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APPEALS CHAMBER

Before: Judge Luz del Carmen Ibáñez Carranza, Presiding
Judge Piotr Hofmański
Judge Solomy Balungi Bossa
Judge Rosario Salvatore Aitala
Judge Gocha Lordkipanidze

SITUATION IN THE REPUBLIC OF MALI

IN THE CASE OF
THE PROSECUTOR v. AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG
MAHMOUD

Public

Corrigendum to ‘Public Redacted Version of “Defence Appeal of ‘Decision on Application for Notice of Possibility of Variation of Legal Characterisation Pursuant to Regulation 55(2) of the Regulations of the Court’ (ICC-01/12-01/18-1211-Conf)”’

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

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Introduction¹

1. The trial proceedings against Mr. Al Hassan commenced on 14 July 2020. Approximately five months later, after hearing several Prosecution witnesses, the Trial Chamber issued its ‘Decision on application of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court’ (‘the Decision’).² The Chamber subsequently certified leave to appeal in relation to two issues arising from the Decision:³
 - The First Issue: Whether the Chamber erred in law, and acted in a manner that is contrary to Article 67(1)(a), by finding that it may take into consideration allegations of sexual violence committed against P-0574, P-0542, P-0570 and P-0547 in its assessment and analysis of counts 1 to 5; and
 - The Second Issue: Whether the Trial Chamber’s reliance on unconfirmed facts to give notice of a potential requalification of Mr. Al Hassan’s individual liability, exceeded the scope of Regulation 55, and constituted a de facto amendment to the charges.
2. The reversal of both aspects of the Decision is required in order to cure the *ultra vires* action of the Trial Chamber, and to remedy the prejudice occasioned by the modifications made to the factual matrix of the charges. The Prosecution in this case was fully aware of the procedural avenues available to it in order to pursue the effective investigation and prosecution of these allegations. It simply failed to employ them. The goal of eliminating impunity gaps does not stretch so far as to trigger additional powers in order to cure or provide unnecessary redress as concerns the Prosecution’s lack of diligence or strategic choices at the pre-trial stage. There is also no practical, procedural or legal justification for carving out additional powers for the Trial Chamber to either change the material facts underpinning specific charges or to extrapolate additional facts based on evidence that was not submitted, pleaded, or substantiated before the Pre-Trial Chamber.
3. The manner in which the Trial Chamber resolved the Two Issues controverts the principle that Regulation 55 must not be employed in a manner that “would circumvent article 61 (9) of the Statute and (...) blur the distinction between the two provisions.”⁴ As concerns the First Issue, the Trial Chamber essentially reverse engineered Regulation 55: rather than using existing facts as the foundation for a new or additional legal qualification, the Chamber relied on existing legal qualifications in order to insert additional facts into counts 1 to 5. The notion that the Trial Chamber can move or rearrange facts between

¹ Pursuant to Regulation 23*bis*(2), this appeal brief is filed confidentially as it refers to confidential filings.

² ICC-01/12-01/18-1211-Conf.

³ ICC-01/12-01/18-1319-Conf.

⁴ [ICC-01/04-01/06-2205](#), para. 94.

different charges undermines the role of the Pre-Trial Chamber in confirming and fixing the factual matrix of each charge and contravenes Mr. Al Hassan's right to timely notice as concerns the cause and content of these charges. Similarly, the manner in which the Trial Chamber interpreted and extrapolated material facts from general narratives in the charges, in connection with the Second Issue, has allowed the Prosecution to circumvent the appropriate processes and safeguards set out in Article 61(9). This blurring between the provisions has further undermined the impartiality of the process and injected a significant degree of uncertainty as concerns the 'authoritative' nature of the confirmed charges in this case.

4. In accordance with Article 82(3), the Defence further requests the Appeals Chamber to order the Trial Chamber to grant suspensive effect as concerns these two aspects of the Decision. The Defence is not requesting that the proceedings as a whole be suspended, but that the operative parts of the Decision are suspended for the purposes of ascertaining whether the impugned modifications can be considered part of the existing charges in connection with upcoming witnesses. This partial suspension will preserve Mr. Al Hassan's rights, and ensure that the objective of the appeal is not undermined through intervening developments at the trial level.⁵ It will also neither delay the trial proceedings nor occasion prejudice to the other parties.

The First Issue: The Chamber erred in law, and acted in a manner that is contrary to Article 67(1)(a), by finding that it may take into consideration allegations of sexual violence committed against P-0574, P-0542, P-0570 and P-0547 in its assessment and analysis of counts 1 to 5

5. The ICC legal framework sets out two courses of action for modifications to the charges: either the Prosecution can request an amendment to the facts and circumstances of the charges, in accordance with the process set out in Articles 61(8)-(9) of the Statute, and the attendant safeguards that apply to this procedure, or the Trial Chamber can modify the legal qualification of existing charges following the procedure set out in Regulation 55 and the attendant safeguards. Neither approach was followed in this instance.
6. On 31 January 2020, the Prosecution requested the Pre-Trial Chamber to amend the DCC, in order to include, *inter alia*, allegations of rape concerning P-0636, P-1134, P-0636 and P-1674, in a range of different counts, including counts 1 to 5.⁶ The request made no

⁵ ICC-01/04-01/07-3344, paras. 8-9,

⁶ ICC-01/12-01/18-568-Conf.

reference to allegations concerning **P-0574, P-0542, P-0570 and P-0547**. On 23 April 2020, the Pre-Trial Chamber granted this request, after considering whether the Prosecution had satisfied the threshold for demonstrating that it had adduced additional evidence, and that there were legitimate reasons as concerns the Prosecution's omission to tender such evidence during the confirmation hearing.⁷

7. Nine months after the confirmation decision was issued, and less than a month before the start of the trial, the Prosecution filed a Regulation 55 Request.⁸ The late submission of the request meant that it was impossible for the Trial Chamber to adjudicate the request before the commencement of the trial; the Trial Chamber nonetheless rejected a Defence request to adjourn the starting date.⁹ The Regulation 55 Request asked the Trial Chamber to 'requalify' the charges so that "the rapes committed against these victims [**P-0574, P-0542, P-0570 and P-0547**] may also be considered, as appropriate, under Counts 1 to 5 and 11 to 12".¹⁰ The Request did not explain how the existing facts concerning these Courts could support the proposed requalification. The Request was also not predicated on additional evidence, and the Prosecution provided no explanation or justification as to why it had failed to pursue this course of action during the confirmation hearing.
8. In its Decision, the Trial Chamber acknowledged that the purpose of the Request was not to requalify existing facts, but "to have those facts included under these counts, already confirmed by PTC I".¹¹ The Chamber therefore found that it was unnecessary to resort to Regulation 55, as the Chamber possessed the power to rely on the facts and circumstances as a whole, when assessing each count.¹² The Chamber further found that this approach raised no issues of notice, since the existing counts already referred to these victims.¹³ In reaching this conclusion, the Trial Chamber committed an error of law, in finding that it possessed the power to add additional underlying acts to existing counts. The Chamber also abused its discretion, and acted in a manner that contravened Mr. Al Hassan's fair trial rights, by first, incorrectly concluding that this approach raised no issues of notice, and second, failing to consider the specific prejudice generated in this particular case.

⁷ [ICC-01/12-01/18-767-Corr-Red.](#)

⁸ ICC-01/12-01/18-894-Conf.

⁹ ICC-01/12-01/18-940-Conf.

¹⁰ ICC-01/12-01/18-894-Conf, para. 77.

¹¹ Decision, para. 59.

¹² Decision, para. 59.

¹³ Decision, para. 59.

The ICC Legal Framework does not permit the Trial Chamber to modify the acts relied upon to support existing charges.

9. The Defence does not dispute the Trial Chamber’s decision not to invoke Regulation 55 as concerns the legal basis for incorporating additional acts of a sexual nature into Counts 1 to 5. Regulation 55 governs modifications to the *legal* nature of existing charges: it does not permit the Trial Chamber to modify their *factual* nature. The Defence does, however, dispute that the Trial Chamber has any power or discretion, outside the limits of either Article 61(9) or Regulation 55, to include additional acts in existing charges or to make substantive changes to the manner in which the confirmed charges are pleaded.
10. The factual matrix and specific wording, as crystallised by the Pre-Trial Chamber, forms the basis for trial, and pre-trial preparation.¹⁴ Any changes to this matrix must therefore be approved in accordance with the procedure set out in Article 61(9), before the commencement of the trial. The legal rational underpinning this cut-off point is that:¹⁵

given the strong link between the right to be informed in detail of the nature, cause and content of the charges and the right to prepare one’s defence, only information made available before the start of the trial hearings may be taken into account. This is because a trial must commence based on a set of clearly defined charges.

11. Although Regulation 55 vests the Chamber with the discretion to change the legal characterization of the facts concerning a particular charge, it does not allow the Chamber to modify the “statement of the facts”.¹⁶ The Trial Chamber’s approach is predicated on the position that the ‘statement of facts’ applies to the charges as a whole. If this approach were accepted, it would mean that the Chamber could notionally rely on any fact or incident in the DCC to support a specific charge, even though it might transform the nature and gravity of the charge. This fluid approach to the charges is not consistent with the overarching legal framework of the Court, and would further defeat the safeguards erected to guide the usage of Article 61(9) and Regulation 55, and ensure certainty and diligence in the formulation of charges.
12. Although Article 74(2) refers generally to the facts and circumstances in the charges, this provision must be reconciled with Rule 142(2) of the RPE, which specifies that “where there is more than one charge, the Trial Chamber shall decide separately on each charge”.

¹⁴ [ICC-01/04-01/07-1547-tENG](#), para. 22; [ICC-01/05-01/08-836](#), para. 35.

¹⁵ [ICC-01/04-01/06-3121-Red](#), para. 129.

¹⁶ [ICC-01/04-01/06-2205](#), para. 97: “The text of Regulation 55 only refers to a change in the legal characterisation of the facts, but not to a change in the statement of the facts. This indicates that only the legal characterisation (...) could be subject to change, but not the statement of the facts”.

This underscores the point that the defendant is not prosecuted in connection with a loose connection of facts and circumstances, but a set of clearly defined charges, that can be heard and resolved independently if necessary. The right to a reasoned verdict, and the right to be heard in relation to such a verdict, presuppose that the defendant has clear and timely notice as concerns the facts that can be relied upon to establish each separate charge. The importance of linking specific facts to a particular legal qualification was, moreover, emphasized by the Appeals Chamber in finding that the right to be informed of the nature, cause and content of the charges refers not only to “the cause of the charges – that is, the acts he or she is alleged to have committed – but also the nature of the charges, or the legal characterisation given to the acts in question.”¹⁷ This finding would be meaningless in practice if the Trial Chamber were to possess the residual right to reorder the facts and circumstances in a manner that changes the nature (i.e. factual content) of specific charges, and to do so outside of the framework of Article 61(9) or Regulation 55.

13. This interpretation as concerns the nexus between particular facts and particular charges is further bolstered by Article 61(7)(a), which refers to the role of the Pre-Trial Chamber in determining whether “each of the charges” is substantiated by sufficient evidence, and then committing “the person to a Trial Chamber for the trial on the charges as confirmed”. It follows that the Trial Chamber is not only constrained by the overall parameters of the charges, but also the parameters of each charge (‘as confirmed’). Article 61(9) sets out a broad requirement that amendments to the charges (as confirmed by the Pre-Trial Chamber) must be authorized by the Pre-Trial Chamber. This requirement is not limited to requests to add additional charges or to substitute more serious charges: otherwise, the distinction between amendments which require a hearing, and those which do not, would be superfluous. Rule 128(1) also employs broad language, evidencing the intent that it should govern *any* amendments that alter the nature of the charges, as confirmed by the Pre-Trial Chamber. While the Appeals Chamber has eschewed the distinction between material and subsidiary facts, the Court’s practice nonetheless reflects the legal stance that if the Prosecution wishes to modify or include new material facts in particular charges, it should seek an amendment to the charges.

The Trial Chamber manifestly abused its discretion, and acted in a manner that was contrary to Article 67(1)(a) of the Statute

¹⁷ [ICC-01/14-01/18-874](#), para 38.

14. Neither the Prosecution nor the Trial Chamber dispute the position that the confirmed charges do not include acts of a sexual nature in relation to **P-0574, P-0542, P-0570 and P-0547, in counts 1 to 5.**¹⁸

15. The Trial Chamber's indication that it could rely on acts of a sexual nature, set out in counts 13, for the purpose of reaching its verdict concerning counts 1 to 5, constituted a change to the factual matrix concerning the acts and conduct underpinning these counts. This change was notified several months after the commencement of the trial, and after repeated communications from the Prosecution and the Pre-Trial Chamber to the effect that these allegations fell outside the scope of these counts. It therefore violated Mr. Al Hassan's right to timely notice as concerns the nature of the charges that he would face at trial, and his related right to adequate time as concerns investigations and case preparation pertaining to such charges. The prejudice is exacerbated to an impermissible degree, by the absence of clarity as concerns the manner in which the Trial Chamber intends to use these allegations, and the vagueness of these allegations, including the lack of detail as concerns key elements required to establish Mr. Al Hassan's responsibility.

16. Article 67(1)(a) sets out the key right "to be informed promptly and in detail of the nature, cause and content of the charge". The Appeals Chamber has explained that the purpose of this provision is to ensure that the defendant is "informed not only of the cause of the charges – that is, the acts he or she is alleged to have committed – but also the nature of the charges, or the legal characterisation given to the acts in question."¹⁹ Article 67(1)(a) therefore requires the defendant be given prompt notice of the acts relied upon to support a specific charge, and the legal characterization of those acts. This is because:²⁰

[c]harges are not merely a loose collection of names, places, events, etc., which can be ordered and reordered at will. Instead, charges must represent a coherent description of how certain individuals are linked to certain events, defining what role they played in them and how they related to, and were influenced by, a particular context. Charges therefore constitute a narrative in which each fact belonging to the 'facts and circumstances' has a particular place. Indeed, the reason why facts are included in the 'facts and circumstances' is precisely because of how they are relevant to the narrative in a particular way.

17. Although there is no uniform practice as concerns the submission of an updated DCC (following the confirmation of charges), the Chambers that have requested such documents have emphasized the importance of receiving, before the start of the trial, a

¹⁸ ICC-01/12-01/18-1211-Conf, paras. 62, 68.

¹⁹ [ICC-01/14-01/18-874](#), para 38.

²⁰ [ICC-01/04-01/07-3436-AnxI](#), para. 32.

clear statement of facts, which the Prosecution intends to rely upon to substantiate each charge.²¹ Trial Chamber V further clarified, as concerns the content of such a statement, that “the “facts and circumstances described in the charges” should be presented **separately** for each count” (emphasis added).²²

18. In line with this position, the current ICC Chambers Practice Manual specifies that:²³

The charges on which the Prosecutor intends to bring the person to trial to be presented prior to the confirmation hearing (...) shall be spelt out in a clear, exhaustive and self-contained way and shall include all, and not more than, the ‘material facts and circumstances’ (i.e. the facts and circumstances that must be described in the charges (...) and which are the only facts subject to judicial determination to the applicable standard of proof at confirmation and trial stages, respectively) and their legal characterisation; (...) If the Prosecutor chooses to include submissions in the document containing the charges rather than in a separate filing, the two sections – ‘charges’ and ‘submissions’ – must be kept clearly separate, and no footnotes containing cross- references or reference to evidence must be included in the charges.

19. Although the Chambers Practice Manual is not binding *per se*, the above position reflects the legal stance adopted by the ICTR and ICTY Appeals Chambers, and can thus be said to reflect relevant judicial precedent as concerns the degree of clarity required in complex ICL cases to meet the internationally recognized human right to prompt notice of the nature, content and cause of the charges.²⁴

20. In accordance with this body of precedent, whereas certain background information concerning the defendant could be understood as being cross-cutting vis-à-vis the different charges set out in the DCC,²⁵ the same does not hold true as concerns specific facts that are pleaded in support of specific counts. If the charging document (i.e. the indictment) fails to plead certain facts in support of a specific crime, the Chamber cannot

²¹ [ICC-01/04-01/06-1548](#), paras. 12-13, requesting an updated DCC “to ensure that there is complete understanding of the ‘statement of facts’ underlying the charges confirmed”; [ICC-01/04-01/07-1547-tENG](#), para. 29-31; [ICC-01/09-02/11-450](#), paras. 7-9; [ICC-01/05-01/08-836](#), para. 30.

²² [ICC-01/09-02/11-536](#), p. 9.

²³ [Chambers Practice Manual \(2019\)](#), para. 35.

²⁴ [ICC-01/14-01/18-874](#), para. 1, referring to experience of the ad hoc Tribunals in complex cases; para. 2, finding it “appropriate to follow the approach of the ad hoc tribunals in preferring detail about the role of an accused in the charges.”

²⁵ Cf *Prosecutor v. Ntabakuze*, [Appeals Judgment](#), para. 106: “the Appeals Chamber recalls that the Prosecution’s failure to expressly state that a paragraph in the indictment supports a particular count in the indictment is indicative that the allegation in the paragraph is not charged as a crime. Paragraphs 4.6 and 4.8 of the Indictment, however, are contained in a section titled “The Accused”, which merely describes Ntabakuze and provides information on his professional background and military authority during the period of the relevant events. Although they contain material facts supporting elements of crimes pleaded elsewhere in the Indictment, paragraphs 4.6 and 4.8 do not plead allegations that may be separately charged as a crime. As a result, the Appeals Chamber considers that the Prosecution was not required to plead these paragraphs expressly under each of the counts in the charging section of the Indictment.”

rely on such facts to enter a conviction. As explained by the ICTR Appeals Chamber in *Muvunyi*:²⁶

the Prosecution’s failure to expressly state that a paragraph in the Indictment supports a particular count in the Indictment is indicative that the allegation is not charged as a crime. The Appeals Chamber therefore considers that the mistreatment underlying Muvunyi’s conviction for other inhumane acts as a crime against humanity was not charged in his Indictment. The omission of a count or charge from an indictment cannot be cured by the provision of timely, clear, and consistent information.

21. In the subsequent appeals judgment in *Karera*, the ICTR Appeals Chamber determined that in circumstances where a particular allegation was charged under a particular count only, it was unfair and unduly prejudicial to enter a conviction which relied upon this allegation in connection with a different charge.²⁷ In reaching this conclusion, the Appeals Chamber rejected the claim that the indictment “should be read as a whole”, noting that there was no language in the relevant count which incorporated other facts by reference:²⁸ there was thus no language in the indictment putting the defendant on notice that it should be read as a whole. The Appeals Chamber further found that the Prosecution’s own conduct contributed to the lack of sufficient notice: although the Prosecution initially listed the allegation in connection with counts 3 and 4 in an application to amend the indictment, this allegation was later only linked to count 4, which had “given the message” that it would only be relied upon this count.²⁹ The nature and gravity of this prejudice could not be cured by wording of the Pre-Trial Brief.³⁰
22. The Trial Chamber’s approach falls within the four corners of these ICTR precedents. The Trial Chamber has indicated that it intends to rely upon facts, pleaded under a different count (count 13), to establish Mr. Al Hassan’s responsibility for counts 1 to 5. Mr. Al Hassan commenced this trial, and the Defence cross-examined the first 19 witnesses, on the understanding that counts 1 to 5 would not encompass acts of a sexual nature as concerns P-0574, P-0542, P-0570 and P-0547. As was the case with *Karera*, the Prosecution contributed to the defendant’s lack of timely notice. Specifically: (1) the Prosecution explicitly averred in the arrest warrant application that it would not pursue Mr. Al Hassan in connection with allegations or acts of rape, committed at the BMS,

²⁶ *Prosecutor v. Muvunyi*, [Appeals Judgment](#), para. 156.

²⁷ *Prosecutor v. Karera*, [Appeals Judgment](#), para. 365.

²⁸ *Prosecutor v. Karera*, [Appeals Judgment](#), para. 365.

²⁹ *Prosecutor v. Karera*, [Appeals Judgment](#), para. 367.

³⁰ *Prosecutor v. Karera*, [Appeals Judgment](#), para. 368.

under the control of Hesbah;³¹ (2) the Prosecution repeatedly indicated during the confirmation hearing that it was not seeking to charge Mr. Al Hassan in connection with these acts of rape in connection with counts 1 to 5;³² and (3) in its Trial Brief, filed on 18 May 2020, the Prosecution foreshadowed its intention to seek recharacterisation in relation to counts 9-10 (and not counts 1-5).³³

23. Of further import, in its April 2020 Amendment Decision, the Pre-Trial Chamber affirmed that the Confirmation Decision should be read as confirming the facts set out in the following paragraphs, in relation to Counts 1 to 5 for P-0542, P-0570 and P-0547 as described in paragraphs 331-332, 334-335, 337-338 and 355 of the Confirmation Decision.³⁴ These paragraphs do not include acts of a sexual nature. After this decision was issued, the Trial Chamber issued a self-contained set of charges, [REDACTED].³⁵ The Prosecution did not seek any modifications to this language. The accusatory instruments in this case thus uniformly conveyed the position that these acts did not form part of Counts 1 to 5.
24. The need for notice and specificity in the charges is of heightened importance as concerns the counts of “other inhumane acts” and “other forms of ill-treatment”. Given the potentially broad and vague nature of “other inhumane acts” as a residual provision, it was emphasised during the drafting of the Statute that this provision would need to be strictly construed.³⁶ This understanding would be vitiated if it were to be employed as a ‘catch-all’ count that can apply to potentially any allegation in the charges.
25. The absence of any clear demarcation as concerns the acts relied upon in support of this count would also contravene the requirement, set out in the Elements of the Crimes, that the Prosecution must demonstrate that the perpetrator was aware of the factual

³¹ ICC-01/12-01/18-1-Conf-Exp-Red2, paras. 233 and 252 : “233.La responsabilité d’AL HASSAN est engagée sur le fondement de l’article 25(3)(a) du Statut, en tant que co-auteur direct pour avoir commis, conjointement avec d’autres personnes, les crimes qui font l’objet de la présente Requête, à commencer par le crime de persécution pour motifs religieux et de persécution pour motifs sexistes tels que décrits supra en sections 5.3.1 et 5.3.2 (à l’exception des viols commis en détention au siège de la Hesbah). (...) 252. AL HASSAN est aussi responsable comme co-auteur indirect pour avoir participé à la commission des crimes décrits aux sections 5.3.1 et 5.3.2 supra (à l’exception des viols commis en détention au siège de la Hesbah).”

³² ICC-01/12-01/18-461-Conf-Corr, para. 676: [REDACTED].

³³ ICC-01/12-01/18-894-Conf, fn. 227: [REDACTED].

³⁴ ICC-01/12-01/18-767-Conf-Anx, p. 10.

³⁵ ICC-01/12-01/18-923-Conf-AnxA, para. 19: [REDACTED].

³⁶ “the language of the relevant statutory provision and the Elements of Crimes, as well as the fundamental principles of criminal law, make it plain that this residual category of crimes against humanity must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity”: [ICC-01/09-02/11-382-Red](#), para. 269.

circumstances that established the character of the act.³⁷ Footnote 29 thereto further clarifies that “[i]t is understood that “character” refers to the nature and gravity of the act.” It follows that the nature and gravity of the act relied upon by the Prosecution to establish this charge are material elements that must be explicitly pleaded and confirmed by the Pre-Trial Chamber, including by reference to the knowledge of the defendant.

26. Apart from the lack of notice, the Defence faces concrete prejudice as a result of this change. The Decision changes and increases the importance of these acts in light of the fact that they can now be relied upon to support multiple charges. This affects and undermines Defence strategy and the related right to adequate time and resource to implement this strategy. As noted by the ICTR Appeals Chamber in *Karera*, “[i]n a world of limited legal resources, the Appellant’s counsel might have focused more attention on Murekezi’s killing had this key material fact been more specifically linked to a larger number of counts”.³⁸ Whereas the Defence could have addressed and rebutted the count of persecution by focusing on persecutory intent, if the acts of rape are added to Counts 1 and 5, the Defence must now address these acts in addition to existing material facts concerning arrest and detention, in the absence of any clear indication as to which acts will be relied upon to establish the threshold of severity, mental elements, or the connection to a shared criminal objective.³⁹ The absence of certainty as concerns the purposes in relation to which the acts can be relied upon, multiplies the volume of Defence argumentation since the Defence must now shadow-box a range of different possibilities.

27. The impact on the Defence must also be viewed in connection with the cumulative degree of prejudice caused by the multiple changes made to the charges in this case. This includes the Pre-Trial Chamber’s confirmation of a series of new, and more serious

³⁷ [Elements of Crimes](#), Article 7 (1) (k), Element 3: “The perpetrator was aware of the factual circumstances that established the character of the act.”

³⁸ *Prosecutor v. Karera*, [Appeals Judgment](#), para. 368.

³⁹ [ICC-01/04-01/07-3436-AnxI](#), para. 33: “It is crucial to note that it is insufficient to simply compare ‘stories’ in order to see to what extent they contain some of the same elements. It is equally important to analyse the legal significance of each fact within the framework of each narrative, because this determines how an accused would defend him or herself against the charges as formulated. It matters a great deal, in this respect, how important certain parts of the story are within each narrative. A similar fact may be a mere detail in one narrative, but constitute the linchpin of another. Accordingly, a defendant may have chosen not to devote scarce resources to such a fact because it could not be expected to have any tangible effect on the outcome of the case, whereas he or she would in all likelihood concentrate all his or her investigative efforts on that same fact if that fact were to perform a different function in an alternative narrative. The same is true for trial time spent on such issues, the number and type of questions posed during cross-examination, the evidence called to rebut the allegation, or indeed the facts admitted or agreed to.”

amendments, less than three months before the start of the trial,⁴⁰ and the scope of the Decision itself, which in addition to the two issues, encompasses a series of additional notices concerning other witnesses and charges.⁴¹ The Defence is not only required to address such mutations and additional workload ‘in a world of limited resources’, it is also required to do so, under the particular and exceptionally difficult investigative restraints stemming from the Covid-19 pandemic, and the security situation in the North of Mali. Accordingly, in line with the ICTR Appeals Chamber’s determination that a reversal was required to remedy the prejudice occasioned by the Trial Chamber’s reliance on allegations from one count, to enter a verdict concerning another, the same remedy is required in the current case.⁴²

The Second Issue: The Chamber’s reliance on unconfirmed facts to give notice of a potential requalification of Mr Al Hassan’s individual liability, exceeded the scope of Regulation 55, and constituted a de facto amendment to the charges

28. The Trial Chamber’s decision to give notice concerning the potential requalification of Mr. Al Hassan’s individual responsibility from Article 25(3)(d) to Article 25(3)(c) for specific cases is predicated on Mr. Al Hassan’s alleged role in drafting the Islamic Police Reports related to the cases in question, and the related extent to which this had an outcome on the judgment.⁴³ The Trial Chamber thus considered Mr. Al Hassan’s alleged authorship of these reports and their transmission to the Tribunal to be of material relevance to the degree and nature of his contribution. And yet, the Trial Chamber’s description of the ‘facts’ that it relied upon to justify this aspect of the Decision cannot be reconciled with the plain text of the Confirmation Decision, and thus appears to constitute an extrapolation or addition to the existing confirmed facts. While such an approach might be permissible as concerns background or subsidiary facts, these fact underpinned the Trial Chamber’s notice concerning a potential requalification of his mode of liability. It therefore constituted a material amendment to the charges.

29. There is no hybrid procedure that allows the Trial Chamber to amend the charges to include additional facts, while at the same time, using these new facts as the basis for a requalification of the legal nature of the charges. It is also impermissible and highly

⁴⁰ [ICC-01/12-01/18-767-Corr-Red](#).

⁴¹ ICC-01/12-01/18-1211-Conf, para. 45.

⁴² *Karera*, [Appeals Judgment](#), para. 370.

⁴³ Regulation 55 Decision, paras. 104, 109.

prejudicial for the Trial Chamber to base either a Regulation 55 decision or eventual verdict on material facts concerning the defendant's conduct which have not been evidentially established and confirmed in accordance with the procedural safeguards set out in Article 61. The Trial Chamber thus committed a reversible legal and procedural error by making new findings of fact concerning Mr. Al Hassan's contributions to specific Islamic court cases. Its reliance on this fact to give notice of a potential requalification (and aggravation) as concerns his individual responsibility regarding these cases was also contrary to Mr. Al Hassan's right to a fair and impartial trial.

The Trial Chamber's findings concerning Mr. Al Hassan's authorship or signature of the seven Islamic Police Reports falls outside the scope of the confirmed facts

30. The Trial Chamber acknowledged, in its Decision, that "in its assessment of the seven cases and the facts and circumstances underlying each of them, PTC I did not refer to Islamic Police reports allegedly drafted and signed by the accused and corresponding to these written Islamic Tribunal judgments".⁴⁴ The Trial Chamber nonetheless found that it could rely on broad and abstract descriptions concerning Mr. Al Hassan role, including the finding that on "some occasions", reports that he had signed were sent to the Islamic Tribunal,⁴⁵ to extrapolate additional material facts to the effect that he did in fact author and sign these specific reports in relation to the 7 cases charged as separate incidents.⁴⁶
31. Although the Chamber's reliance on such a generic conclusion might be acceptable in cases where the defendant is charged with a generic crime or offence, rather than specific incidents, that is not the present case. The Pre-Trial Chamber confirmed the charges in such a manner that each Islamic Court case constitutes a separate incident capable of giving rise to individual responsibility,⁴⁷ and not a sample of an amorphous whole.
32. In line with this 'case-by-case' approach, the Pre-Trial Chamber also assessed the nature and extent of Mr. Al Hassan's contribution to each case and confirmed some cases in connection with Article 25(3)(c) and others, via Article 25(3)(d).⁴⁸ The key differential between the two forms of liability turned on the Pre-Trial Chamber's finding that in some cases, the Prosecution has established that Mr. Al Hassan had facilitated the commission of the crime through his conduct in signing and drafting Islamic Police Reports that

⁴⁴ Decision, para. 107.

⁴⁵ Decision, para. 109.

⁴⁶ Decision, para. 109.

⁴⁷ ICC-01/12-01/18-461-Conf-Corr, pp. 398-404; See also ICC-01/12-012/18-335-Conf-Corr, pp. 441-443

⁴⁸ ICC-01/12-01/18-461-Conf-Corr, paras. 928-929.

appeared to have a nexus to the Islamic Judgment in question,⁴⁹ whereas in the other cases, the Pre-Trial Chamber found that such a nexus or contribution had not been established.⁵⁰ The Chamber therefore confirmed these cases under Article 25(3)(d). These cases were the subject of the Trial Chamber's Regulation 55 Decision, and [REDACTED].⁵¹

33. The fact that the Pre-Trial Chamber did not refer to these specific Islamic Police Reports, as being drafted and signed by Mr. Al Hassan or otherwise linked to a particular Islamic Tribunal judgment, was not an inadvertent omission on the part of the Pre-Trial Chamber but a reflection of both an absence of pleadings and a lack of evidence on this point. [REDACTED].⁵² [REDACTED]:⁵³ any assertion that the reports had *all* been signed by Mr. Al Hassan would have undermined the reliability of the evidence that the Prosecution was relying upon to establish this fact in relation to specific reports.

34. In its 2020 amendment request, the Prosecution also conceded that it did not allege that Mr. Al Hassan drafted the police report for [REDACTED] in the DCC,⁵⁴ but in fact, the DCC also completely failed to refer to [REDACTED], and failed to make any attribution to [REDACTED]. Indeed, [REDACTED] is also not a signed report; there is no indication that it emanated from the Islamic Police or Mr. Al Hassan. Thus, when the Pre-Trial Chamber set out its findings concerning the specific reports for which it found sufficient evidence to establish authenticity and authorship on the part of Mr. Al Hassan, the Chamber did not include [REDACTED].

35. The linkage between reports and specific judgments was also a factual matter which fell to the Prosecution to demonstrate, and yet the Pre-Trial Chamber ultimately confirmed no linkage.⁵⁵ The Pre-Trial Chamber's findings were not, therefore, of a legal nature that could be subject to a legal requalification. It follows that in finding that there may be grounds to demonstrate such a linkage on the basis of Mr. Al Hassan's alleged authorship of these reports, and connection to specific Islamic Court judgments, the Trial Chamber

⁴⁹ ICC-01/12-01/18-461-Conf-Corr, para. 928.

⁵⁰ ICC-01/12-01/18-461-Conf-Corr, para. 929.

⁵¹ ICC-01/12-01/18-335-Conf-Corr, para. 302, fn. 717. See also ICC-01/12-01/18-461-Conf-Corr,

⁵² ICC-01/12-01/18-335-Conf-Corr, para. 302.

⁵³ [REDACTED].

⁵⁴ ICC-01/12-01/18-894-Conf, para. 19.

⁵⁵ ICC-01/12-01/18-461-Conf-Corr, paras. 457 [REDACTED], 466-467 [REDACTED], 462 [REDACTED], 448 [REDACTED], 469 [REDACTED], 436 [REDACTED], 472 [REDACTED].

effectively stepped into the shoes of the Pre-Trial Chamber, expanding, and thus exceeding, the factual matrix of the confirmed charges.

The Trial Chamber's approach constitutes a de facto amendment of the charges as it is predicated on new material facts that were not confirmed by the Pre-Trial Chamber

36. In accordance with the pleading requirements of Regulation 52, it was necessary for the Prosecution to plead and prove the nature of Mr. Al Hassan's contribution to each such incident, to the requisite standard of proof. The Trial Chamber was in turn constrained by the Pre-Trial Chamber's findings as concerns the nature and number of contributions that had come up to proof by the conclusion of the confirmation stage. This is because:⁵⁶

In providing for a pre-trial phase, whose culminating point is the decision on the confirmation of the charges, rendered following an adversarial hearing, and in requiring the Trial Chamber to be bound by the facts and circumstances described in the charges as thus confirmed, and by them alone, the Statute does not allow either the Chamber, or even the Prosecutor, to add new facts in the course of the trial as and when they are disclosed by the ongoing investigations. Thus it should be recalled that the filing of the Confirmation Decision represents not the starting point of the preliminary proceedings but in fact their termination. In the Chamber's view, the decision on the confirmation of the charges crystallises the facts and circumstances accepted in that decision in support of the charges it has confirmed. This is one of the fundamental reasons for the existence of the Pre-Trial Chamber, the purpose of which is to enable the trial to be conducted, as expeditiously as possible, on factual bases that are clear and certain, and accessible to the accused. If the Prosecutor were to be entitled to present at the confirmation hearing a mere sample of the facts with which he intends to charge the accused, and to reserve the right subsequently to add new facts at the trial, this requirement of certainty could not be satisfied.

37. Although the above finding concerns criminal acts, it applies equally to the defendant's contributions to each act. Put simply, if the Prosecution were entitled to rely on pleadings concerning a sample of contributions, the same issue of certainty would arise. Such an approach would also render it impossible to put forward a meaningful defence in relation to each incident. For example, if the Prosecution were to rely on the defendant's participation at meetings as evidence of his contribution to certain crimes, in the absence of particulars concerning such meetings, it would be impossible for the Defence to put forward an alibi defence. Conversely, if the Prosecution were permitted to rely on the 'generic notion of meetings', this would open the door to allowing the Prosecution to mould its case to the evidence. For this reason, in the *Ntabakuze* case, the ICTR Appeals

⁵⁶ [ICC-01/04-01/07-1547-tENG](#), para. 22. See also separate opinion of Judge Morrison and Judge Van den Wyngaert, [ICC-01/05-01/08-3636-Anx2](#), fn. 23: "The only precedent is a decision of Trial Chamber II in the Katanga case where, the Prosecutor also argued that the criminal acts mentioned in the charges were only samples (Katanga and Ngudjolo, Office of the Prosecutor, "Réponse de l'Accusation à la question posée par la Chambre de première instance II lors de l'audience du 1er octobre 2009", 6 October 2009, ICC-01/04-01/07-1513). The Trial Chamber radically rejected this approach. (Trial Chamber II, Prosecutor v. Germain Katanga ICC-01/04-01/07-1547, paras 22, 23)." See also [Majority Opinion](#), paras. 110, and 115.

Chamber further explained that notwithstanding the geographic and temporal magnitude and complexity of international cases, the indictment cannot rely on a ‘sample’ of material facts (such as the location of the crimes), particularly when the information in question is in possession of the Prosecution.⁵⁷

38. The material importance of the facts underpinning the defendant’s contributions to the charged incidents is further reinforced by the Appeals Chamber’s recent ruling that:⁵⁸

For the purposes of sufficient notice, the charges must set out the exact subprovision applicable in article 25 of the Statute and the specific form of participation within that sub-provision. The Appeals Chamber further notes that the charges must also give notice to an accused of the material facts associated with his or her particular form of participation. This practice fully comports with the spirit of internationally recognised human rights principles on that matter and takes on board the experience of the ad hoc tribunals in their complex proceedings.

39. The converse of this ruling is that if the charges must give the defendant notice of the material facts associated with his participation in the charged incidents, it follows that the Trial Chamber cannot rely on material facts that are not confirmed in the charges for the purposes of establishing the defendant’s participation in the charged incidents, in the ultimate verdict. This is in line with the ruling of Trial Chamber III in *Bemba* to the effect that although the charges referred to Mr. Bemba’s “wide discretionary powers” which he used to issue, inter alia, military decrees, the allegation that he issued a specific decree constituted a new fact that was not relied on, in the confirmation decision.⁵⁹ The Chamber therefore ordered the Prosecution to strike it out from the updated charges.⁶⁰ The Trial Chamber thus confirmed that the Prosecution could not rely on the ‘general narrative’ concerning the abstract nature of the defendant’s contributions to the crimes, as a foundation for extrapolating material facts concerning specific contributions. This is consistent with the approach of the ICTR Appeals Chamber in the *Kanyarukiga* case. The Appeals Chamber found that a conversation, during which the accused allegedly planned an attack on a church, constituted a material fact that should have been pleaded in the indictment; the generic allegation that he was responsible for ‘planning’ did not exempt the Prosecution from the duty to furnish the particular concerning the course of conduct linked to this particular incident in the charges.⁶¹

⁵⁷ *Prosecutor v. Ntabakuze*, [Appeal Judgement](#), para 38 and fn. 88

⁵⁸ [ICC-01/14-01/18-874](#), para. 1.

⁵⁹ [ICC-01/05-01/08-836](#), para. 134.

⁶⁰ [ICC-01/05-01/08-836](#), para. 134.

⁶¹ *Prosecutor v. Ntabakuze*, [Appeal Judgement](#), para 76: ‘This conversation thus amounted to a material fact that, along with others, underpinned Kanyarukiga’s conviction for planning. Recalling that when the accused is

40. When these principles are distilled and applied to the presence case, it is apparent that:

- Given the penal consequences of being convicted for each incident concerning the individual Islamic Court cases, Mr. Al Hassan has a right to adequate and prompt notice as concerns the details for his alleged responsibility for each such case, so that he can effectively defend himself at trial. Since Mr. Al Hassan did not play a direct role in the adjudicative process concerning these cases, the need for clarity as concerns the nature of his individual involvement in the execution of the alleged crimes is of crucial importance to Defence preparation.
- The Prosecution was in possession of the relevant Islamic Police Reports and Islamic Tribunal Judgments at the time of the confirmation hearing and had the capacity to furnish particulars concerning Mr. Al Hassan's alleged authorship and signature of these reports, and the alleged nexus to judgments, in the charges, and the obligation to establish this fact to the requisite standard of proof. It failed to do so.
- The Pre-Trial Chamber considered the issue as to whether Mr. Al Hassan signed or authored particular Islamic Police Reports to be 'facts' that were material to the degree and nature of his contribution to specific incidents, and not merely a question of evidence. The Prosecution did not seek leave to appeal as concerns these findings. The Pre-Trial Chamber also did not subsequently amend the charges to incorporate new additional material facts to this effect.
- The Prosecution's Regulation 55 Application was predicated on the assertion that "there is an Islamic Police report drafted and a corresponding written Islamic Tribunal judgment":⁶² this factual assertion was the lynchpin of its argument that the nature of Mr. Al Hassan's contribution satisfied the threshold for Article 25(3)(c).
- In the Decision, the Trial Chamber noted that the Reports and Judgments have been submitted into the record.⁶³ In its Decision granting leave to appeal, the Trial Chamber further confirmed it referred to this evidence in order to "support that Mr Al Hassan allegedly authored the reports linked to the seven cases at stake."⁶⁴ The Chamber then

charged with planning, the Prosecution is required to identify the "particular acts" or the "particular course of conduct" on the part of the accused which forms the basis for the charge in question, the Appeals Chamber finds that the conversation should have been pleaded in the Amended Indictment. In this respect, the Amended Indictment was defective."

⁶² ICC-01/12-01/18-1211-Conf, para. 104.

⁶³ ICC-01/12-01/18-1211-Conf, para. 108.

⁶⁴ ICC-01/12-01/18-1319-Conf, para. 25.

“linked the evidence to the facts and circumstances already included in the Confirmation Decision”.⁶⁵ It is therefore apparent that the Trial Chamber relied on this evidence, not for the purpose of interpreting or requalifying the Pre-Trial Chamber’s *legal* findings, but for the purpose of making its own appreciation and extrapolation as concerns the facts and circumstances of the case. Indeed, it is telling that the Trial Chamber did not refer to any *legal* elements or findings arising from the Confirmation Decision. The Trial Chamber’s conclusion did not, therefore, rest on a disagreement as concerns the correct qualification of these facts, but rather, the underlying existence of the facts. This is consistent with the Trial Chamber’s acknowledgement that it had used the evidence in question to “support that Mr Al Hassan allegedly authored the reports linked to the seven cases at stake”. The Decision thus rests on the allegation (i.e. material fact) that “Mr Al Hassan allegedly authored the reports linked to the seven cases at stake”.

- The Trial Chamber did not address the issue that the Charges did not cite all of these Reports: the existence of all seven Reports, and the allegation that “Mr Al Hassan allegedly authored the reports linked to the seven cases” thus falls outside the scope of the confirmed charges. The Trial Chamber did not cite the evidence that it considers capable of substantiating Mr. Al Hassan’s alleged role in authoring or signing these Reports, nor did it specify whether this evidence satisfied the threshold of ‘substantial grounds to believe’. The Defence was also afforded no opportunity to adduce its own evidence to contest this conclusion. The Trial Chamber’s approach thus failed to comport with either the evidential standards or procedural safeguards that would apply to the confirmation hearing or the process for amending the charges.

The Trial Chamber’s approach is inconsistent with Mr. Al Hassan’s right to fair and impartial proceedings

41. Although the Appeals Chamber has noted the relevance of ICTY/ICTR case law as concerns the level of detail required to satisfy Article 67(1)(a), the Appeals Chamber has also stressed the specific nature of the ICC confirmation process, and the unique role of the Pre-Trial Chamber in fixing the factual parameters of the charges, not just the overall outline of the case. The Appeals Chamber thus noted in the *Mbarashimana* case that:⁶⁶

⁶⁵ ICC-01/12-01/18-1319-Conf, para. 25.

⁶⁶ [ICC-01/04-01/10-514](#), para. 43.

the drafters of the Statute did not import the ICTY/ICTR procedures. The drafters of article 61 specifically rejected the idea of an indictment procedure which had appeared in earlier drafts of the Statute and replaced it with a new confirmation of charges hearing, which constituted part of a new "single, straightforward procedural approach, acceptable to delegations representing different national legal systems". The confirmation of an indictment at the ICTY/ICTR is an ex parte procedure conducted in the absence of the defence by one judge. The confirmation of charges hearing, in comparison, was deliberately established as a hearing before a Pre-Trial Chamber of three judges at which the person charged has the right to be present and to contest the evidence and following which the Pre-Trial Chamber must assess the evidence. Such a process clearly requires the Pre-Trial Chamber to go beyond looking at the Prosecutor's allegations "on their face" as is done in confirming an indictment at the ICTY or ICTR.

42. In the same judgment, the Appeals Chamber further rejected the proposition that the Pre-Trial Chamber should adopt a more lenient approach as concerns its assessment of Prosecution evidence, due to the fact that the Prosecution might conduct ongoing investigations.⁶⁷ The Appeals Chamber underscored the Prosecutor's duty to act in a manner that was consistent with the defendant's right to expeditious proceedings and further noted the possibility that the Prosecutor could request an amendment to the charges if new evidence became available.⁶⁸
43. In line with these findings, the Prosecution was required to present and substantiate its case concerning these seven Islamic Court cases at the confirmation hearing. The Prosecution's failure to act in a diligent manner in pleading and raising all relevant matters at that stage should not operate to the detriment of the Defence. If the Prosecution wished to contest the Pre-Trial Chamber's findings concerning these cases, it could have requested leave to appeal, or submitted a request for an amendment, based on additional evidence. There was no procedural lacuna and no basis for the Trial Chamber to remedy the Prosecution's omissions by carving out an ICTY/ICTR style indictment procedure, which allowed the Trial Chamber to generate new material facts after the commencement of the trial, and without following the procedural or evidence requirements of either Article 61(6) or (9).
44. The right to an impartial Trial Chamber demands a clear separation between the role of the Pre-Trial Chamber in confirming charges, as compared to the role of the Trial Chamber in determining whether the evidence satisfies the confirmed charges. If the Trial Chamber adopts an overly active and broad approach in interpreting the facts (or extrapolating new facts), so as to allow for a range of additional, and more serious charges, this will raise the question as to whether the Trial Chamber has in fact donned the

⁶⁷ [ICC-01/04-01/10-514](#), para. 44.

⁶⁸ [ICC-01/04-01/10-514](#), para. 44.

mantle of an investigating/confirming judge, in violation of Article 39(4) of the Statute⁶⁹ and internationally recognized human rights law.⁷⁰ In line with this concern, in *Lubanga*, the Appeals Chamber cautioned that “[t]o give the Trial Chamber the power to extend proprio motu the scope of a trial to facts and circumstances not alleged by the Prosecutor [in the charges] would be contrary to the distribution of powers under the Statute”.⁷¹ The prerogative for defining the factual elements of the charges also rests solely with the Pre-Trial Chamber: subsequent ‘updates’ risk promoting uncertainty, and undermining the authoritative nature of the charges, as confirmed by the Pre-Trial Chamber.⁷² Indeed, the notion that the Trial Chamber has the power to extrapolate new facts or to interpret the charged facts differently, with a view to reaching new factual conclusions, potentially opens a Pandora’s box of uncertainty and confusion as concerns the precise scope and content of the charges. Article 22(2) of the Statute specifies that “the definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.” It would be contrary to this provision for the Chamber to infer specific incriminating facts from generic or ambiguous narratives. This in turn raises concerns regarding the Trial Chamber’s impartiality vis-à-vis these factual elements of the case.

45. Finally, the Trial Chamber’s conclusion that its approach did not cause unfairness is directly contradicted by its own admission that the Chamber had already “received a body of evidence related to the seven cases and considers that waiting for the presentation of additional evidence relevant to the above incidents would be more prejudicial for the accused” (emphasis added).⁷³ The goal of averting further prejudice does not justify causing the prejudice in the first place. The Prosecution already called to testify in September and October 2020 two key experts related to the alleged authorship and signature of these reports (P-0620 and P-0621), and other chain of custody witnesses (P-0007 and P-0102). The Defence prepared for and cross-examined these witnesses without the benefit of prior notice concerning the legal and factual implications of Mr. Al Hassan’s alleged authorship of these seven reports vis-à-vis the charges. The pre-trial preparation period has concluded, and the Defence now has very limited opportunities for

⁶⁹ Article 39(4) specifies that “under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case”. See also [ICC-01/05-01/08-2606-Red](#), para. 19.

⁷⁰ *De Cubber v. Belgium*, [9186/80](#), paras. 27-30

⁷¹ [ICC-01/04-01/06-2205](#), para. 94.

⁷² [ICC-01/05-01/13-992](#), paras. 16-17; [ICC-01/12-01/18-548](#), para. 17; [ICC-01/05-01/13-2275-Red](#), para. 196.

⁷³ [ICC-01/12-01/18-1211-Conf](#), para. 112.

investigating and preparing its case. Re-calling Prosecution witnesses would also unfairly and unnecessarily prolong the case. The Article 61(9) proscription concerning trial amendments serves to ensure that “only information made available before the start of the trial hearings may be taken into account. This is because the trial must commence “based on a set of clearly defined charges” (emphasis added).⁷⁴ The issuance of the Decision five months after the start of the trial has ruptured this objective, and the appropriate remedy is to reverse this aspect of the Decision.



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Dated this 12th Day of March 2021
At The Hague, The Netherlands

⁷⁴ [ICC-01/04-01/06-3121-Red](#), para. 129.