the case of self-defence, making this condition reminiscent of necessity. In any event, I consider that the imminence of the threat may be made out by a general, persistent state of emergency, provided that such a state is objective. As such, my position is fairly close to that of the Defence, since I believe that what matters is that an objective risk exists and affects the mind of the Accused at the time he or she commits the criminal acts.[156] In other words, it may be a serious, objective and persistent threat to the life or health of the actor or his or her family. I disagree with the view that, as the Appeals Chamber said in *Ongwen*,[157] the threat must be present and immediate or at least sufficiently close at hand.[158] The criminal history of humankind has made sufficiently clear that a general, unremitting and persistent atmosphere of xenophobia, racism or antisemitism may at any time erupt into individual or organized violence, or even a reign of terror or genocide. It is therefore necessary to be circumspect in this regard and to look at every situation individually, while of course remaining within the basic criteria stated in the Rome Statute. As regards the source of the threat, it may come from other persons or be constituted by a constellation of circumstances outside the actor's control.[159] The threat must therefore be irresistible, at least for the reasonable person.

110. The person exposed to the threat may be the actor, or it may be another person. Lastly, the threat must take the concrete form of objective and imminent duress or peril to the actor. The duress is the link between the serious threat and the actor's criminal conduct. The duress must exceed the actor's mental grasp, so that he or she falls victim to it. It must not, therefore, be caused or provoked by the actor and must instead be unforeseeable, as required by French law. The threat gives rise to duress only if a reasonable person in similar circumstances would be unable to avoid it otherwise than by engaging in the conduct that is regarded as criminal under the Rome Statute.

111. However, there is no requirement to show bravery or special heroism in response to the threat. The standard is by no means that of the hero, but that of the ordinary

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[156] See Defence Trial Brief, para. 86.
[157] See ICC, Situation in Uganda, *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15A, "Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled 'Trial Judgment'", 15 December 2022, 611 pages.
[158] See ICC, *Ongwen* case, Trial Judgment, para. 2582; Judgment of the Appeals Chamber, paras. 1422-1423.
[159] See Kai Ambos (Editor), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, *op. cit., idem.*

and reasonable person, what Romano-Germanic law calls the "*bon père de famille*". The external force must therefore be one which a reasonable person in the same conditions or circumstances would be unable to resist. The actor must have acted necessarily and reasonably to avoid and avert the threat. Unlike in self-defence, which requires the actor's blameworthy act to be proportional to the danger sought to be avoided, no such requirement seems to arise here. The reaction need only be necessary and reasonable. This is consistent with the choice of a lesser evil, as summarized by Judge Antonio Cassese in his Dissenting Opinion in *Erdemović*, requiring that "[the crime committed is not] disproportionate, the crime committed under duress must be, on balance, the lesser of two evils".[160]

112. Lastly, the a actor must not seek to cause a more serious harm than the threat sought to be averted or avoided.

113. In this instance I believe there was in fact a persistent and unremitting but sufficiently objective threat of bodily harm to Mr Al Hassan or his family, on an ongoing basis, should he not consent to joining the Tuareg armed groups. This factor is not to be underestimated or taken lightly. In his particular individual position, refusal would have been seen as a betrayal of the members of his ethnic group. The harm to his or his family's life or bodily integrity could have materialized at any time. It was an objective possibility that could have become fact immediately or at some point in the future. Although the carrying out of the threat might have been delayed, it could just as well have occurred promptly. Mr Al Hassan was therefore living in a relentlessly hostile, violent environment. Financially, and above all psychologically, given his age and shy nature, he had no reliable means of coping other than to give in and join Ansar Dine. To my mind, therefore, the threat need not be one that will materialize immediately. So to hold would destroy the entire exculpatory effect of this important Rome Statute provision which, to reiterate, blends the specific concepts of necessity and duress – the actual circumstances in which the Accused found himself.

[160] See ICTY, Appeals Chamber, *Prosecutor v. Drazen Erdemović*, IT-96-22-A, "Separate and Dissenting Opinion of Judge Cassese", 7 October 1997, 37 pages, para. 16. The complete definition of duress, as found in Judge Cassese's separate opinion, para. 41, requires: (1) a severe threat to life or limb, (2) no adequate means to escape the threat, (3) proportionality in the means taken to avoid the threat, (4) the situation of duress should not have been self-induced. Available at https://www.icty.org/x/cases/erdemovic/acjug/en/erd-adojcas971007e.pdf

114. Thus, in the specific circumstances of the case, I do not think that Mr Al Hassan, in his heart of hearts, fully shared Ansar Dine/AQIM's ideology. I would point out that he was described as a person who, before the groups came to power in Timbuktu, used to attend concerts, play music with friends, sing and dance.[161] P-0065's stated impression was that when the groups entered the towns, the tribal leaders, faced with Al Qaida's grip on affairs, asked the young people to join Ansar Dine to protect themselves and the community from within, and that Al Hassan's tribe and personal ambition spurred him to become a "non-extremist stakeholder". Admittedly, not all young Tuaregs joined the armed groups, but they were not all in Al Hassan's particular individual position. They each had their own ties to clan and ethnicity, and not all clans were the same, as we learned at trial. The fact is that Al Hassan, who was born on 19 September 1977 and was 35 to 36 years old at the material time, was a rather shy young man who, in my opinion, found himself caught up involuntarily in the armed groups' movement, spurred on by the force of his Tuareg ethnic group and by his ignorance of the ICC's legal intricacies. He was benevolent by nature. It is worth noting witness P-0065's further statement that Mr Al Hassan was also known for having played a positive role in the Islamic Police, and that there was talk of how he had helped people during his time there.[162] Al Hassan did not have the soul of an "[TRANSLATION] Islamist terrorist".

115. Lastly, as a Tuareg and thus a member of a minority that had been persecuted by the central government for decades,[163] Mr Al Hassan was necessarily predisposed to join an armed group – Ansar Dine – that claimed to be the defender of his people. Furthermore it is my view that, although the bench must be satisfied of the existence of the *objective* character of the threat, it must also assess the *perceived* or *subjective* character of the threat. It is, after all, the accused's perception that leads to the decision to commit the offence. To be sure, safety rests on objective considerations, but it also has to be gauged against the individual perception of the person concerned.

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[161] D-0272, MLI-D28-0006-4181-R01, p. 4183, para. 16.
[162] P-0065: T-050, p. 18.
[163] Trial Judgment, para. 411: "In addition, [the Tuareg] community also felt that they were discriminated against by the rest of the population and by the Malian army, in particular during and as a result of the Tuareg rebellions. Within the Tuareg community, people repeatedly referred to several killings allegedly committed by the Malian army targeting Tuareg people."

In the case *sub judice*, the Defence explained that Mr Al Hassan had no other option than to join the groups, not least because he lacked the wherewithal to flee.[164]

116. Next, the Chamber has determined that a document found at the premises of the former *Gendarmerie Nationale* shows that new recruits were required to "lis[ten] and ob[ey]" and to comply with "all orders given". They were informed of the rules governing their behaviour and that any violation thereof would result in punishment, which could include exclusion from the camp.[165] P-0150 explained that all this had been reduced to writing to serve as a pledge for new recruits so that everyone was fully aware of all the conditions when they joined the group.[166]

117. The Chamber has concluded that that document, entitled "Rules of Recruitment", contained Ansar Dine/AQIM's rules of recruitment in Timbuktu in 2012-2013, which applied in particular to the training camps.[167] The Chamber has also underscored D-0529's evidence that new recruits were informed that the punishment for fornication was 100 lashes of the whip for a person who had never been married, and stoning for a person who had been married.[168] I would also point to the evidence of P-0150, referenced by the Chamber, that, had he refused to obey, he

> knew very well that [he] would have been dismissed from all the positions that [he] had at the time, - and also, [he] would have been chased or maybe accused by very big charges and accusations. And [he] could have been killed. And it would have been a very big risk.[169]

118. Lastly, on top of that, the flagrant violence with which Ansar Dine/AQIM governed Timbuktu must have been intimidating to anyone living there at the time, especially any member who might want to leave the groups, thereby becoming "[TRANSLATION] a traitor". I therefore find that, during the time frame of the charges, Mr Al Hassan, as a member of Ansar Dine/AQIM, was facing a general and persistent threat, possibly including mortal danger, should he not follow orders. All these factors lead me to conclude that, contrary to the view of the Majority,

[164] Defence Trial Brief, para. 93: "At the beginning of 2012, Al Hassan lost his source of income, 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 9 months pregnant in April 2012, it was not a safe and reasonable option in his particular circumstances."
[165] Trial Judgment, para. 440, referring to document MLI-OTP-0002-0759, translation MLI-OTP-0078-6164, p. 6165.
[166] Trial Judgment, para. 440, note 1116.
[167] Trial Judgment, para. 440, note 1116.
[168] Trial Judgment, para. 440, note 1116, referring to D-0529: T-189, pp. 7-8, 48.
[169] Trial Judgment, para. 1762, referring to P-0150: T-103, pp. 30-31.

Mr Al Hassan acted under duress within the meaning of article 31(1)(d) of the Statute. And despite that duress, or rather thanks to it, Al Hassan was able to join Ansar Dine/AQIM; and mistake of law was to thank, or to blame, for the fact that Al Hassan was nonetheless able to provide a relative degree of security in Timbuktu and to assist the population, to a greater or lesser extent, from within Ansar Dine/AQM.

X. THE RELATIVE CONTRIBUTION MADE BY MR AL HASSAN AND ANSAR DINE/AQIM, NOTWITHSTANDING THE SERIOUS CRIMES COMMITTED

119. Furthermore, as said above and as determined by the Chamber, it is clear that many serious crimes were committed by the armed groups, Ansar Dine/AQIM, during their reign in Timbuktu. But Ansar Dine/AQIM cannot be criticized, in the case *sub judice*, for setting up institutions in Timbuktu and contributing to the restoration of public order. I have already said as much. At a time when the apparatus of the State was completely absent, they protected the civilian population in the State's place. As is known, "[p]ublic order is restored through police operations, which are governed by domestic law and international human rights, and not through military operations governed by IHL on the conduct of hostilities."[170] Mr Al Hassan contributed relatively positively to this endeavour, to judge by the esteem in which he was held by the civilian population of Timbuktu.

120. It is my view that, when organized armed groups take control of a territory for a prolonged period, they cannot repeal the constitution in place but must ensure respect for the law in that territory. Accordingly, Ansar Dine/AQIM should therefore owe obligations akin to those of an occupying State, as described in the Fourth Geneva Convention and Additional Protocol I, when it comes to governance of the territory and the need to ensure public order and administer justice. I note that the main reason why those obligations exist for States that occupy the territory of another State is none other than the security, welfare and protection of the civilian population and protected persons. As the evidence shows, Al Hassan contributed positively and enthusiastically to the provision of security and assistance to the people of Timbuktu. These same concerns should therefore guide the adoption of

[170] See Kenneth Watkin, "Use of force during occupation: law enforcement and conduct of hostilities", *op. cit.*, *idem*, p. 212.

further minimum international obligations for organized armed groups that are in control of territory.[171]

121. Moreover, numerous witnesses testified to the fact that the security situation improved from the time Ansar Dine/AQIM took control of the city of Timbuktu – an improvement to which Al Hassan also contributed, believing that he was within his rights, and being the kind-natured person that he was. The Chamber has found that from that point on, and after the "chaos" created by the MNLA, the population felt that order and security had been restored, and pillaging and theft reduced.[172] For example, the groups put in place an emergency telephone number and provided free electricity, water and medical care to the population.[173]

122. Ansar Dine/AQIM, whose capabilities were a far cry from those of a State, set up institutions, a system and procedures for the administration of justice that were commensurate with the capabilities they had. It was not within their limited capabilities, for example, to ensure that proceedings involved defence counsel, whose absence in the region predated their arrival anyway. Ansar Dine/AQIM also necessarily relied on the traditional justice system – that of the *qadis* – that was already in place locally.[174] They also recruited local judges who were respected by the townspeople, such as Houka Houka, who was already a judge before Ansar Dine/AQIM arrived and continued to sit as one after the armed groups left, as the evidence shows.[175]

123. Lastly, it is worth reiterating that the trial judgment in this case does not examine, let alone condemn, Ansar Dine/AQIM's overarching project in Timbuktu and

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[171] ICRC, ICRC report on IHL and the challenges of contemporary armed conflicts - Recommitting to protection in armed conflict on the 70th anniversary of the Geneva Conventions, 22 November 2019, pp. 53-54: "IHL applicable in non-international armed conflict does not, however, contain rules addressing issues such as the provision of public order and safety, the possible collection of taxes, or the adoption of laws regulating life in such territory. […] Issues pertaining to the relationship between citizens and authorities are primarily the purview of human rights law. Ensuring continued protection of the human rights of persons living in territory under the de facto control of armed groups is, however, challenging as a matter of law and practice […] unlike IHL, human rights treaties bind only States. […] In a number of instances, States – notably though resolutions adopted in UN organs such as the Security Council, the General Assembly, or the Human Rights Council – have called on non-State armed groups that exercise de facto control over territory to comply with human rights law in addition to respecting their IHL obligations. […] To overcome these legal challenges and engage in protection-related dialogue with all parties to armed conflict, the ICRC takes a pragmatic approach and operates on the premise that 'human rights responsibilities may be recognized de facto' if a non-State armed group exercises stable control over territory and is able to act like a State authority."
[172] Trial Judgment, para. 464.
[173] Trial Judgment, para. 464.
[174] Trial Judgment, section III.A.5 ("Traditional justice system").
[175] Trial Judgment, para. 609.

northern Mali at large. Nor does it interfere with the Malian Government's efforts to keep the country unified. The Chamber has examined the protagonists' conduct where it forms part of the charges against Mr Al Hassan and has ascertained from the evidence, in accordance with the Statute, whether the existence of crimes for which responsibility may be attributed to the Accused has been established beyond reasonable doubt.

XI. CONCLUSION

124. In conclusion, I agree with all the findings of fact and conclusions of law reached in the trial judgment as regards the crimes committed and Mr Al Hassan's individual criminal responsibility for them, with the exception of the crimes relating to the floggings. That notwithstanding, I consider that there is a ground for fully excluding criminal responsibility within the meaning of article 31(1)(d) of the Rome Statute, based on duress, and a further ground based on mistake of law under article 32(2) of the Statute. Accordingly, Mr Al Hassan should be acquitted of all the charges brought against him. True culpability does not lie with him.

125. My conclusion does not mean that crimes were not committed. I emphatically reaffirm that serious crimes were perpetrated by the armed groups, Ansar Dine/AQIM, and by their members – international crimes under the Rome Statute which the Office of the Prosecutor has successfully proved to the Chamber beyond reasonable doubt. Those odious crimes had a deeply adverse impact on the victims in Timbuktu, particularly women and children, and on the victims around Mali and perhaps elsewhere in the world. All these victims deserve to be heard and acknowledged, and to receive reparation and assistance, so far as possible, to the full extent of their rights. I respectfully pay tribute to them and hope that future proceedings or cases arising out of the situation in Mali will result in the trial and conviction of those culpable for all this suffering caused to, and in respect of, the innocent victims.

Done in both English and French, the French version being authoritative.

[signed]

Judge Antoine Kesia-Mbe Mindua

Presiding Judge

Dated this 28 June 2024

At The Hague, Netherlands