CASE NOTE

PROSECUTOR V AL HASSAN: GOVERNANCE AND GENDER IN INTERNATIONAL CRIMINAL LAW

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CONTENTS

I INTRODUCTION

On 26 June 2024, the International Criminal Court ('ICC') handed down its judgment in the *Al Hassan* case,[1] which dealt with the 2012 occupation of Timbuktu by the armed groups, Al-Qaeda in the Maghreb ('AQIM') and Ansar Dine. During this occupation, Ansar Dine and AQIM had instituted a governance regime in Timbuktu, based, as the Trial Chamber stated, on 'their … interpretation of *Sharia*'.[2] They introduced rules and prohibitions that affected many aspects of the daily life of the people of Timbuktu.[3] There were rules concerning relations between men and women, religious practices, dress, conduct, music, entertainment, alcohol and tobacco.[4] Institutions were created to enforce these rules: an Islamic Police; a morality police ('the *Hesbah*'); an Islamic Court; and a Sharia Committee. Breaches of the rules were punished by violent sanctions, including floggings and an amputation.[5] Al Hassan, as de facto chief of the Islamic police, was charged for his contribution to war crimes and crimes against humanity associated with this governance regime, including torture, cruel treatment, outrages on personal dignity, the passing of sentences and the carrying out of

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1 *Prosecutor v Al Hassan (Trial Judgment)* (International Criminal Court, Trial Chamber X, Case No ICC-01/12-01/18, 26 June 2024) ('*Prosecutor v Al Hassan*').

2 Ibid [1288].

3 Ibid [1].

4 Ibid [670], [690]–[701], [702]–[703], [733].

5 Ibid [1].

executions without previous judgment pronounced by a regularly constituted court and persecution on religious grounds.[6]

While Ansar Dine/AQIM's governance regime affected all the inhabitants of Timbuktu, it contained particularly onerous rules and punishments around dress and conduct for women. Women who contravened the rules were detained in horrific conditions in what was known as the 'women's prison' — a bank ATM room with a glass door exposed to public view.[7] Some women were raped while detained. Ansar Dine/AQIM also encouraged '*jihadi* marriages' with local women and girls.[8] In response to these practices, Al Hassan was charged with complicity in forced marriage as a crime against humanity, sexual slavery, rape and gender persecution.[9]

This was only the second time that forced marriage had been prosecuted in the ICC, following the *Ongwen* case,[10] and the first time that gender persecution had been charged.[11] As a result, the *Al Hassan* judgment was greatly anticipated by feminist scholars, who hoped that it would further develop the international jurisprudence concerning gender-based crimes.[12] These hopes, however, were frustrated when a lengthy and confusing judgment was finally handed down. The judgment consisted of an 822-page trial judgment and three separate opinions — one by each of the three judges. Judge Akane's separate opinion explained her dissent from the "majority position" held by Judge Prost and Judge Mindua. Although Judge Mindua was nominally part of the majority, his separate opinion departed from the majority on many important points. He made several unconventional digressions and finally excused Al Hassan on all charges, through the defences of mistake of law and duress. When these fragmented opinions were added together, it was clear that Al Hassan had been acquitted of all gender-related charges — leading to criticism and chagrin.[13]

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6 Ibid annex 3 ('*Updated Self-Contained Set of Charges and Convictions*') [7], [10]–[12], [19].

7 *Prosecutor v Al Hassan* (n 1) [536]–[537], [1569].

8 Ibid [493].

9 *Updated Self-Contained Set of Charges and Convictions* (n 6) [14]–[19].

10 *Prosecutor v Ongwen (Trial Judgment)* (International Criminal Court, Trial Chamber IX, Case No ICC-02/04-01/15, 4 February 2021) [3021]–[3026] ('*Prosecutor v Ongwen Trial Judgment*').

11 Rosemary Grey et al, 'Gender-Based Persecution as a Crime against Humanity: The Road Ahead' (2019) 17(5) *Journal of International Criminal Justice* 957, 959.

12 See, eg, Valerie Oosterveld, 'Forced Marriage: Terminological Coherence and Dissonance in International Criminal Law' (2019) 27(4) *William and Mary Bill of Rights Journal* 1263, 1279–80 ('Forced Marriage'); Rosemary Grey and Louise Chappell, 'Re-Writing Sex and Gender in International Criminal Law' in Margaret deGuzman and Valerie Oosterveld (eds), *The Elgar Companion to the International Criminal Court* (Edward Elgar Publishing, 2020) 363, 384–5; Tanja Altunjan, 'The International Criminal Court and Sexual Violence: Between Aspirations and Reality' (2021) 22(5) *German Law Journal* 878, 889–90.

13 See, eg, Rosemary Grey and Valerie Oosterveld, 'Al Hassan: The International Criminal Court's First Judgment on Gender Persecution (Part 2)', *Opinio Juris* (Blog Post, 2 August 2024) <https://opiniojuris.org/2024/08/02/al-hassan-the-international-criminal-courts-first-judgment-on-gender-persecution-part-2>, archived at <https://perma.cc/YA7Q-M255>; Melanie O'Brien, Kathleen M Maloney and Valerie Oosterveld, 'Forced Marriage in the Al Hassan Trial Judgment', *Opinio Juris* (Blog Post, 23 July 2024) <https://opiniojuris.org/2024/07/23/forced-marriage-in-the-al-hassan-trial-judgment>, archived at <https://perma.cc/7XBL-6E62>; Lucy Gaynor, 'Is the ICC Al Hassan Judgement a Mess or the Future?' *Justice Info* (Blog Post, 5 July 2024) <https://www.justiceinfo.net/en/133973-icc-al-hassan-judgement-mess-or-future.html>, archived at <https://perma.cc/Y6FY-H7MG>.

Yet, although the gender-related charges failed, Al Hassan was found guilty of the other crimes that arose out of Ansar Dine/AQIM's governance of Timbuktu.[14] And while attention has been largely focused on the ICC's (in)ability to further a feminist vision of international criminal law, these other charges also exposed conflicting visions of international law. They required the judges to engage in difficult discussions about whether Ansar Dine/AQIM's rules, procedures and punishments constituted a legal system or a series of crimes. The way the judges did this, and their varying conclusions, are important for understanding both *Al Hassan* and international criminal law more generally. These discussions evoked uncomfortable theoretical questions about the universality of international criminal law, its possibilities and limitations, its political or jurispathic ambitions[15] and even the qualifications of law itself.[16] For those scholars who seek a greater inclusion of Islamic legal principles in international criminal law,[17] and those who seek to create a crime of gender apartheid,[18] the majority's wary, legalistic disqualification of rules and punishments it refused to describe as '*Sharia*', and Judge Mindua's equally convoluted defence of sharia law, are worth noting. Finally, the different ways that the judges addressed these questions of law and governance shaped their conclusions about the gender-related crimes.

The complex reasoning and confusing outcome of the case led to appeals by the Prosecution and the Defence.[19] However, on 17 December 2024, both the Defence and the Prosecutor discontinued their appeals. Therefore, the verdict stands, and with it, stand three, contradictory strands of reasoning on central aspects of international criminal law. This case note will explain the different layers of argument that led to the verdict and point to some of the questions that the case raises. Part I explains the Chamber's interpretation of common goal and common purpose, which were to inform the assessment of Al Hassan's liability. Part II looks at the successful charges related to Ansar Dine/AQIM's governance

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14 See *Prosecutor v Al Hassan* (n 1) [1785].

15 For some discussion of these questions, see Tor Krever, 'International Criminal Law: An Ideology Critique' (2013) 26(3) *Leiden Journal of International Law* 701; Judith N Shklar, *Legalism: Law, Morals and Political Trials* (Harvard University Press, 1986); Samuel Moyn, 'Judith Shklar on the Philosophy of International Criminal Law' (2014) 14(4–5) *International Criminal Law Review* 717; Immi Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 13(3) *European Journal of International Law* 561, 593.

16 The discussions and conclusions about law in *Al Hassan* echo some of the central debates of analytical jurisprudence, exemplified in the Hart–Fuller debate: HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) *Harvard Law Review* 593; Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71(4) *Harvard Law Review* 630; Tallgren (n 15) 593–5.

17 See, eg, Julie Fraser, 'Exploring Legal Compatibilities and Pursuing Cultural Legitimacy: Islamic Law and the ICC' in Julie Fraser and Brianne McGonigle Leyh (eds), *Intersections of Law and Culture at the International Criminal Court* (Edward Elgar Publishing, 2020) 378; Mohamed Elewa Badar, 'Islamic Law (Shari'a) and the Jurisdiction of the International Criminal Court' (2011) 24(2) *Leiden Journal of International Law* 411.

18 See, eg, Karima Bennoune, 'The International Obligation to Counter Gender Apartheid in Afghanistan' (2022) 54(1) *Columbia Human Rights Law Review* 1, 84; Rangita de Silva de Alwis, 'Holding the Taliban Accountable for Gender Persecution: The Search for New Accountability Paradigms under International Human Rights Law, International Criminal Law and Women, Peace, and Security' (2024) 25(2) *German Law Journal* 289.

19 See *Prosecutor v Al Hassan (Prosecution Notice of Appeal)* (International Criminal Court, The Appeals Chamber, Case No ICC-01/12-01/18, 18 September 2024); *Prosecutor v Al Hassan (Defence Notice of Appeal against the Trial Judgement)* (International Criminal Court, The Appeals Chamber, Case No ICC-01/12-01/18, 18 September 2024).

regime and the difficulties these charges revealed in determining the universality or boundaries of international criminal law. Part III discusses the failure of the gender related charges, linking this outcome to the judges' positions on the nature of international criminal law and international crime. The case note concludes that *Al Hassan* reveals a deep ambivalence about the purpose and parameters of international criminal law.

II COMMON PURPOSE

Al Hassan's liability for international offences was contingent on the existence and scope of Ansar Dine/AQIM's common goal, or common purpose. Al Hassan was charged with war crimes under art 8(2)(c) and (e) of the ICC's *Rome Statute*, which concerns non-international armed conflicts and crimes against humanity under art 7.[20] For art 8 to apply, the Trial Chamber had to find, among other elements, that Ansar Dine and AQIM displayed the requisite degree of organisation. The Trial Chamber found that this was demonstrated by the groups' hierarchical command structures, discipline, distinctive attire and ability to speak with one voice.[21]

Crimes against humanity also require a degree of organisation sufficient to carry out multiple, systemic attacks in pursuit of a state or organisational policy.[22] The Trial Chamber found that Ansar Dine/AQIM was an organisation, pointing out the institutions that constituted its governance regime.[23] Moreover, the Chamber considered that Ansar Dine/AQIM's conduct was shaped by an organisational policy, directed towards its ultimate goal of 'establish[ing] an Islamic State governed by their own interpretation of *Sharia* on the entire territory of Mali'.[24] The Chamber continued 'the control of the city of Timbuktu in order to impose and enforce new rules and prohibitions on the population of Timbuktu was in close alignment with this broader goal'.[25]

A common goal was also necessary for establishing Al Hassan's liability under art 25 of the *Statute*. Al Hassan was only charged as a direct perpetrator, pursuant to art 25(3)(a) of the *Statute*, for two incidents of flogging. He was also charged in the alternative, under art 25(3)(c) of the *Rome Statute*, for 'aiding, abetting or otherwise assisting' in these incidents, other incidents of flogging and five incidents of sentencing without due process as a war crime.[26]

For all the other offences, however, Al Hassan was charged pursuant to art 25(3)(d), which extends criminal responsibility to a person who 'in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose'.[27] This included other incidents of torture, an amputation and a more extensive list of acts charged as sentencing

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20 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) ('*Rome Statute*'); *Prosecutor v Al Hassan* (n 1) [9]–[13].

21 *Prosecutor v Al Hassan* (n 1) [1259]–[1261].

22 Ibid [1108]–[1114].

23 Ibid [1286]–[1287].

24 Ibid [1288].

25 Ibid.

26 Ibid [1587].

27 *Rome Statute* (n 20) art 25(3)(d).

without due process. It was also the mode of liability under which Al Hassan was prosecuted for the mistreatment and rape of women in detention, forced marriage, sexual slavery and persecution on religious and/or gender grounds as a crime against humanity.

Thus, many of the important charges, particularly those related to the treatment of women depended on the interpretation of art 25(3)(d) and its specific requirement of a 'common purpose' that, the Trial Chamber noted, set it apart from the other forms of liability.[28] Common purposes and common enterprises had become increasingly complex and controversial in international criminal law.[29] The majority in *Al Hassan*, however, distanced itself from the complicated approaches of the past. Judge Prost and Judge Mindua stated that the provision was an innovation of the *Rome Statute* and guidance could not be sought from other international criminal law jurisprudence.[30] The language, Judge Prost and Judge Mindua continued, should be read in its ordinary meaning and nothing else should be added — although they also noted that the provision imported language from counterterrorism efforts.[31] Judge Akane objected to this last point,[32] but it did not appear to influence the majority's account of the requirements of the provision.[33] These requirements, the majority stated, are that there must be 'a crime within the jurisdiction of the Court', committed by persons who 'belong[…] to a group acting with a common purpose that involves the commission of a crime'.[34]

This common purpose, the majority explained, does not have to take the form of an agreement, such as is required for direct liability under art 25(3)(a).[35] There is also no need for the group to agree on the exact manner in which the crimes will be committed or 'exact contours' of the crimes.[36] The members of the group only need to be linked by a common purpose, 'which by the ordinary meaning of this expression, is a shared aim, goal or objective'.[37] The accused must have made an intentional contribution, 'with the aim of furthering the criminal activity or criminal purpose of the group, or was made in the knowledge of the intention of the group to commit the crime'.[38]

In this case, the Trial Chamber reiterated Ansar Dine/AQIM's common purpose as the organisation's goal 'to impose and implement their interpretation of "*Sharia*" and to control Timbuktu and its residents for this purpose'. [39] Alternatively, in Judge Akane's words, the purpose was to

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28 Ibid [1235].

29 Darryl Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21(4) *Leiden Journal of International Law* 925, 927, 939; Alicia Gil Gil and Elena Maculan, 'Current Trends in the Definition of "Perpetrator" by the International Criminal Court: From the Decision on the Confirmation of Charges in the *Lubanga* Case to the *Katanga* Judgment' (2015) 28(2) *Leiden Journal of International Law* 349, 359–62.

30 *Prosecutor v Al Hassan* (n 1) [1230].

31 Ibid [1231].

32 Ibid opinion 1 [10] (Judge Akane).

33 Ibid [1231].

34 Ibid [1232].

35 Ibid [1236].

36 Ibid [1238].

37 Ibid [1236].

38 Ibid [1232].

39 Ibid [1618].

> control the city of Timbuktu in order to impose and enforce new rules and prohibitions on the population as part of its ultimate goal to establish an Islamic State governed by their own interpretation of *Sharia* on the entire territory of Mali.[40]

III CRIMES OF LAW AND GOVERNANCE

Thus, the Chamber agreed that a central part of Ansar Dine/AQIM's common goal was to create a legal system. As the judgment revealed, Ansar Dine/AQIM were largely successful in realising this goal in Timbuktu. The Chamber detailed an increasingly formal, organised and legalistic system. There were evidentiary rules,[41] rules of procedure[42] and secondary rules for managing legal debate through the Sharia Committee.[43] New rules were publicly announced and generally applied.[44] The trial judgment commented that '[t]he Islamic Court treated all defendants who came before it equally, regardless of whether they were from Ansar Dine/AQIM or from the population, or whether they were "rich or poor".'[45] It related, in detail, the account of Abou Boccar, a member of the Islamic Police, who was found guilty of rape and sentenced to 100 lashes.[46]

As this anecdote shows, Ansar Dine/AQIM's governance was characterised by principles of legality and extreme violence. It was this troubling system of governance that became the focus of the *Al Hassan* case and the source of all the offences for which Al Hassan was convicted. Ansar Dine/AQIM's sanctions were characterised as war crimes and crimes against humanity; the Islamic Court's sentences were found to constitute the war crime of sentencing without due process; and the whole system of rules was held to constitute the crime against humanity of religious persecution.[47] In this way, *Al Hassan* stands as a trial of a legal system and the judges' opinions as deliberations on the nature of domestic and international law.

Given this focus on the criminality of Ansar Dine/AQIM's governance regime, it should be noted that the laws of armed conflict have little to say about the legality of changing a legal system in this context. Article 43 of the *Hague Convention IV* and art 64 of the *Geneva Convention IV* require an occupying power to maintain order and respect the existing laws as far as possible during *international* conflicts.[48] Yet, as the Defence was careful to confirm during its early submissions, Ansar Dine/AQIM's occupation, taking place during a non-international conflict, was not subject to these provisions.[49] The Pre-Trial

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40 Ibid opinion 1 [65] (Judge Akane).
41 Ibid [632]–[634].
42 Ibid [643]–[646].
43 Ibid [613].
44 See, eg, ibid [674].
45 Ibid [623].
46 Ibid [679]–[680].
47 Ibid [1143]–[1144], [1155]–[1158], [1544].
48 *Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land*, opened for signature 18 October 1907 (entered into force 26 January 1910) ('*Hague Convention IV*'); *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949 75 UNTS 287 (entered into force 21 October 1950) ('*Geneva Convention IV*').
49 *Prosecutor v Al Hassan (Submissions for the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/12-01/18, 9 July 2019) [119].

Chamber agreed that there was no '"occupation" in the 'legal sense'.[50] The majority trial judgment applied this finding by putting the word 'occupation' in quotation marks; it sought, as will be shown, to locate the criminality of the regime in its content and effect, rather than its mere existence.

Yet, although Judge Mindua purportedly supported this majority judgment, he presented a different account of Ansar Dine's occupation in his separate opinion. There, Judge Mindua made the unorthodox argument that non-state parties' occupations *are* covered by the international laws of occupation.[51] He supported this claim with two arguments. First, Judge Mindua suggested that the evolving trend in international humanitarian law has been to consider the actual conditions of a conflict rather than its designation as international or internal.[52] Secondly, he insisted that Ansar Dine/AQIM had a right to belligerent status, a right to self-determination and, consequently, a right to occupy as the first step in the realisation of its self-determination.[53] Therefore, Judge Mindua concluded, Ansar Dine/AQIM also had the right to set up appropriate institutions and to enact necessary rules.[54]

Leila Sadat, in a critique of *Al Hassan* and Judge Mindua's opinion, commented that a right to self-determination does not allow a rebel group to impose its 'own interpretation of law'.[55] Judge Mindua did, however, recognise this limitation, and he addressed it by proceeding to ask whether Ansar Dine/AQIM's violent sanctions had changed the law of Mali. The death penalty, Judge Mindua noted, had previously existed in Mali's law, but he was equivocal about whether amputation and flogging changed the law.[56] Instead of dealing with this question directly, Judge Mindua commented that these punishments are legal sanctions in other states and provided for in the Qur'an.[57] As such, it would be hard, Judge Mindua continued, for many Muslims to say that these penalties are illegal.[58] Thus, while Judge Mindua did not directly declare that these rules complied with the *Hague Convention IV* and *Geneva Convention IV*, he did suggest that Ansar Dine/AQIM were '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

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50 *Prosecutor v Al Hassan (Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud)* [Decision on the Confirmation of Charges Brought against Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud] (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/12-01/18, 13 November 2019) [225].

51 *Prosecutor v Al Hassan* (n 1) opinion 3 [44] (Judge Mindua).

52 Ibid [45] (Judge Mindua).

53 Ibid [34], [37] (Judge Mindua). See also Amanda Alexander, 'Judge Mindua's Separate Opinion in Al Hassan: International Humanitarian Law and the Right to Political, Legal and Cultural Self-Determination', *Opinio Juris* (Blog Post, 24 July 2024) <https://opiniojuris.org/2024/07/24/judge-minduas-separate-opinion-in-al-hassan-international-humanitarian-law-and-the-right-to-political-legal-and-cultural-self-determination/>, archived at <https://perma.cc/93SQ-V84Q>.

54 *Prosecutor v Al Hassan* (n 1) opinion 3 [38] (Judge Mindua).

55 Leila Nadya Sadat, 'Al Hassan Symposium — A Disappointment for the Victims of Sexual and Gender-Based Violence in Timbuktu', *Articles of War* (Blog Post, 18 February 2025) <https://lieber.westpoint.edu/disappointment-victims-sexual-gender-based-violence-timbuktu/>, archived at <https://perma.cc/QMQ7-E2HE>.

56 *Prosecutor v Al Hassan* (n 1) opinion 3 [56] (Judge Mindua).

57 Ibid [56] (Judge Mindua).

58 Ibid.

within the Islamic norms prescribed by Islam'.[59] In this way, Judge Mindua implied that Ansar Dine/AQIM's governance regime was not just a political creation that fell outside international law, but rather a legitimate system that was actively countenanced by international law.

This implication and the direct association of Ansar Dine/AQIM's rules with sharia further distinguished Judge Mindua's approach from the majority trial judgment. The trial judgment scrupulously avoided conflating Ansar Dine/AQIM's approach with sharia; it was always careful to describe Ansar Dine/AQIM's governance as a 'version' or 'interpretation' of sharia and it explicitly refused to engage in any general assessment of sharia.[60] Rather, the judgment sought to disqualify any claims Ansar Dine/AQIM's system had to legality by demonstrating the criminality of its punishments, the Court and, finally, the body of rules itself. Judge Mindua purported to join with the majority on these matters, but, as will be shown, he then invoked his distinct position on the legitimacy of Ansar Dine/AQIM's rules to justify the defences of mistake of law and duress.

A *Penal Sanctions*

Ansar Dine/AQIM's system of violent punishments was the source of all the charges for which Al Hassan was convicted and the only charges against him as a direct perpetrator. The majority noted that the punishments were 'an integral component of the goal of the groups to impose their interpretation of *Sharia* on the population of Timbuktu'.[61]

The punishments of flogging and amputation were characterised as several offences, including torture as a war crime and crime against humanity, cruel treatment and outrages on personal dignity. The characterisation of these acts as torture generated the most discussion among the judges, because torture as a crime against humanity excludes pain and suffering that arises from lawful sanctions.[62] This exception gave rise to questions about whether Ansar Dine/AQIM's governance system created "lawful sanctions" and whether flogging and amputation could ever be lawful sanctions.

The Defence, Judge Akane in dissent and Judge Mindua, despite being in the majority, pointed out that floggings and amputation are practiced in some Islamic states. Indeed, the Defence and Judge Akane argued that the drafters of the *Rome Statute* had deliberately introduced the lawful sanctions exception to prevent criminalising these diverse practices.[63] Judge Akane said that 'to suggest that certain forms of punishment that are allowed/used in some non-western parts of the world, can never constitute "lawful sanctions" … may detract from the "international" nature of the Court'.[64]

The majority, however, maintained that a punishment that satisfied all the elements of torture could not constitute a lawful sanction and insisted that lawful

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59 Ibid [54] (Judge Mindua).
60 See, eg, *Prosecutor v Al Hassan* (n 1) [1500].
61 Ibid [1623].
62 Ibid [1130]; *Rome Statute* (n 20) art 7(2)(e).
63 *Prosecutor v Al Hassan* (n 1) [1133], [1139]; *Prosecutor v Al Hassan* (n 1) opinion 1 [75]–[77] (Judge Akane).
64 Ibid opinion 1 [77] (Judge Akane).

sanctions 'must be consistent with internationally recognised human rights'.[65] It explicitly rejected the suggestion that the *Statute* accepted cultural difference,[66] but it also refused to consider whether Ansar Dine/AQIM's punishments were consistent with sharia systems.[67] Instead, the majority insisted that the punishments 'only reflected Ansar Dine/AQIM's own understanding and subjective interpretation of *Sharia* sources, in the pursuit of their goals'.[68]

Judge Mindua again explicitly connected Ansar Dine/AQIM's law with sharia in his separate opinion. He stated that:

> 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.[69]

Once Judge Mindua had established that these punishments were provided for by sharia, he then asserted that Al Hassan could not reasonably be expected to know they would constitute criminal acts.[70] For Al Hassan, Judge Mindua explained, the punishments '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'.[71]

Such a mistake of law, Judge Mindua argued, can negate the mens rea of a crime, if it leads to an individual wrongly believing that they could legitimately perform an act.[72] He, therefore, excused Al Hassan for the charges of war crimes and crimes against humanity that were related to flogging.[73] Therefore, both Judge Akane and Judge Mindua's opinions suggested that flogging and amputation were not, in themselves, unlawful sanctions. In the context of *Al Hassan,* however, these sanctions were eventually found to be unlawful — but only because the Trial Chamber agreed that the Islamic Court was improperly constituted, making its sentences unlawful.[74]

B *The Islamic Court*

The trial judgment found Ansar Dine/AQIM's Islamic Court and its system of sentences unlawful through an innovative use of the war crime of '[t]he passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable.'[75] This offence, in art 8(2)(c)(iv) of the *Rome Statute*, echoed a war crime listed in common art 3 of the *Geneva*

65 *Prosecutor v Al Hassan* (n 1) [1141].
66 Ibid [1137].
67 Ibid [1332].
68 Ibid.
69 Ibid opinion 3 [72] (Judge Mindua).
70 Ibid [100]–[101] (Judge Mindua).
71 Ibid [99] (Judge Mindua).
72 Ibid [93] (Judge Mindua).
73 Ibid [101] (Judge Mindua)
74 Ibid opinion 1 [80] (Judge Akane).
75 *Rome Statute* (n 20) art 8(2)(c)(iv), cited in *Prosecutor v Al Hassan* (n 1) [1521]–[1522].

Conventions — only removing its now embarrassing final words 'by civilised peoples'.[76]

There have been previous instances when this offence has been charged — but never in the same manner or to the same effect as in *Al Hassan*.[77] The Extraordinary Chambers in the Courts of Cambodia listed the failure to provide a fair and regular trial among the offences associated with the imprisonment and arbitrary execution of Vietnamese prisoners of war and civilians in *Nuon*[78] and *Kaing*.[79] In *Nuon,* however, the Chamber made it clear that the offence lay in the failure to provide any trial, legal advice or judicial consideration for Vietnamese prisoners who were labelled as spies and enemies.[80] Their execution, the Chamber stated, 'was a foregone conclusion'.[81] Indeed, the Chamber noted that 'no functioning judiciary' existed at the time.[82]

There were also some trials following the Second World War, in which defendants were charged with failure to provide a fair trial to prisoners of war sentenced to death.[83] These charges, predating the *Geneva Conventions* of 1949, were based on the *1929 Geneva Convention*, which required judicial proceedings for prisoners of war accused of disciplinary breaches.[84] Ghadiri notes that the requirements of the *1929 Geneva Convention* were, on occasion, supplemented with a reference to 'minimum standards of civilisation'.[85]

The *Justice* case,[86] in which the United States Military Tribunal at Nuremberg prosecuted leading Nazi legal officials for their contribution to the atrocities of the Nazi regime, tends to be included in these accounts of post-war unfair trial cases.[87] In the *Justice* case, however, the Prosecution made it clear that the defendants were *not* being charged for unfair trials or their failure to apply norms of due process; they were accused of direct responsibility for war crimes and crimes against

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76 *Geneva Convention* IV (n 48) art 3(1)(d). For some discussion of this change, see Brett Bowden, 'The Colonial Origins of International Law: European Expansion and the Classical Standard of Civilization' (2005) 7(1) *Journal of the History of International Law* 19, 21–2; Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press, 2020) 8.

77 For a more comprehensive account of unfair trial cases in international criminal law, see Diletta Marchesi, 'The War Crimes of Denying Judicial Guarantees and the Uncertainties Surrounding Their Material Elements' (2021) 54(2) *Israel Law Review* 174; Shannon Ghadiri, 'Criminalising the Denial of a Fair Trial as a Crime against Humanity' in Philipp Ambach et al (eds), *The Protection of Non-Combatants during Armed Conflict and Safeguarding the Rights of Victims in Post-Conflict Society: Essays in Honour of the Life and Work of Joakim Dungel* (Brill, 2015) 200.

78 *Prosecutor v Nuon (Judgement)* (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case No 002/19-09-2007/ECCC/TC, 16 November 2018) [3351], [4008] ('*Prosecutor v Nuon*').

79 *Prosecutor v Kaing (Judgement)* (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case No 001/18-07-2007/ECCC/TC, 26 July 2010) [401] ('*Prosecutor v Kaing*').

80 *Prosecutor v Nuon* (n 78) [2630].

81 Ibid.

82 Ibid [4008].

83 See Marchesi (n 77) 176–7.

84 *Convention relative to the Treatment of Prisoners of War*, opened for signature 27 July 1929, 118 LNTS 343 (entered into force 19 June 1931) arts 60–7 ('*1929 Geneva Convention*'). See also Ghadiri (n 77) 203–4.

85 Ghadiri (n 77) 205.

86 *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No 10* (United States Government Printing Office, 1951) vol 3 ('*Trials of War Criminals*').

87 Ghadiri (n 77) 206; Marchesi (n 77) 178.

humanity, which they had accomplished by using 'the emptied forms of legal process' as a tool for persecution, enslavement and extermination.[88] As this comment shows, the Prosecution's argument did rely on an assertion that there was no true law in Nazi Germany. Christiane Wilke argues that this assertion depended on the depiction of the Nazi state and Nazi law as an aberration from civilisation,[89] a portrayal which reveals international law's traditional association of law with 'civilised peoples'.[90] In addition to these references to civilisation, the prosecution and judges devoted considerable attention to demonstrating that the Nazi regime lacked principles of legality and legalism. Nazi Germany, the Prosecution and judges stated, had relinquished the autonomy of reason associated with the rule of law and had become ideological, an extension of the administrative state.[91] As will be seen, the Trial Chamber in *Al Hassan* would interpret legality in a similar manner — although without any reference to the *Justice* case. Thus, although the *Justice* case may provide an example of the judicial disqualification of a legal system and an illustration of the uses of legality, it does not provide a precedent for deploying an offence of unfair or improper sentences to do so.

Al Hassan was, therefore, the first time this offence had been used in quite this way, and in a contemporary era that has supposedly rejected standards of civilisation, to question the lawfulness of a court and a whole system of sentences and punishments. The Defence tried to limit the scope of the offence, arguing that it only applied to executions or other very severe punishments.[92] The Chamber, however, rejected this interpretation and presented an expansive list of incidents that fell within the charge. This list was divided into two groups, which satisfied two different forms of the offence. The first group consisted of summary punishments for breaking Ansar Dine/AQIM's rules — such as when a man was caught smoking and consequently flogged with ten lashes in the street and when women were put in detention for failing to comply with the dress code.[93] These summary punishments were accounted for in Ansar Dine/AQIM's regime as *ta'zirs*, which, during the first part of the occupation, any member of Ansar Dine/AQIM was empowered to impose on anyone they deemed to be in violation of the rules.[94]

The Chamber stated that these incidents could count as a 'passing of sentences without the … judgment of a court'.[95] A sentence, the Chamber explained, could be both a formal pronouncement by a court and the punishment imposed on an individual.[96] That is, a sentence could be a punishment that was carried out without any written or oral judgment by a court.[97] However, it must still fall within the

88 *Trials of War Criminals* (n 86) 31–2.

89 Christiane Wilke, 'Reconsecrating the Temple of Justice: Invocations of Civilisation and Humanity in the Nuremberg Justice Case' (2009) 24(2) *Canadian Journal of Law and Society* 181, 192.

90 Ibid 195 (citations omitted).

91 See, eg, *Trials of War Criminals* (n 86) 41, 987, 990.

92 *Prosecutor v Al Hassan* (n 1) [1165].

93 Ibid [1480].

94 Later, following concerns arising from this practice, Ansar Dine/AQIM sought to limit these functions so that the Islamic Police and the *Hesbah* could only punish offenders if ordered to by the Islamic Court: ibid [1630]–[1632].

95 Ibid [1477].

96 Ibid [1162].

97 Ibid [1164].

framework of a criminal process and sentence.[98] The perpetrator must have some form of authority, and it must be intended as a punishment.[99] In this way, the war crime was interpreted to encompass summary punishments, which exist in many legal systems — although not perhaps in this violent form.

The second group of incidents involved the judicial sentences passed by the Islamic Court. The Chamber stated that these constituted a second reading of the article, whereby the phrase 'without previous judgement pronounced by a regularly constituted court refer[red] to a court that was not "regularly constituted", in the sense that it did not provide the "essential guarantees of independence and impartiality"'.[100]

The offence in the *Rome Statute*, following common art 3 of the *Geneva Conventions*, does not mention independence and impartiality, and there had been some doubt as to what a 'regularly constituted' court meant.[101] One approach, mentioned in the International Committee of the Red Cross ('ICRC') study on customary international humanitarian law, stated that a 'regularly constituted court' is one 'established and organised in accordance with the laws and procedures already in force in a country'.[102] The ICC Trial Chamber appeared to reference and reject this suggestion that 'regularly constituted' simply referred to how the court had been set up.[103]

Instead, the Trial Chamber referred to the *Elements of Crimes*, a separate explanatory document established under art 9 of the *Rome Statute*, for the definition that a court is not 'regularly constituted' if it does not 'afford the essential guarantees of independence and impartiality', or if 'the court that rendered judgement did not afford all other judicial guarantees generally recognised as indispensable under international law'.[104] The Chamber still needed to define the notions of independence and impartiality, and it did so with reference to the *ICRC Commentary on the Third Geneva Convention* and the UN Human Rights Committee General Comment on the *International Covenant on Civil and Political Rights*.[105] The Chamber then defined independence as 'the ability of the judiciary to be shielded from outside interference by "other branches of the government, especially the executive", or other undue influence such as "political interference by the executive branch and legislature"'.[106] Impartiality, the Chamber explained, has subjective and objective requirements.[107] Subjectively, a judge must not harbour personal prejudice or bias, must not presume the guilt of the accused, nor favour one party's interests or improperly promote the interests of one side. Objectively, the court must 'appear to a reasonable observer to be

98 Ibid.
99 Ibid [1167]–[1168].
100 Ibid [1169].
101 Marchesi (n 77) 195–6.
102 Ibid 195, discussing Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005) vol 1 355.
103 *Prosecutor v Al Hassan* (n 1) [1169].
104 International Criminal Court, *Elements of Crimes*, Doc No ICC-ASP/1/3 (adopted 9 September 2002) 23 ('*Elements of Crimes*'), cited in *Prosecutor v Al Hassan* (n 1) [1169].
105 *Prosecutor v Al Hassan* (n 1) [1172], [1174].
106 Ibid [1172] (citation omitted).
107 Ibid [1174].

impartial'.[108] For example, the trial judgment stated, there is an unacceptable appearance of bias if a judge's decision will lead to the promotion of a cause in which he or she is involved.[109]

In this case, the Chamber found that the Islamic Court was neither independent nor impartial. Although the Chamber acknowledged that Ansar Dine/AQIM had endeavoured to include local judges of different ethnicities on the Islamic Court,[110] it also noted that the Islamic Court included three judges who were part of the Ansar Dine/AQIM leadership.[111] 'These three individuals', the trial judgment stated, 'represented Ansar Dine/AQIM's ideology on the bench',[112] allowing Ansar Dine to control and direct the decisions taken by the Islamic Court.[113] The Chamber also noted that some local judges simultaneously held roles within other Ansar Dine/AQIM institutions, such as the Sharia Committee or the morality police.[114] The Chamber considered that

> these judges' involvement in other institutions, which were essentially designed to implement the policy of Ansar Dine/AQIM, necessarily influenced their views about the objectives of the Islamic Court, the cases they heard and/or their assessment of those cases.[115]

The Chamber did acknowledge that there could be some executive presence in a court, but insisted that in the circumstances in Timbuktu, the Islamic Court could not act independently or appear impartial.[116] The judges concluded that '[t]he lack of independence and impartiality must be seen as rendering any judgment by the court invalid, resulting in a situation comparable to there having been no judgment at all.'[117]

In this way, art 8(2)(c)(iv) allowed the Chamber, despite its refusal to judge sharia, to depict the contribution of the Islamic Court to the institutionalisation of Ansar Dine/AQIM's religious and legal ideology as a disqualification from legal status. This is worth noting, considering the intrinsic relationship of all judicial systems with a prevailing political ideology.[118] Yet, even more notable is the way that Judge Mindua excused Al Hassan for his contribution to this offence — and all other offences — through the defence of duress. This was a surprising conclusion, given Al Hassan's central role in the governance regime. It has been widely criticised, both by Judge Prost, who described it as 'devoid of legal reasoning and without any evidentiary support',[119] and by observers who noted that it departed from the stricter standard set in *Ongwen*.[120] Judge Mindua redefined the conventional definition of duress as a 'present' and 'immediate'

108 Ibid (citation omitted)
109 Ibid [1174].
110 Ibid [1503].
111 Ibid [1506].
112 Ibid [1507].
113 Ibid [1501].
114 Ibid [1505].
115 Ibid.
116 Ibid [1508], [1514].
117 Ibid [1170].
118 See, eg, Shklar (n 15) for an account of the liberal ideology underlying legalism and international law.
119 *Prosecutor v Al Hassan* (n 1) opinion 2 [3] (Judge Prost); Sadat (n 55).
120 Grey and Oosterveld (n 13); O'Brien, Maloney and Oosterveld (n 13).

threat to a more indirect and distant possibility of harm that may have resulted if Al Hassan had left Ansar Dine.[121] Judge Mindua then proceeded to supplement this vague account of possible dangers with comments that hinted at a different kind of moral compulsion. He explained that Al Hassan had been predisposed by his ethnicity to join a group that 'claimed to be the defender of his people' and implied that Al Hassan had assimilated Ansar Dine's will to some degree.[122] Judge Mindua emphasised again that Al Hassan believed in the legality of Ansar Dine's rules,[123] and he concluded with a comment that Al Hassan acted in a way that provided security and support for the people of Timbuktu.[124] This apparently incongruous argument suggests that Judge Mindua had conflated mistake of law, Al Hassan's belief in the legitimacy of Ansar Dine's regime and Judge Mindua's own acceptance of the regime's legitimacy with the moral compulsion of duress.

C *Persecution on Religious Grounds*

Finally, the Chamber found that Ansar Dine/AQIM's imposition of rules and punishments constituted persecution on religious grounds. The crime against humanity of persecution is outlined in art 7(1)(h) of the *Rome Statute*:

> Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.[125]

Article 7(2)(g) adds: '"Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity'.[126]

The judges took different approaches to interpreting these provisions. The majority of Judge Prost and Judge Mindua, following the *Elements of Crimes,*[127] considered the first element of persecution to be the deprivation of fundamental rights, as outlined in art 7(2)(g). They noted 'the fundamental right to freedom of thought, conscience and religion, protected notably under Article 18 of the *ICCPR* and Article 18 of the *UDHR*'.[128] The imposition of rules that forced the population to behave and practice religion in a way that complied with Ansar Dine/AQIM's vision and furthered Ansar Dine/AQIM's goal of imposing and implementing their interpretation of sharia,[129] constituted a deprivation of the right to freedom of

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121 *Prosecutor v Al Hassan* (n 1) [1743]–[1744]; *Prosecutor v Al Hassan* (n 1) opinion 3 [109] (Judge Mindua).

122 *Prosecutor v Al Hassan* (n 1) opinion 3 [115] (Judge Mindua). This implication appears stronger in the original French version of the judgment, which states that Al Hassan had no option, but to 'plier et intégrer Ansar Dine': at opinion 3 [113] (Judge Mindua). It is still, however, suggested in the English version, especially in the connection made between duress and mistake of law: at opinion 3 [118] (Judge Mindua).

123 Ibid [118] (Judge Mindua).

124 Ibid [114], [118] (Judge Mindua).

125 *Rome Statute* (n 20) art 7(1)(h).

126 Ibid art 7(2)(g).

127 *Elements of Crimes* (n 104) 7, quoted in *Prosecutor v Al Hassan* (n 1) [1200].

128 *Prosecutor v Al Hassan* (n 1) [1527].

129 Ibid [1528].

thought, conscience and religion,[130] and the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment and the right to bodily integrity.[131]

The second element of persecution, the majority continued, is that 'the perpetrators must have targeted such person or persons by reason of the identity of the group or collectivity'.[132] The majority defined the identifiable group as the population of Timbuktu, because they were perceived by Ansar Dine/AQIM as not being 'real Muslims'.[133] Finally, the majority dealt with the requirement in art 7(1)(h) that the acts of persecution need to 'be connected with acts listed under Article 7(1) of the *Statute* or any crime within the jurisdiction of the Court'.[134] The majority interpreted this requirement extremely broadly. Article 7(1) lists crimes against humanity, but the majority stated that an art 7(1) act, for the purposes of art 7(1)(h), does *not* have to meet the contextual elements for crimes against humanity: 'it is sufficient that there is a connection between the persecution and any instance of murder, torture, rape or other inhumane act'.[135] The majority then further broadened the requirement, by adding:

> [T]here is no requirement that the act of persecution equates to an act under Article 7(1) of the *Statute* or any other crime under the jurisdiction of the Court. By the plain language of the *Statute*, there need only be a 'connection' in the sense of link to, or interrelated with.[136]

When applying this reading to the events in Timbuktu, the majority did note that many of the acts of persecution were also crimes under art 7(1).[137] Nevertheless, its interpretation had reduced the connection requirement in art 7(1)(h) to an undemanding addendum.

Judge Akane, in contrast, began her separate opinion with this requirement, which she interpreted extremely strictly. Her analysis focused on the part of the provision which states that persecution must be committed 'in connection with any act referred to in this paragraph', rather than the part which refers to 'any other crime'.[138] She argued that this condition was deliberately drafted to exclude from the *Statute* acts of discrimination that did not also amount to a crime against humanity.[139] Thus, for Judge Akane, the relevant question was whether the crimes against humanity, for which Al Hassan was liable as a direct perpetrator or because they fell within Ansar Dine/AQIM's common purpose, *also* amounted to discrimination. She concluded that the acts which satisfied the charges of torture, mistreatment, inhumane acts, cruel treatment and mutilation 'constitute severe deprivation of fundamental rights targeting the civilian population of Timbuktu on religious grounds'.[140] She noted: 'These crimes were perpetrated as part of the

130 Ibid [1544].
131 Ibid [1550].
132 Ibid [1557].
133 Ibid [1559]–[1560].
134 Ibid [1575].
135 Ibid [1208].
136 Ibid [1210] (citations omitted).
137 Ibid [1576].
138 Ibid opinion 1 [98] (Judge Akane) (citations omitted).
139 Ibid.
140 Ibid [100] (Judge Akane).

rules imposed by Ansar Dine/AQIM, which prohibited the local population from practising or taking part in certain religious and traditional customs.'[141] As Judge Mindua excused Al Hassan by reason of duress, Judge Akane's concurrence was necessary for the finding that Al Hassan was guilty of the crime against humanity of persecution on religious grounds. It also meant that the entire system of governance was declared criminal by two judges — while the other implied its legitimacy. It is, however, not quite clear from this contradictory reasoning whether the regime was criminal because it was discriminatory in nature or because the other, proven crimes against humanity had a discriminatory element. Although this may seem to be a trivial difference in this context, it proved to be important when the Chamber turned to the gender-based crimes.

IV GENDER CRIMES

The feminist work that underpinned the introduction of gender-related crimes into international law has been thoroughly recorded elsewhere, in particular the early debates about how best to conceptualise rape as a violent, structural crime against women,[142] the ongoing contests about the definition of gender[143] and the attempts to shape and prosecute crimes of forced marriage and gender persecution.[144] The nature of Ansar Dine/AQIM's governance, which became increasingly onerous for women; the mistreatment and rape of women who were detained for breaching the rules; and the practice of what was described as "jihadi marriage" seemed to position *Al Hassan* as an ideal case to develop these concepts and crimes.[145] Yet, despite this context, Chamber failed to find Al Hassan guilty of the crimes against humanity of forced marriage, rape and gender persecution.

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141 Ibid.

142 See, eg, Michelle Jarvis and Judith Gardam, 'The Gendered Framework of International Humanitarian Law and the Development of International Criminal Law' in Indira Rosenthal, Valerie Oosterveld and Susana SáCouto (eds), *Gender and International Criminal Law* (Oxford University Press, 2022) 47; Janet Halley, 'Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law' (2008) 30(1) *Michigan Journal of International Law* 1.

143 See, eg, Lisa Davis and Danny Bradley, 'Victory for Women and LGBTIQ+ Rights under International Criminal Law: Gender in the Draft Crimes against Humanity Treaty' in Indira Rosenthal, Valerie Oosterveld and Susana SáCouto (eds), *Gender and International Criminal Law* (Oxford University Press, 2022) 187; Oosterveld, 'Forced Marriage' (n 12); Valerie Oosterveld, 'Constructive Ambiguity and the Meaning of "Gender" for the International Criminal Court' (2014) 16(4) *International Feminist Journal of Politics* 563 ('Constructive Ambiguity').

144 Grey et al (n 11); Kiran Kaur Grewal, 'International Criminal Law as a Site for Enhancing Women's Rights? Challenges, Possibilities, Strategies' (2015) 23(2) *Feminist Legal Studies* 149; Grey and Chappell (n 12); Melanie O'Brien, 'Gender Dimensions of Forced Marriage in International Criminal Law' in Indira Rosenthal, Valerie Oosterveld and Susana SáCouto (eds), *Gender and International Criminal Law* (Oxford University Press, 2022) 207; Kathleen M Maloney, Melanie O'Brien and Valerie Oosterveld, 'Forced Marriage as the Crime against Humanity of "Other Inhumane Acts" in the International Criminal Court's *Ongwen* Case' (2023) 23(5–6) *International Criminal Law Review* 705.

145 Kate Gauld, 'How Is the Crime against Humanity of Gender Persecution Being Litigated before the International Criminal Court, and What Are Its Implications?' (2023) 24(2) *Melbourne Journal of International Law* 162, 183.

A *Forced Marriage*

The concept of forced marriage as the crime against humanity as other inhumane acts was developed in the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia,[146] and charged for the first time in the ICC in *Ongwen.*[147] In *Ongwen*, this crime was described as a structural, gendered harm. In addition to recognising the other harms caused by the Lord's Resistance Army's practice of allocating wives to its soldiers,[148] the Appeals Chamber confirmed that 'forced marriage is not necessarily sexual in nature but entails a "gendered harm", which is essentially the imposition on the victim of socially constructed gendered expectations and roles attached to "wife" or "husband"'.[149] The judges in *Al Hassan* repeated this definition,[150] and they all agreed that Ansar Dine/AQIM encouraged its members to seek marriage with local girls and women.[151] They disagreed, however, in their assessment of whether the marriages in Timbuktu represented a structural gendered harm and whether jihadi marriages could be distinguished from the traditional system of marriage where 'the consent of the woman getting married was not always sought'.[152] The majority presented the marriages as harmful by repeating the testimonies of girls and women who were forced into marriage and raped.[153] It linked the marriages to the governance regime, arguing that they were 'facilitated by, and made possible through the military takeover of Timbuktu and the resulting groups' position as sole rulers of the city of Timbuktu, with evident military presence'.[154] Moreover, the majority described the practice of jihadi marriages as part of the common purpose of Ansar Dine/AQIM, promoted by the leadership,[155] and upheld by the institutional structure[156] and coercive environment.[157] The majority listed several ways in which Al Hassan contributed to this purpose, stating that 'his role in the Islamic Police contributed to a coercive environment in Timbuktu where such marriages could be forced.'[158] However, Judge Akane argued that, although Ansar Dine/AQIM encouraged and facilitated marriage with locals, this was *not* part of their common purpose which, she stated, was to control Timbuktu, introduce new rules and prohibitions and establish an Islamic state.[159] Moreover, she argued it was wrong to equate jihadi marriage with forced marriage without regarding the individual circumstances of each marriage.[160] If anything, she argued, the practice

146 Oosterveld, 'Forced Marriage' (n 12) 1263–4.

147 *Prosecutor v Ongwen Trial Judgment* (n 10); Cóman Kenny, 'Prosecutor v Dominic Ongwen' (2024) 118(1) *American Journal of International Law* 153, 154.

148 *Prosecutor v Ongwen (Judgment on the Appeal against the Decision of Trial Chamber IX of 4 February 2021)* (International Criminal Court, The Appeals Chamber, Case No ICC-02/04-01/15 A, 15 December 2022) [1022] ('*Prosecutor v Ongwen Appeal Judgment*').

149 Ibid [1024] (citations omitted).

150 *Prosecutor v Al Hassan* (n 1) [1188].

151 Ibid opinion 1 [34] (Judge Akane).

152 *Prosecutor v Al Hassan* (n 1) [1418].

153 Ibid [1421]–[1424].

154 Ibid [1278].

155 Ibid [1640].

156 Ibid [1642].

157 Ibid [1643].

158 Ibid [1713].

159 Ibid opinion 1 [34] (Judge Akane).

160 Ibid [36] (Judge Akane).

was characterised by negotiation, and she referred to a witness who testified that, while pressure existed, direct compulsion never occurred.[161]

In this way, Judge Akane rejected the majority's argument that the marriages arose out of a coercive structure. This conclusion has been criticised by commentators, who argue that Judge Akane overlooked the coercive environment in Timbuktu or misinterpreted *Ongwen*'s definition of a coercive environment.[162] Judge Akane's dissent has also been criticised for narrowing the doctrine of common purpose.[163] Yet, while Judge Akane may have been alone in rejecting the majority's interpretation of common purpose, her dissent was supplemented by Judge Mindua's separate opinion, which excused Al Hassan by reason of duress.[164] Thus, only Judge Prost concluded that Al Hassan was responsible for forced marriage, and he was acquitted of this charge.[165]

B *Rape in Detention*

In addition to the rape in forced marriages, there were incidents of women detained by the morality police and raped in detention. The majority, again, found that these rapes could be linked to Ansar Dine/AQIM's common purpose and system of governance. It stated:

> The Majority accepts that the evidence does not show that these rapes were an objective of the leadership of Ansar Dine/AQIM. The Majority however recalls that it need not be established that the groups' goal or objective was the commission of the crime, only that the crime was committed as part of the common purpose. The Majority is of the view that the combined circumstances, including the overall power structure with respect to women, was such that the conditions with respect to the detention of women would include rape.[166]

The majority also commented that there was a pattern between the rapes 'sufficient to support that these were not random acts of individuals'.[167] In this way, the majority found that even though the rape of women in detention was not an explicit goal of Ansar Dine/AQIM, it was closely enough associated with Ansar Dine/AQIM's power structure and mode of governance to be considered part of the common purpose.

Judge Akane, however, disagreed with this finding for the same reasons that she dissented from the decision on forced marriage. She stated that the rape of women in detention fell outside the common purpose of Ansar Dine/AQIM, and she noted that rape was not part of sharia.[168] There was, Judge Akane determined, no 'synergistic system of repression' that would lead to this result.[169] Even if the rapes took place in a coercive environment, they were individual acts.[170] As such, with the addition of Judge Mindua's finding of duress, Al Hassan was acquitted of this charge.

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161 Ibid [39] (Judge Akane).
162 O'Brien, Maloney and Oosterveld (n 13).
163 Sadat (n 55).
164 *Prosecutor v Al Hassan* (n 1) opinion 3 [124] (Judge Mindua).
165 *Prosecutor v Al Hassan* (n 1) opinion 2 [18]–[20] (Judge Prost).
166 *Prosecutor v Al Hassan* (n 1) [1655].
167 Ibid [1651].
168 Ibid opinion 1 [28]–[29], [47] (Judge Akane).
169 Ibid [47] (Judge Akane).
170 Ibid [31] (Judge Akane).

C *Gender Persecution*

The introduction of gender persecution in the *Rome Statute* provided the possibility of acknowledging a structural element to gender-related crimes.[171] This understanding of persecution was expressed in the trial judgment. The majority stated that Ansar Dine/AQIM deprived women and girls of fundamental rights due to the particular roles, expectations and conduct Ansar Dine/AQIM assigned to their gender:[172]

> In this case, the Chamber found that Ansar Dine/AQIM believed that it was the duty of women to stay at home to take care of children and household affairs, and that they called upon women to stay at home ... The behaviour of women and girls was particularly controlled: in addition to Ansar Dine/AQIM's rules and prohibitions applying to the entire population of Timbuktu, specific rules and prohibitions were aimed at women and girls, and their violation was repressed with especially harsh punishment and detention conditions, involving gender-specific violence.[173]

The majority also noted that women and girls were

> targeted by reason of their gender in the context of the forced marriages, in the course of which women suffered, such as being treated as objects, subjected to rapes or other forms of sexual violence and to significant restrictions to their freedoms.[174]

This, too, was based on the gender roles that Ansar Dine/AQIM imposed on women: wives were expected to stay home and had no right to refuse sexual relations with their 'husband'.[175]

The majority's finding that gender-based persecution had occurred and its description of that persecution in terms of socially constructed gender roles has been welcomed as an important legal development by feminist observers.[176] Judge Akane, however, rejected this finding and the structural interpretation of gender persecution. As discussed above, Judge Akane approached the crime of persecution by insisting that it had to be connected to one of the other crimes against humanity. Since she had found that forced marriage and rape fell outside Ansar Dine/AQIM's common purpose, they could not constitute underlying acts and therefore there could be no finding of gender persecution.[177]

Judge Akane added that the dress code imposed on women and the rapes in detention 'were not committed "in connection with" a crime or an Article 7(1) act for which Mr Al Hassan is responsible'.[178] She stated that 'while the rules and prohibitions imposed did affect women and girls to a great extent, the facts do not support a specific discriminatory intent beyond the targeting on religious grounds'.[179] Moreover, she attributed the treatment of women in detention to the

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171 See, eg, Sara E Davies and Jacqui True, 'Reframing Conflict-Related Sexual and Gender-Based Violence: Bringing Gender Analysis Back In' (2015) 46(6) *Security Dialogue* 495, 497.

172 *Prosecutor v Al Hassan* (n 1) [1566].

173 Ibid [1568] (citations omitted).

174 Ibid [1572].

175 Ibid (citations omitted).

176 Grey and Oosterveld (n 13).

177 *Prosecutor v Al Hassan* (n 1) opinion 1 [101] (Judge Akane).

178 Ibid [102] (Judge Akane).

179 Ibid [103] (Judge Akane).

individual responsibility of the Emir of the *Hesbah*, Mohammed Moussa, arguing that his abuses 'did not embody the views of other members of Ansar Dine/AQIM'.[180]

Judge Akane's insistence that the assaults on women were individual acts rather than systemic features, together with Judge Mindua's apparent support for the legitimacy of that system, meant that Al Hassan was acquitted of all the gender-related charges. For feminist international lawyers, who had hoped for a better outcome, this result appeared both as a reversal of feminist progress[181] and an example of the ongoing erasure of gender-based crimes in international criminal law.[182]

V CONCLUSION

A lot was expected of *Al Hassan* — as, indeed, is expected of international criminal law more generally. International criminal justice is meant to uphold the principles of legality and express universalist values, while also furthering progressive goals. For most observers, the foremost hope was that *Al Hassan* would further the feminist vision of an international law which could acknowledge and prosecute structural crimes against socially constructed gender roles. Instead, the result was a case that has been widely described as 'fractured and confused'.[183] In this article, I have endeavoured to lay out and explain these legal fractures and to show that the most significant divisions stem back to fundamental conflicts about the expectations underlying international criminal law. These conflicts are too complex to be properly canvassed in a case note; they will be the subject of further work. It is, however, worth briefly commenting on some of the questions raised and the answers attempted in the *Al Hassan* judgment.

The most difficult and confronting question was how international law could assess a governance regime that offended, in Judge Mindua's words, the sensibilities of western jurists.[184] Is international criminal law a universalist system, which refuses to judge the rules and values of different cultures? Does international law contain a right to self-determination that encompasses the realisation of any legal vision? Judge Mindua responded to these questions with what has been described as 'cultural relativist' approach,[185] but could also be described as a universalist or even a positivist approach — one that locates law in power, order and right.

Outside of this dissent, the Trial Chamber was clearly determined to reject the suggestion that Ansar Dine/AQIM's violent and oppressive regime could be law,

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180 Ibid [20] (Judge Akane).

181 Melanie O'Brien and Kathleen M Maloney, 'Gender Justice Denied at the ICC: Problematic Judicial and Prosecutorial Decisions in the Al Hassan Case', *Völkerrechtsblog* (Blog Post, 4 March 2025) <https://voelkerrechtsblog.org/gender-justice-denied-at-the-icc/>, archived at <https://perma.cc/5TQV-ECSE>.

182 Grey and Oosterveld (n 13); O'Brien and Maloney (n 181).

183 Sadat (n 55). See also Janet H Anderson, 'Sentencing Al Hassan, and his Judges', *Justice Info* (Blog Post, 5 September 2024) <https://www.justiceinfo.net/en/135456-sentencing-al-hassan-and-his-judges.html>, archived at <https://perma.cc/H2CY-EXNC>; Katharine Fortin, Ezequiel Heffes and Sean Watts, 'Al Hassan Symposium: (Re)introduction', *Articles of War* (Blog Post, 5 February 2025) <https://lieber.westpoint.edu/al-hassan-symposium-reintroduction/>, archived at <https://perma.cc/N2H2-PWP4>.

184 *Prosecutor v Al Hassan* (n 1) opinion 3 [70], [88] (Judge Mindua).

185 Sadat (n 55).

but it was constrained in how it could do so. Unlike the Nuremberg tribunal, it could not simply disqualify the regime as violent or "uncivilised". Indeed, the Trial Chamber was careful to reject any suggestion that it was assessing sharia law. Ultimately, the trial judgment resorted to the traditional liberal tools of legality. The judges combined a broad reading of the *Rome Statute* provisions with a strict account of the requirements of independent legal procedure and non-ideological law to reject the legal aspirations of Ansar Dine/AQIM's regime.

There was just enough liberal consensus in the Trial Chamber to disqualify the illiberal law of Ansar Dine/AQIM — but the same sensibilities that allowed this conclusion also dismissed the gender-related crimes. Judge Akane's insistence on the individuality of acts against women stymied the efforts to introduce concepts of systemic gender oppression into international criminal law. Meanwhile, Judge Mindua's acceptance of Ansar Dine/AQIM's right to self-determination led to the same result. This outcome recalls the longstanding warnings of feminists about the limitations of international legal rights for protecting women, especially when women's concerns are relegated to a private sphere.[186] As Hilary Charlesworth and Christine Chinkin asked in 2000, what does a 'people's' right to self-determination mean for women with unequal status within the group?[187] *Al Hassan* demonstrates that these questions about the universality and limits of international law are still relevant and troubling.

[186] Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, 2000) 56.

[187] Ibid 162.