

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/12-01/18**

Date: **3 October 2024**

THE APPEALS CHAMBER

Before: Judge Luz del Carmen Ibáñez Carranza, Presiding
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

Defence Response to the “Prosecution Request concerning the Defence notice of appeal”

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

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

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1. INTRODUCTION

1. The Appeals Chamber should dismiss the ‘Prosecution Request concerning the Defence notice of appeal’ (‘the Request’).¹ The Request is procedurally and substantively unfounded. The Defence drafted its Notice of Appeal (‘Notice’)² after carefully studying the distinct requirements of Regulations 57 and 58 of the Regulations of the Court, as well as the content of prior Notices that had been accepted by the Appeals Chamber. The Defence’s Notice conforms with these requirements. No further details are required in advance of the submission of the Appeal Brief, which itself must comply with Regulation 58.
2. The Request should also be rejected as an inappropriate attempt to litigate substance outside the procedural deadlines and page limits already allocated to briefs and responses. If the Prosecution requires more time to respond to the grounds set out in the Notice, then the appropriate remedy is to seek a request for an extension of time for its Response, not a motion to dismiss the Defence’s Notice *in limine*.

2. SUBMISSIONS

2.1 The Notice complies with the requirements of Regulation 57³

3. Article 81 of the Statute establishes an unequivocal statutory right for a party to appeal the Trial Judgment in connection with any of the errors as set out in this Article. Procedural requirements governing the exercise of this right can only be imposed through clear legal provisions, which must be implemented carefully to ensure they do not extinguish the effective exercise of the underlying right provided by Article 81.
4. Regulation 57 sets out the procedural requirements concerning the exercise of this right. In its current form, it requires appellants to set out the following:

For the purposes of rule 150, the appellant shall file a notice of appeal which shall state:

- (a) The name and number of the case;
- (b) The title and date of the decision of conviction or acquittal, sentence or

¹ [ICC-01/12-01/18-2650](#).

² [ICC-01/12-01/18-2648](#).

³ Regulations of the Court (‘Regulations’).

reparation order appealed against;

(c) Whether the appeal is directed against the whole decision or part thereof;

(d) The specific provision of the Statute pursuant to which the appeal is filed;

(e) The grounds of appeal, cumulatively or in the alternative, specifying the alleged errors and how they affect the appealed decision;

(f) The relief sought.

5. The Notice complies with these requirements. It sets out:

a. the name and number of the case;⁴

b. the title of the judgment;⁵

c. whether the appeal is directed against the whole decision or a part thereof (in this case, contesting the judgment as a whole);⁶

d. the specific provision of the Statute pursuant to which the appeal was filed;⁷

e. the grounds of appeals, describing the type of error with specificity,⁸ including by reference to the categories of errors set out in Article 81(1)(b), and the impact on the appealed decision (in this case, the remaining convictions against Mr Al Hassan);⁹ and

f. the relief sought (in this case, the full reversal of all convictions).¹⁰

6. The Prosecution's argument that the Notice is defective because it does not cite Judgment paragraph numbers or findings is incorrect. Unlike ICTY Rule 108, Regulation 57 – which governs the notice – does not require appealing parties to cite the parts of the judgment, evidential record, case file, or transcript relevant to the ground in question. This requirement is instead incorporated into Regulation 58, which governs the content of the Appeal Brief. The Defence will duly incorporate this information into its Brief. It is only if the Defence fails to do so in its Brief that this becomes a live issue that may then be raised by the Prosecution in its response, as is standard ICC practice.

7. Given the clear wording and requirements of Regulations 57 and 58, with which the Defence has duly complied, it would be unfair to now impose new requirements conspicuously absent in the guiding legal texts and which would, in practical effect, restrict the exercise of Mr Al Hassan's statutory right.

⁴ See pg. 1 of the Notice.

⁵ See para. 1 of the Notice.

⁶ See para. 4 of the Notice.

⁷ See para. 2 of the Notice.

⁸ See paras 6-11, 12-15, 16-20, 21-23 of the Notice.

⁹ See para. 2 of the Notice.

¹⁰ See para. 4 of the Notice.

2.2 The Notice complies with relevant precedent

8. Contrary to the Prosecution’s assertion, Grounds 2 to 4 of the Defence’s Notice are not defective.¹¹ They have been formulated in the same manner as other notices accepted by the Appeals Chamber. The format and content are also consistent with those filed at the *ad hoc* Tribunals.

2.2.1 Ground 2 is not defective

9. Ground 2 concerns the wholesale application, throughout the Trial Judgment, of a flawed evidentiary regime. The Notice systematically sets out (i) the type of error, (ii) the categories of evidence and issues impacted by the error, and (iii) the findings and convictions that were, in turn, invalidated by the error. Regulation 57 did not require the Defence to identify specific citations in the Trial Judgment, but these will be provided in the Appeal Brief as required by Regulation 58.
10. The format and content are also consistent with grounds previously accepted by the Appeals Chamber. Ground 2 contains more detail than Ground 7 of the *Ongwen* Notice of Appeal, which claimed errors of fact and law in the application of the standard of proof.¹² The Appeals Chamber accepted the *Onwgen* formulation.¹³ In *Ntaganda*, Ground 7 of the Defence Notice of Appeal set out the following error: “[t]he Trial Chamber committed mixed errors of law and fact in assessing the evidence”.¹⁴ The *Ntaganda* Defence then described the impact of this error in terms similar to those used in the *Al Hassan* Notice,¹⁵ and listed non-exhaustive examples concerning particular categories of evidence,¹⁶ as in the *Al Hassan* Notice.¹⁷ The Appeals Chamber summed up Ground 7 in the following

¹¹ Since the Prosecution has not contested Ground 1, this response focuses on Grounds 2-4.

¹² [ICC-02/04-01/15-1826](#), p.7: “The Chamber erred in law and fact throughout the Judgment by failing to correctly apply the standard of proof of beyond a reasonable doubt, in assessing the Prosecution evidence, in respect to the Defence’s affirmative defences, as well as in its assessment of all the other evidence in convicting the Appellant of crimes and modes of liability, thereby materially affecting the entire Judgment and causing a miscarriage of justice”.

¹³ [ICC-02/04-01/15-2022-Red](#), paras. 318 *et seq.*

¹⁴ [ICC-01/04-02/06-2396](#), p. 10.

¹⁵ The *Ntaganda* Notice describes the impact as “failing to adjudicate and provide a reasoned opinion, impermissibly shifting the burden of proof to the accused and misapplying the standard of proof beyond a reasonable doubt” ([ICC-01/04-02/06-2396](#), p. 10). The *Al Hassan* Notice describes the error as impacting the “the burden and standard of proof, principle of orality, and the requirements of a reasoned Trial Judgment”: [ICC-01/12-01/18-2648](#), para. 13. See also fn 20 concerning the standards of evidence, which were misapplied by the Trial Chamber.

¹⁶ [ICC-01/04-02/06-2396](#), pp. 10-13.

¹⁷ [ICC-01/12-01/18-2648](#), para. 12.

terms: “[i]n essence, Mr Ntaganda seeks to impugn the Trial Chamber’s approach to fact finding with particular emphasis on the notions of witness credibility and corroboration.”¹⁸

The Appeals Chamber’s formulation is almost identical to Ground 2 of the *Al Hassan* Notice. The Notice cannot be considered defective if it is framed using the same language employed by the Appeals Chamber in its own determination of the merits of an appeal.

11. The level of detail provided in Ground 2 satisfies the more exacting requirements at the *ad hoc* Tribunals. In terms of evidential errors, such as a failure to provide reasons, it was considered sufficient to identify the error and provide a description of the issues impacted thereby. It was not necessary to identify each finding affected by the error or describe each item of evidence erroneously disregarded.¹⁹
12. The use of the phrase ‘*inter alia*’ does not invalidate this ground. Both the Prosecution and Defence teams have used language to indicate that examples are non-exhaustive in Notices of Appeal.²⁰ Moreover, since Regulation 57 does not require the parties to list or cite all sub-findings impacted by an error (as opposed to issues or convictions), there is also no corresponding obligation to list them exhaustively.

2.2.2 Ground 3 is not defective

13. Ground 3 concerns errors of law and fact that impacted the Chamber’s findings that the elements of crimes were fulfilled. The Ground describes the nature of the errors by reference to the categories in Article 81 of the Statute, the specific elements of the crimes to which these errors apply, and the convictions (by counts) impacted by the errors.
14. Ground 3 is more detailed than grounds which were accepted in *Ntaganda*. Ground 6 of the *Ntaganda* Defence Notice of appeal asserted that “[t]he Trial Chamber erred in law and

¹⁸ [ICC-01/04-02/06-2666-Red](#), para. 569.

¹⁹ *Stanisic & Simatovic*, [Prosecution Response To Stanisic’s Motion To Strike And/Or Amend Prosecution Notice Of Appeal](#), para. 5, fn. 9 citing: “See e.g. *Prosecutor v. Šešelj*, Case No. MICT-16-99-A, Prosecution’s Notice of Appeal, 2 May 2016 (“*Šešelj* Prosecution Notice”), para. 5; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-A, Prosecution’s Notice of Appeal, 27 August 2013 (“*Prlić* Prosecution Notice”), paras 8-9; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-A, Slobodan Praljak’s Notice of Appeal, 28 June 2013, paras. 276- 277; *Prosecutor v. Stanišić & Simatović*, Case No. IT-03-69-A, Prosecution’s Notice of Appeal, 28 June 2013 (“*ICTY Stanišić & Simatović* Prosecution Notice”), paras 5, 11, 17; *Prosecutor v. Tolimir*, Case No. IT-05-88/2- A, Defence Amended Notice of Appeal, 9 September 2013, para. 39; *Prosecutor v. Stanišić & Župljanin*, Case No. IT-08-91-A, Amended Notice of Appeal on Behalf of Mićo Stanišić, 23 April 2014 (“*M.Stanišić Defence Notice*”), para. 23.” See also *Stanisic & Simatovic*, [Decision On Jovica Stanisic's Motion To Strike And/Or Amend Prosecution Notice Of Appeal And On A Request To Expedite](#).

²⁰ *Gbagbo*, [ICC-02/11-01/15-1270](#), para. 7; *Ntaganda*, [ICC-01/04-02/06-2396](#), pp. 7, 9, 10, 12, 16.

in fact in entering a conviction for ordering displacement as a war crime”.²¹ The Appeals Chamber accepted this formulation, rendering a judgment on the merits.²²

15. The Prosecution Notice in the same case applied a similar approach, asserting that the Trial Chamber committed an error of law as concerns its findings regarding an element of the offence.²³ Since the Trial Chamber did not conduct further factual or legal analysis beyond that of the impugned element, the Prosecution Notice encapsulated the entirety of the Trial Chamber’s legal findings concerning the offences in question.²⁴ Whereas the Prosecution Notice set out two separate grounds of appeal in relation to the same legal error (the definition of ‘attack’), the Appeals Chamber consolidated them in its judgment analysis.²⁵ Ground 3 contains the same level of detail as the Prosecution Notice, while the consolidation of different crimes in one ground is consistent with the approach adopted by the Appeals Chamber.
16. In *Ongwen*, the Appeals Chamber consolidated various grounds concerning impugned crimes into a single analysis concerning legal and factual errors related to the crimes in question.²⁶ Ground 3 is consistent with this approach.
17. In terms of the approach adopted at the *ad hoc Tribunals*, it was “standard to identify an error of law in relation to a particular element of a mode of responsibility or a crime without going into further detail as to how the law applied to that element is erroneous”.²⁷ It was also accepted practice to assert an error of law or fact in combination or in the alternative, in relation to findings that crimes either occurred or did not occur.²⁸

²¹ [ICC-01/04-02/06-2396](#), p. 10.

²² [ICC-01/04-02/06-2666-Red](#), para. 530 *et seq.*

²³ [ICC-01/04-02/06-2395](#), para. 5.

²⁴ [ICC-01/04-02/06-2395](#), para. 5, noting that following the error, the Trial Chamber “terminated its legal analysis of this incident in paragraph 1144”.

²⁵ [ICC-01/04-02/06-2666-Red](#), para. 1145.

²⁶ [ICC-02/04-01/15-2022-Red](#), paras 978-980.

²⁷ *Stanisic & Simatovic*, [Prosecution Response To Stanisic’s Motion To Strike And/Or Amend Prosecution Notice Of Appeal](#) para. 3, fn. 7, citing : “See e.g. *Prosecutor v. Mladić*, Case No. MICT-13-56-A, Prosecution’s Notice of Appeal, 22 March 2018 (“*Mladić* Prosecution Notice”), para. 7; *Prosecutor v. Mladić*, Case No. MICT-13-56-A, Notice of Appeal of Ratko Mladić, 22 March 2018 (“*Mladić* Defence Notice”), para. 34; *Prosecutor v. Karadžić*, Case No. MICT-13- 55-A, Prosecution’s Notice of Appeal, 22 July 2016 (“*Karadžić* Prosecution Notice”), para. 21; *Prosecutor v. Prlić et al.*, Case No.IT-04-74-A, Jadranko Prlić’s Notice of Appeal, 5 August 2014 (“*Prlić* Defence Notice”), para. 8; *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Prosecution Notice of Appeal, 27 May 2009, para. 4.” See further *Stanisic & Simatovic*, [Decision On Jovica Stanisic’s Motion To Strike And/Or Amend Prosecution Notice Of Appeal And On A Request To Expedite](#).

²⁸ *Stanisic & Simatovic*, [Prosecution Response To Stanisic’s Motion To Strike And/Or Amend Prosecution Notice Of Appeal](#) para 10, citing “See e.g. *Mladić* Prosecution Notice, para. 5; *Karadžić* Prosecution Notice, paras. 3, 9, 16; *Prlić* Prosecution Notice, paras. 3, 7; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-A, Bruno Stojić Notice of Appeal, 4 August 2014, paras. 8-9; *Prosecutor v. Lukić & Lukić*, Case No. IT-98-32/1-A, Notice of Appeal on Behalf of Sredoje Lukić, 19 August 2009, p. 84; *Delić* Defence Notice, para. 37.”

2.2.3 *Ground 4 is not defective*

18. Ground 4 concerns errors of law and fact relating to the Trial Chamber's conclusion that Mr Al Hassan bears individual criminal responsibility for the crimes for which he was convicted. Ground 4 describes the nature of the errors by reference to the categories set out in Article 81, the specific elements of responsibility exhibiting these errors (including knowledge, intent and conduct), and the modes of liability and positive defences affected by the errors. The format of Ground 4 replicates the structure of Ground 3. The above considerations therefore support the validity of Ground 4.
19. The degree of detail and description in Ground 4 is similar to other grounds, which were accepted by the Appeals Chamber.
20. In *Ntaganda*, Defence ground 13 asserted that the Trial Chamber committed errors of fact and law in relation to each of the elements of indirect co-perpetration.²⁹ The formulation is similar to *Al Hassan* sub-grounds 4.2 and 4.3. The *Ntaganda*'s challenge to *mens rea* in grounds 14 and 15³⁰ is also similar to *Al Hassan* sub-ground 1. The Appeals Chamber accepted the *Ntaganda* formulations, while also noting that grounds 13, 14 and 15 all concerned the theory of indirect co-perpetration.³¹ Similarly, in *Ongwen*, the Appeals Chamber consolidated 23 individual grounds of appeal addressing the Trial Chamber's findings concerning Mr Ongwen's individual criminal responsibility.³² Ground 4 of the *Al Hassan* Notice is thus consistent with the Appeals Chamber's recognition of the intersection of issues concerning personal liability.
21. In terms of *ad hoc* tribunal precedent, in *Šešelj*, the Prosecution's second ground of appeal asserted that the Trial Chamber erred in fact in acquitting the accused.³³ The Prosecution listed the counts for which *Šešelj* was acquitted but provided no further detail concerning the error.

2.3 The Notice causes no prejudice

²⁹ [ICC-01/04-02/06-2396](#), p. 14.

³⁰ [ICC-01/04-02/06-2396](#), pp. 16.

³¹ [ICC-01/04-02/06-2666-Red](#), para. 879.

³² [ICC-02/04-01/15-2022-Red](#), para. 617.

³³ *Šešelj*, MICT-16-99-A, [Prosecution's Notice of Appeal](#), 2 May 2016, para. 9.

22. The Prosecution's arguments concerning prejudice are predicated on misconceived and erroneous arguments concerning the purpose of a notice of appeal.
23. Regulations 57 and 58 were amended on 17 July 2017. According to the accompanying explanation, the objective was to enable "the Appeals Chamber to commence preparation for these appeals at an earlier stage as well as to allow for an oral hearing to be held sooner in the appellate process".³⁴ The objective was not related to the parties' appellate preparation. The Appeals Chamber has calculated the amount of time required for preparing responses by reference to the time period between the date on which the appeal brief is submitted and the due date for the response.³⁵ The assumption is thus that the parties will commence their response preparation once the Appeal Brief has been filed. This is consistent with the possibility to withdraw grounds of appeal, which were set out in the Notice. In line with ICTR precedent, if upon receiving the Defence Appeal Brief, the Prosecution determines that the standard response period is insufficient, it may seek additional time.³⁶
24. The amount of time allocated to the Prosecution and the Defence for submitting the appeal briefs was also calculated on the premise that the parties would dedicate this time exclusively for the preparation of the appeal brief. The Prosecution appears to have surplus time available, such that it is already in a position to start working on its response to the Defence. This suggests that the time allocated to the Prosecution is excessive and should be curtailed in order to avoid an inequality of arms between the Prosecution, which unlike the Defence, has a dedicated appeals team, and the Defence, which only recently concluded sentencing-related activities.
25. The Prosecution has also misstated the *Ongwen* precedent in linking the notice to the content of prospective arguments. The Appeals Chamber did not find 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".³⁷ Rather, the Appeals Chamber merely "note[d the] scope and range of the arguments anticipated in the present appeal, as presented in the Notice of Appeal", for the purpose of estimating an appropriate page limit.³⁸ Observing content is not

³⁴ <https://www.icc-cpi.int/news/icc-judges-amend-regulations-court-0>

³⁵ ICC-02/04-01/15-1861, paras 10, 17, taking into account workload and judicial recess, occurring between filing of the brief and the Prosecution response.

³⁶ *Munyagishari*, ICTR-05-89-AR11bis, [Decision On The Prosecutor's Motion Requesting Compliance With The Requirements For Filing A Notice Of Appeal](#), 18 July 2012, para. 8.

³⁷ *Cf* Request, para. 4.

³⁸ ICC-02/04-01/15-1850, para. 14.

the same thing as requiring content. The ICTY Appeals Chamber has even found that it is inappropriate to include prospective arguments in the Notice of Appeal.³⁹

26. Far from impeding Prosecution preparation, the format of the *Al Hassan* Notice facilitates a focused and streamlined approach to common issues. Following the approach adopted in *Ongwen*, where the Appeals Chamber grouped various overlapping grounds together to facilitate an orderly presentation of the issues,⁴⁰ the Defence identified intersections in advance, thus facilitating the work of the Appeals Chamber. Notably, at the time the *Ongwen* appeal was ongoing, the Prosecution also intimated that the *Ongwen* grounds could have been grouped together and formulated in a more “succinct” manner.⁴¹ The ICTY Appeals Chamber also indicated that “[g]iven the limitations on brief length as well as the greater effectiveness of cohesive and well structured arguments, it is useful for appellants to organize their various allegations of error rather than simply setting them forth seriatim in no particular groupings.”⁴²

2.4 An appropriate remedy is to order the Defence to refile its Notice

27. The remedy of dismissal is excessive and should be rejected. Since the right to appeal a conviction is an internationally-recognised human right, it should not be extinguished in circumstances where the Defence prepared its Notice in good faith, based on both a reasonable interpretation of Regulation 57 and on prior practice.
28. The Appeals Chamber has also recognised the importance of respecting statutory rights in the absence of express language restricting such rights. Thus, in *Bemba et al.*, while the Appeals Chamber requested the Defence teams to include additional details in their notices of appeal, the Appeals Chamber also recognised that this request was without prejudice to the defence teams’ right to introduce additional or different grounds of appeal in their subsequent brief in the absence of any formal requirements or restrictions in the prior versions of Regulations 57 and 58.⁴³ Similarly, in *Muyagashiri*, the ICTR President found that in the absence of express wording requiring Rule 11bis appeals to comply with

³⁹ *Hartmann*, [Decision On Motions To Strike And Requests To Exceed Word Limit](#), 6 November 2009, para. 14.

⁴⁰ [ICC-02/04-01/15-2022-Red](#), para. 39.

⁴¹ [ICC-02/04-01/15-1836](#), para. 9.

⁴² *Brđjanin*, [Decision On Appellant’s Motion For Extension Of Time To File A Consolidated Brief And For Enlargement Of Page Limit](#), 22 June 2005, para 10. See also para 11, noting that it is not necessary to number and list each challenge to a finding as a separate ground of appeal.

⁴³ [ICC-01/05-01/13-2046](#), para. 19.

additional Notice requirements, such requirements could not be imposed through analogy or judicial fiat.⁴⁴

29. Accordingly, were the Appeals Chamber to take issue with the Defence's Notice in its current form, an order to refile its notice would be consistent with ICC precedent. In the *Al Mahdi* case, the Appeals Chamber found that it was in the interests of justice to ask the Legal Representatives for Victims re-file its notice of appeal against the reparations order.⁴⁵ It would also be consistent with the practice of the ICTY and ICTR.⁴⁶
30. The *Gbagbo* precedent is not applicable to Article 81 appeals. The decision in question concerned an **interlocutory** appeal seeking provisional release. Rejection of the appeal was without prejudice to the defendant's right to submit a new provisional release application at any time.

3. **RELIEF SOUGHT**

31. For the reasons set out above, the Defence for Mr Al Hassan respectfully requests the Appeals Chamber to **REJECT** the Prosecution Request concerning the Defence notice of appeal.



Melinda Taylor
Lead Counsel for Mr Al Hassan

Dated this 3rd day of October 2024

At The Hague, The Netherlands

⁴⁴ *Munyagishari*, ICTR-05-89-AR11bis, [Decision On The Prosecutor's Motion Requesting Compliance With The Requirements For Filing A Notice Of Appeal](#), 18 July 2012, paras 5-7.

⁴⁵ [ICC-01/12-01/15-240](#).

⁴⁶ *Hartmann*, IT-02-54-R77.5-A, [Decision on Motions to Strike and Requests to Exceed Word Limit](#), 6 November 2009, para. 14; *Šešelj*, IT-03-67-R77.3-A, [Decision on Vojislav Seselj's Submission No. 491 and on the Amicus Prosecutor's Motion to Strike Vojislav Seselj's Notice of Appeal and to Close the Case](#), 6 July 2012, paras 22-23; *Prlic et al.*, IT-04-74-A, [Decision on Prosecution Motion to Strike Grounds 12 and 14 of Valentin Ćorić's Notice of Appeal](#), 11 December 2014, p. 3. See also *Kordić & Čerkez*, [Decision Granting Leave to Dario Kordić to Amend His Grounds of Appeal](#), 9 May 2002, paras 5, 7 stating, inter alia, that the inability of the counsel to articulate a ground of appeal properly should not exclude the appellant from raising that ground of appeal.