

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: **ICC-01/12-01/18**
Date: **27 September 2024**

THE APPEALS CHAMBER

Before: Judge Luz del Carmen Ibáñez Carranza, Presiding Judge
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze
Judge Miatta Maria Samba
Judge Erdenebalsuren Damdin

SITUATION IN THE REPUBLIC OF MALI

IN THE CASE OF

***THE PROSECUTOR V. AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG
MAHMOUD***

Public

Prosecution request regarding the Defence Notice of Appeal

Source: Office of the Prosecutor

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

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Introduction

1. On 18 September 2024, the Defence filed its notice of appeal against the Trial Judgment pursuant to article 81(1)(b) of the Rome Statute.¹ Substantial portions of the Defence Notice of Appeal are impermissibly broad and vague, and fail to comply with the requirements for notices of appeal under regulation 57 of the Regulations of the Court (“RoC”). In particular, grounds 2, 3 and 4 fail to identify with sufficient specificity the alleged errors and how they affect the appealed decision, as required under regulation 57(e). As a result, the Prosecution is not able to understand the scope of the Defence appeal and cannot realistically use the period until the Defence files its document in support of the appeal to prepare its response. This affects the fairness and expeditiousness of the appeal proceedings.

2. The Appeals Chamber has the discretion to take any measures it considers necessary in the interests of justice under regulation 29 of the RoC to address the Defence’s failure to comply with regulation 57, including dismissal of the deficient parts of the Notice of Appeal *in limine*. In the circumstances, the Prosecution requests the Appeals Chamber to assess whether any of the grounds/sub-grounds in grounds 2-4 of the Defence Notice of Appeal warrant dismissal *in limine*, or whether they may be remedied by requiring the Defence to supply further details to comply with regulation 57 of the RoC. If the Appeals Chamber is minded to order the latter, the Prosecution submits that this should not prevent the Defence from filing its appeal brief in support of the Appeal by the current due date of 5 December 2024.² This is because the Defence has already benefitted from two extensions of time to file its Notice of Appeal.³

Submissions

A. Notices of Appeal must sufficiently specify the alleged errors and how they affect the appealed decision

3. The Defence Notice of Appeal does not conform with the requirements of regulation 57 of the RoC, as shown below.⁴

4. Regulation 57 was amended on 12 July 2017 to require in sub-regulation 57(e) that notices of appeal under rule 150 of the Rules of Procedure and Evidence state the appellant’s

¹ ICC-01/12-01/18-2648 (“[Defence Notice of Appeal](#)”).

² ICC-01/12-01/18-2647 (“[Appeal Brief Time Extension Decision](#)”), para. 18.

³ ICC-01/12-01/18-2606 (“[First Notice of Appeal Time Extension Decision](#)”); ICC-01/12-01/18-2628 (“[Second Notice of Appeal Time Extension Decision](#)”).

⁴ See below [Section B](#).

grounds of appeal, “specifying the alleged errors and how they affect the appealed decision”.⁵ The addition of this requirement in the RoC serves to ensure that the appellant focuses the issues in the appeal from the outset, and that all parties, participants and the Appeals Chamber are given clear notice of the scope of the appeal so that they can effectively prepare. The Appeals Chamber has observed that a notice of appeal serves to anticipate the scope of an appeal and the range of the arguments to be presented in an appeal.⁶

5. As acknowledged in the ICTY, where notices of appeal involved similar requirements to those in regulation 57,⁷ while the notice of appeal is not required to set out in detail the arguments that the appellant intend to rely upon in support of the grounds of appeal, the notice must “focus the mind of the Respondent, right from the day the notice of appeal is filed, on the arguments which will be developed subsequently in the Appeal brief”.⁸ Indeed it is the filing of the notice of appeal that commences the appeal proceedings and triggers the timeframes for the filing of appeal briefs, responses and the Appeals Chamber’s judgment.⁹ The requirements for the notice are therefore “based on principles of fair trial and effectiveness, aimed at ensuring that both parties have adequate opportunity to be fully apprised of each other’s submissions and to respond in good time to these”.¹⁰

6. Moreover, as the Appeals Chamber has stated in this¹¹ and previous cases,¹² the provisions of regulation 57 require that by the time of filing a notice of appeal, appellants have conducted a “thorough analysis of the impugned decision”. It follows that, having conducted the requisite analysis, appellants must be able to articulate with sufficient specificity the alleged errors on appeal. Inherently, this requires the appellant to identify with precision the findings of the Trial Chamber that were allegedly in error, and the impact of these errors on the Trial

⁵ Regulation 57 of the [RoC](#), amended 12 July 2017, entered into force 20 July 2017.

⁶ ICC-02/04-01/15-1850 (“[Ongwen Appeal Brief Extension Decision](#)”), para. 14.

⁷ ICTY [Rules of Procedure and Evidence](#), rule 108 (requiring, *inter alia* the Appellant to set out in the notice of appeal “the substance of the alleged errors and the relief sought”). See also [Practice Direction on Formal Requirements for Appeals from Judgement](#), 7 March 2002, para. 1.

⁸ *Prosecutor v. Boškoski & Tarčulovski*, IT-04-82-A, [Judgement](#), 19 May 2010, para. 246.

⁹ Regulation 58(1) of the [RoC](#) (requiring the appeal brief to be filed within 90 days from the date of notification of the impugned decision); Regulation 59(1) of the [RoC](#) (requiring the response to be filed within 60 days from the date of notification of the appeal brief); [Chambers Practice Manual](#) (7th edition, 2023), para. 91 (requiring the written judgment to be issued within 10 months from the date of filing of the response brief, or 10 months from the closing of the oral hearing, if one is held).

¹⁰ *Prosecutor v. Mrkšić & Šljivančanin*, IT-95-13/1-A, [Decision on the Prosecution’s Motion to Order Veselin Šljivančanin to Seek Leave to File an Amended Notice of Appeal and to Strike New Grounds Contained in His Appeal Brief](#), 26 August 2008, para. 9.

¹¹ ICC-01/12-01/18-2606 (“[First Notice of Appeal Time Extension Decision](#)”), para. 12; ICC-01/12-01/18-2628 (“[Second Notice of Appeal Time Extension Decision](#)”), para. 13.

¹² ICC-02/11-01/15-1268 (“[Gbagbo & Blé Goudé Appeal Time Extension Decision](#)”), para. 8; ICC-01/04-02/06-2364 (“[Ntaganda Appeal Time Extension Decision](#)”), para. 5.

Judgment. In the *ad hoc* tribunals, this included a requirement to provide precise references to the impugned findings in the trial judgment.¹³ Indeed, notices of appeal filed by parties in other cases in this Court since the amendment to regulation 57 entered into force have largely complied with these requirements,¹⁴ as has the Prosecution's notice of appeal in this case.¹⁵

B. The Defence Notice of Appeal does not comply with regulation 57 of the RoC

7. The Prosecution draws the Appeals Chamber's attention to the deficiencies in grounds 2-4 of the Defence Notice of Appeal.

8. These grounds fail to specify the alleged errors and how they affect the Trial Judgment. Rather, the Defence frames the alleged errors and their impact in very broad terms, rendering the scope of these grounds overly vague. In general, the Defence alleges errors in the Chamber's overall approach or conclusions on a wide range of topics without: (a) specifying the discrete error in the Chamber's approach or its conclusions; (b) referring to the precise underlying findings of the Chamber that the alleged errors relate to; and (c) specifying how the alleged errors affect the Trial Judgment.

9. The Prosecution takes no position as to whether ground 1 of the Defence Notice of Appeal is fully compliant with the requirements under regulation 57. However, it notes that ground 1 and at least some of its four sub-grounds more concretely set out the alleged errors and include some references to the relevant portions of the case record.

10. In **ground 2**, the Defence alleges an extremely broad category of error.¹⁶ It presents a wholesale claim that the Chamber erred in law and procedure as concerns the standards and application of standards used to assess relevance, credibility, reliability and weight of evidence,

¹³ *Prosecutor v. Šainović et al.*, IT-05-87-A, [Decision on Nebojša Pavković's Second Motion to Amend his Notice of Appeal](#), 22 September 2009, para. 17.

¹⁴ See ICC-02/11-01/15-1270 ("[Gbagbo & Blé Goudé Prosecution Notice of Appeal](#)"); ICC-01/04-02/06-2395 ("[Ntaganda Prosecution Notice of Appeal](#)"); ICC-01/04-02/06-2396 ("[Ntaganda Defence Notice of Appeal](#)"); ICC-02/04-01/15-1826 ("[Ongwen Defence Notice of Appeal](#)").

¹⁵ ICC-01/12-01/18-2649 ("[Prosecution Notice of Appeal](#)").

¹⁶ [Defence Notice of Appeal](#), ground 2 ("The Trial Chamber erred in law and procedure as concerns the standards and application of standards used to assess relevance, credibility, reliability and weight of evidence. This resulted in critical findings of fact predicated on an erroneous burden or standard of proof. These standards relate, inter alia, to the treatment of circumstantial evidence; the obligation to provide a coherent and reasoned opinion on disputed evidential issues; and the usage and degree of corroboration required for certain types of documentary/digital, Rule 68(2) and testimonial evidence (including in particular, the evidence of co-operating, insider witnesses and related victim-witnesses)").

resulting in allegedly erroneous findings of fact predicated on an erroneous burden and standard of proof.¹⁷

11. While the Defence lists some examples of the categories of evidence allegedly affected by the error,¹⁸ the error is expressly stated to be “not limited to” these categories, so that the full scope of the alleged error is vague.¹⁹ Moreover, the Defence does not cite to any specific findings of the Chamber as to how it appreciated this evidence, but instead provides two examples in a footnote regarding the treatment of the evidence of P-0150 and P-0582, to illustrate the error.²⁰ However these examples do not provide any useful detail; the Defence only provides statistics on the number of times the Chamber cited these witnesses in the Trial Judgment, without stating how the Chamber erred in relying on their evidence.

12. As to how the alleged errors affected the Trial Judgment, the Defence identifies a non-exhaustive list of six broad categories of findings, ranging from findings on the existence of the contextual elements of war crimes and crimes against humanity, to the findings on the underlying crimes, to the findings on Mr Al Hassan’s knowledge and role in the commission of the crimes.²¹ These findings potentially span the entire scope of the Trial Judgment. This is impermissibly broad and prevents the Prosecution from meaningfully preparing its response.

13. In **ground 3**, the Defence alleges that “Mr Al Hassan was convicted on the basis of conduct that did not fulfil the elements of the crimes charged” and lists seven sub-grounds, with several further sub-grounds. These allege that the Chamber erred in fact and law in reaching its conclusions on a broad range of topics relating to the crimes for which Mr Al Hassan was convicted.

14. These include the Chamber’s general conclusions on the contextual elements of war crimes and crimes against humanity, and its conclusions on all crimes for which Mr Al Hassan was convicted, apart from count 14 (mutilation as a war crime). The Chamber’s legal analysis and conclusions on these topics span over 100 pages in the Trial Judgment.²² The Defence does

¹⁷ [Defence Notice of Appeal](#), p. 9.

¹⁸ [Defence Notice of Appeal](#), para. 12 (listing “Rule 68(2) and testimonial evidence introduced through Article 69(4); the testimony of insider witnesses and victim-witnesses; modified digital evidence; and uncorroborated documentary evidence”).

¹⁹ [Defence Notice of Appeal](#), para. 12.

²⁰ [Defence Notice of Appeal](#), para. 13 (fn. 21).

²¹ [Defence Notice of Appeal](#), para. 14.

²² ICC-01/12-01/18-2594-Red (“[Trial Judgment](#)”), pp. 620-637 (legal findings on contextual elements of war crimes and crimes against humanity), pp. 638-685 (legal findings on counts 1, 2, 3, 4 and 5), pp. 713-752 (legal findings on counts 6 and 13).

not identify any specific error by the Chamber in the findings that led to its conclusions, let alone specify whether they were factual or legal errors. Nor does the Defence pinpoint to the relevant findings in the Trial Judgment.

15. The ground 3 errors may therefore potentially relate to *any* finding that the Chamber made on the identified topics.

16. Examples of the Defence's overly broad approach in ground 3 include:

(a) Sub-ground 3.2.1: "The Trial Chamber erred in fact and law as concerns its findings that the contextual elements for crimes against humanity were satisfied beyond reasonable doubt";

(b) Sub-ground 3.3: "The Trial Chamber erred in fact and law in finding that the elements of Count 6 (Article 8(2)(c)(iv)) were fulfilled";

(c) Sub-ground 3.4.1: "The Trial Chamber erred in fact and law in finding that the elements of the crime of torture under Article 7(1)(f) of the Statute were satisfied beyond reasonable doubt";

(d) Sub-ground 3.7.1 "The Trial Chamber erred in fact and law in concluding that the elements of Count 13 were satisfied beyond reasonable doubt".

17. **Ground 4** is pleaded in a similarly broad and vague manner, framing the sub-grounds on six broad topics relating to Mr Al Hassan's individual criminal responsibility. These topics include the Chamber's findings on *mens rea* for counts 1, 2, 3, 4, 5, 6, 13 and 14; Mr Al Hassan's responsibility under article 25(3)(c) and 25(3)(d); and the grounds for excluding criminal responsibility (*i.e.* the defences of superior orders, duress and mistake of fact/law). These findings span 65 pages in the Trial Judgment.²³ Yet, as in ground 3, the Defence fails to specify the alleged errors, and to refer to the relevant findings in the Trial Judgment.

18. Examples of this overly broad approach in ground 4 include:

²³ [Trial Judgment](#), pp. 754-763 (legal findings on Mr Al Hassan's responsibility under article 25(3)(c) for counts 1, 3 and 5), pp. 764-780 (legal findings on Mr Al Hassan's responsibility under article 25(3)(c) for count 6 and the group acting with a common purpose under article 25(3)(d) for counts 1-6 and 14), pp. 787-808 (legal finding on the group acting with a common purpose under article 25(3)(d) for count 13, and Mr Al Hassan's contribution to the crimes for counts 1-5, 6 and 14), pp. 815-818 (legal findings on Mr Al Hassan's contribution to the crimes for count 13), pp. 819-835 (legal findings on the grounds for excluding criminal responsibility).

- (a) Sub-ground 4.1.1: “The Trial Chamber erred in fact and law in finding that the perpetrators satisfied the *mens rea* requirements of Counts 1, 2, 3, 4, 5, 6, 13 and 14”;
- (b) Sub-ground 4.1.2: “The Trial Chamber erred in fact and law in convicting Mr Al Hassan for Counts 1, 2, 3, 4, 5, 6, 13 and 14, notwithstanding the absence of evidence that he possessed the requisite *mens rea* for these crimes”;
- (c) Sub-ground 4.3.2: “The Trial Chamber erred in fact and law as concerns its finding that the crimes for which Mr Al Hassan was convicted were committed by a group of persons acting with a common purpose, which included the commission of the crimes in question”;
- (d) Sub-ground 4.3.4: “The Trial Chamber erred in fact and law in finding that Mr Al Hassan’s contributions satisfied, to the standard of beyond reasonable doubt, the threshold for individual criminal responsibility in connection with the convictions entered under Counts 1, 2, 3, 4, 5, 6, 13 and 14”.

19. Across all of grounds 2-4, the Defence only cites to specific findings of the Trial Judgment twice.²⁴

20. Finally, the Defence Notice of Appeal does not clearly identify how each of the alleged errors affect the appealed decision. The Defence makes only broad statements as to the impact. For example, in relation to ground 3, the Defence states: “As a result, Mr Al Hassan was convicted in relation to insufficiently proven facts and facts which should not have incurred individual criminal responsibility under the Rome Statute. The Chamber’s factual and legal errors concerning contextual elements invalidate all the counts for which Mr Al Hassan was convicted. The Defence has additionally identified errors of fact and law, which invalidate the convictions under Counts 1, 2, 3, 4, 5, 6, and 13”.²⁵ This is an overly broad and impermissible characterisation of the impact of the alleged errors, as it fails to specify *how* the alleged errors affected the Trial Judgment.

21. As a result, the Notice of Appeal provides no meaningful guidance to the Prosecution, the participating victims and the Appeals Chamber as to the scope of the Defence appeal. Due to the overly broad framing of the alleged errors and their impact in grounds 2-4 of the Defence

²⁴ [Defence Notice of Appeal](#), fns. 24, 25.

²⁵ [Defence Notice of Appeal](#), paras. 19, 20.

Notice of Appeal, the precise scope of these grounds is vague. The Prosecution is not able—and cannot be expected—to predict which of the Chamber’s specific findings are relevant to the alleged errors, especially given the potentially wide scope of the Defence appeal regarding these grounds as currently framed.

22. While the Defence may provide further specificity in its appeal brief, its Notice of Appeal serves only to indicate the Defence’s general intention to appeal the Trial Judgment. The absence of any real notice of the Defence’s appeal has negative consequences for the fair and efficient conduct of the appeal proceedings.

23. First, it will leave the door open for the Defence to raise in its appeal brief *any* errors or arguments broadly related to the general topics identified in the Defence Notice of Appeal. Given there are specific procedures under the RoC that are designed to limit the scope of the appeal to the grounds articulated in the notice of appeal,²⁶ the Defence’s failure to give proper notice of the grounds of appeal at this stage will render those procedures meaningless.

24. Second, it will place the Prosecution under immense pressure to respond within the 60-day timeframe under regulation 59(1) of the RoC when it has not been able to effectively utilise this time since the filing of the Notice of Appeal to do so.

25. Third, it may also affect the Appeals Chamber ability to analyse the scope of the Defence’s appeal and to issue its judgment within the time periods prescribed in the Chambers Practice Manual.²⁷

C. The appropriate remedy

26. For appellants to simply flout the regulation 57 requirements would render the provision meaningless and unfairly hamper the ability of the parties and participants to meaningfully prepare, thereby defeating the purpose of a notice of appeal. On this basis, a notice of appeal, or parts thereof, that merely contain some limited information as to the general subject-matter of an appeal, but fail to specify the alleged errors and how they affect the appealed decision

²⁶ Under regulation 61 of the [RoC](#), appellants may only vary the grounds of appeal with the Appeals Chamber’s leave. See also *Prosecutor v. Kupreškić et al.*, IT-95-16-A, [Appeal Judgement](#), 23 October 2001, para. 470 (rejecting a Prosecution allegation that was not included in the Prosecution’s notice of appeal, stating that “Appellants should not be permitted to side-step procedures fixed within the Statute and the Rules. Nor should they be given the opportunity to continue to point to errors as and when they believe they have been identified”).

²⁷ [Chambers Practice Manual](#) (7th edition, 2023), para. 91 (requiring the written judgment to be issued within 10 months from the date of filing of the response brief, or 10 months from the closing of the oral hearing, if one is held).

could be dismissed *in limine*. In the *Gbagbo & Blé Goudé* case, the Appeals Chamber in an analogous situation dismissed a Defence notice of appeal that failed to specify the alleged errors and how they affect the appealed decision.²⁸

27. In these circumstances, the Prosecution requests the Chamber to exercise its discretion under regulation 29 of the RoC to determine whether any of grounds 2-4 or their sub-grounds should be dismissed *in limine*; or whether they may be remediated by requiring the Defence to supply further details to comply with regulation 57 of the RoC. Such details should include: (a) specifying the discrete error in the Chamber’s approach or its conclusions; (b) referring to the precise underlying findings of the Chamber that the alleged errors relate to; and (c) specifying how the alleged errors affect the Trial Judgment.

28. Any opportunity that the Defence may be afforded to remediate its Notice of Appeal, or parts thereof, should not be used by the Defence to restart or request an extension of the timeline for the filing of the Defence appeal brief, currently due to be filed on 5 December 2024.²⁹ This is because, as mentioned above, the Defence has already benefitted from two extensions of time to file its Notice of Appeal, in which the Appeals Chamber took into account, *inter alia*, the need to satisfy the requirements in regulation 57 of the RoC, recognising that this exercise “involves a thorough analysis of the Conviction Decision”.³⁰ The Defence should have therefore been in a position to provide the details required in regulation 57(e) at the time it filed its Notice of Appeal.

29. Finally, given the procedural difficulties the Prosecution currently faces in responding to the Defence appeal as currently drafted, the Prosecution reserves the right to request an extension of time to respond to the Defence appeal at the appropriate time, if necessary.

Conclusion

²⁸ ICC-02/11-01/15-1047 (“[Gbagbo & Blé Goudé Decision on Mr Gbagbo’s Notice of Appeal](#)”), paras. 5-6 (dismissing *in limine* Mr Gbagbo’s notice of appeal against a decision on his detention, filed under rule 154 and regulation 64(5), which requires the notice of appeal to “specify[] the alleged errors and how they affect the appealed decision”. The Appeals Chamber found that the notice of appeal did not comply with this requirement and the Defence had not demonstrated the required diligence expected of participants notwithstanding that the regulation entered into force three months prior to filing the notice of appeal).

²⁹ [Appeal Brief Time Extension Decision](#), para. 18.

³⁰ [Second Notice of Appeal Time Extension Decision](#), para. 13; [First Notice of Appeal Time Extension Decision](#), para. 12. See also [Appeal Brief Time Extension Decision](#), para. 16.

30. Grounds 2-4 in the Defence Notice of Appeal do not comply with the requirements of regulation 57 of the RoC. Due to the deficiencies outlined above in these grounds of appeal, the Prosecution is unable to effectively prepare its response to the Defence appeal. The Prosecution requests the Appeals Chamber to assess whether any of grounds 2-4 or their sub-grounds should be dismissed *in limine*, or whether they may be remedied by requiring the Defence to supply further details to comply with regulation 57 of the RoC, without affecting the schedule for the filing of the Defence appeal brief.



Karim A.A. Khan KC, Prosecutor

Dated this 27th day of September 2024

At The Hague, the Netherlands