

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **09 January 2025**

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 to the Observations of the Legal Representatives of the
Victims Regarding the Discontinuance of Appeals**

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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**Unrepresented
(Participation/Reparation)**

Applicants

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Reparations Section**

I. INTRODUCTION

1. The Preamble to the Rome Statute emphasises the International Criminal Court's role in eliminating impunity and contributing to the prevention of crimes through effective prosecution at the level of the ICC and at the national level. This objective is served through a fair judicial process, where the outcome of charges is determined through an independent and impartial judicial consideration of the evidence, leading to a judgment. The Preamble further underscores State parties resolve to “guarantee lasting respect for and the enforcement of international justice”. The latter applies equally to acquittals and convictions following such judgments.
2. The Defence and the Prosecution both decided to withdraw their appeals against the Trial Judgment of 26 June 2024. The decision of both parties to accept the outcome of the judicial process contributes to the above preambular goals. As a result of the two withdrawals, the Trial Judgment and underlying facts will become final. This removes uncertainty for the victims of the crimes for which Mr Al Hassan was convicted and further provides a foundation for other victims to pursue a remedy before either national Courts or the ICC in relation to the perpetrators of the crimes for which Mr Al Hassan was found not to bear individual criminal responsibility.
3. This development follows a lengthy investigation and trial process, which respected victims’ right of access to justice and right to an effective remedy, as understood by the Statute, interpreted through the lens of Article 21(3) of the Statute. The victims’ views and concerns were also heard and ventilated fully throughout this process, including in connection with the lead up to the withdrawals of the two appeals.
4. The Defence and Mr Al Hassan are committed to a non-adversarial approach to reparations, consistent with his acquittals, which can commence following the withdrawal of the appeals and formal closure of the proceedings concerning Mr Al Hassan’s responsibility.

II. PROCEDURAL HISTORY

5. On 16 January 2013, the Prosecution opened its investigation in to the Situation in Mali.¹
6. On 27 March 2018, following a request from the Prosecution,² the Pre-Trial Chamber issued an arrest warrant for Mr Al Hassan.³
7. On 8, 9, 10, 11 and 17 July 2019,⁴ the Pre-Trial Chamber held its Confirmation of Charges hearing, with appearances by the Legal Representatives for Victims (LRVs) throughout. The Pre-Trial Chamber issued its Confirmation of Charges Decision on 30 September 2019,⁵ which was also notified to the LRVs. On 23 April 2020, the Pre-Trial Chamber issued a decision amending the confirmed charges,⁶ which had the consequence of adding several *additional* incidents concerning sexual and gender-based violence crimes.⁷
8. On 21 November 2019,⁸ Trial Chamber X was constituted and was referred the case.
9. On 6 May 2020,⁹ the Trial Chamber issued its directions concerning the conduct of the proceedings, which provided for the modalities of victim participation during the proceedings, including the ability to attend hearings, present evidence and question witnesses.¹⁰
10. The Trial Chamber also granted wide ranging protective measures for victims of sexual violence, which were directed towards ensuring their ability to testify at trial. This included maintaining the non-disclosure of witnesses' identities *after* the commencement of the trial until a period shortly before their testimony.¹¹
11. The Trial Chamber issued various decisions amending the charges pursuant to Regulation 55 on 17 December 2020,¹² 20 September 2021¹³ and 8 November 2021,¹⁴ which were all notified to the LRVs. These decisions had the effect of requalifying facts

¹ [Article 53\(1\) Report: Situation in Mali](#), paras 173-175.

² [ICC-01/12-01/18-1-Red](#).

³ ICC-01/12- 01/18-2.

⁴ T-003 (8 July 2019); T-004 (9 July 2019); T-005 (10 July 2019); T-006 (11 July 2019); T-007 (17 July 2019).

⁵ ICC-01/12-01/18-461-Conf-Corr.

⁶ ICC-01/12- 01/18-767-Conf-Corr.

⁷ Rape as a war crime and crime against humanity (P-1134, P-0636, P-1674, P-0609, P-0957) sexual slavery and forced marriage (P-0609, P-0957).

⁸ [ICC-01/12-01/18-501](#).

⁹ [ICC-01/12-01/18-789-AnxA](#).

¹⁰ [ICC-01/12-01/18-789-AnxA](#), paras 24, 36, 91-93.

¹¹ ICC-01/12-01/18-741-Conf-Red, p. 21 (addressing P-0538, P-0553 and P-0574); ICC-01/12-01/18-794-Conf-Red, p. 13 (addressing P-0542 and P-0570); ICC-01/12-01/18-948-Conf-Red, p. 11 (P-0603).

¹² ICC-01/12- 01/18-1211-Conf.

¹³ ICC-01/12- 01/18-1739-Conf.

¹⁴ ICC-01/12- 01/18-1897-Conf.

and circumstances to include specific sexual and gender-based violence charges, such as rape and torture both as a crime against humanity and war crime;¹⁵ charges of other inhumane acts as a crime against humanity and cruel treatment as a war crime;¹⁶ as well as charges being capable of taking into account alleged acts of sexual violence committed against certain victims.¹⁷

12. Between 14 July 2020¹⁸ and 11 February 2022,¹⁹ the Prosecution presented its case before the Trial Chamber, with the LRVs appearing throughout.
13. On 8 February 2022, the LRVs presented the victims' case.²⁰ Both V-0001 and V-0002 subsequently gave evidence before the Trial Chamber, and their testimonies were completed on 10 February 2022.²¹
14. Between 9 May 2022²² and 6 February 2023,²³ the Defence presented its case before the Trial Chamber, with the LRVs appearing throughout. After the Prosecution concluded its closing statements, the LRVs remarked that it had been "very detailed", and had encompassed many of the issues of core concerns to the victims.²⁴ When presenting their own closing submissions, the LRVs further avowed that there was "no doubt but that the witnesses have been heard."²⁵
15. On 4 September 2024,²⁶ the LRVs made submissions concerning sentencing, after electing not to call or submit any evidence for this purpose.

III. SUBMISSIONS

LRVs' Observations falling outside the scope of the discontinued appeals

16. The Appeals Chamber granted the LRVs the right to present the views and concerns of participating victims in relation to the appeals initiated and discontinued by the Prosecution and the Defence.²⁷ This right was granted to victims and victim

¹⁵ ICC-01/12-01/18-1211-Conf, para. 86.

¹⁶ [ICC-01/12-01/18-1897](#), para. 15.

¹⁷ [ICC-01/12-01/18-1739](#), paras 19, 26.

¹⁸ T-017 (14 July 2020).

¹⁹ ICC-01/12-01/18-2110-Conf.

²⁰ T-168, pp. 4-23.

²¹ T-168; T-169; T-170.

²² T-172 (9 May 2022).

²³ ICC-01/12-01/18-2465.

²⁴ T-213, p. 63 lns 1-6.

²⁵ T-214, p. 11, ln 5.

²⁶ T-217 (4 September 2024).

²⁷ ([ICC-01/12-01/18-2659](#), para 1)

organisations who were granted the right to participate during the trial proceedings.²⁸ Only one association was granted victim status.²⁹ Accordingly, none of the other organisations listed in Annex A have standing in this case. The Defence also had not been disclosed any information about the nature of these organisations, their membership, or the individuals who signed these demarches in French.

17. The statements attached in Annex B were also taken and signed in December 2024 and do not form part of the trial record. Given the corrective nature of the appellate process, it would not be appropriate to place weight on allegations that were not raised at trial or in connection with which, the Defence has no meaningful opportunity to respond. Conversely, the victims' applications concerning these individuals were introduced before the Trial Chamber.³⁰ The views and concerns of these individuals were heard throughout the trial process, leading to Mr Al Hassan's acquittal for sexual and gender-based violence crimes. The LRVs also had the opportunity to request to present evidence from these individuals at trial or at sentence but declined to do so.
18. The grievances expressed in several communiques transmitted by the LRVs appear to be predicated on a misunderstanding of the scope of the notices of appeals (since withdrawn), the nature of the allegations and/or judicial findings concerning Mr Al Hassan, and the critical distinction between findings concerning the existence of crimes and individual responsibility for such crimes. The Prosecution did not appeal the verdict concerning Mr Al Hassan's acquittal for the destruction of the mausoleums or rapes in detention. Mr Al Hassan was also never charged in connection with general destruction of property. *Even if* the appeals had not been withdrawn, some of the complaints and allegations set out in Annexes A and B would not have been the subject of an appellate determination in this case.³¹
19. The content of Mr Al Hassan's apology and his possible future return to Timbuktu is also outside the scope of this process.

²⁸ [ICC-01/12-01/18-2659](#), para. 1.

²⁹ [ICC-01/12-01/18-2123](#), fn. 12; ICC-01/12-01/18-2594-Conf. fn 2087, referencing the organisation a/20455/19.

³⁰ The LRVs identified these individuals as a/45279/18, a/11214/21, a/11005/21 and four other individuals who were part of the organisation (a/20455/19) : ICC-01/12-01/18-2671, fn 9. A/45279/18 was admitted to participate in the third decision on victim participation (ICC-01/12-01/18-992-AnxA), a/11214/21 was admitted in the 14th decision (ICC-01/12-01/18-2123, fn 10), and a/11005/21 was admitted in the 11th decision (ICC-01/12-01/18-1930, fn 8).

³¹ This includes the allegations raised in [ICC-01/12-01/18-2671-AnxA-Red](#) pp 2-3 (confiscation and destruction of property and crimes in Kabara) and [ICC-01/12-01/18-2671-AnxB-Red](#), p. 10 (attempted rape in prison).

The withdrawal of the Prosecution and Defence appeals is consistent with the Statute and internationally recognised human rights law

20. The LRVs' Observations do not articulate any legal right of which the LRVs have been deprived because of the withdrawals, or any appropriate remedy available from the Appeals Chamber in these circumstances.
21. Neither the Statute nor international human rights law afford victims the right to a specific outcome in a judicial process or the right to compel the Prosecution to continue to appeal an acquittal, in circumstances where the Prosecution has exercised its independent discretion to withdraw such appeal. In terms of the Statute, Article 81(1) of the Statute provides that either "the Prosecutor"³² or "the convicted person, or the Prosecutor on that person's behalf"³³ may appeal against a decision of acquittal or conviction or against sentence. As such, any decision to either continue or discontinue an appeal under Article 81(1) can only be afforded to the parties referred to therein. The Statute and Rules afford both parties the right to discontinue such an appeal. Rule 152(1) states that an appeal may be withdrawn "at any time before judgment has been delivered". The Appeals Chamber confirmed this in rejecting the joint request for additional time.³⁴ While a discontinuance may be rejected if framed in a conditional or equivocal manner, that is not the case in the present instance, with both notices using withdrawal language that was accepted in *Katanga* as being unconditional and unequivocal.³⁵ Since Mr Al Hassan relied on the *Katanga* precedent to waive the right to continue an appeal that could have resulted in Mr Al Hassan's full acquittal under Grounds 1-4 and further remedies in relation to the matters raised in Ground 1,³⁶ the principle of legal certainty militates in favour of a similar outcome in the present case.³⁷
22. Civil parties in Mali do not possess the right to appeal an acquittal or the length of a sentence under Malian law: their right to appeal is restricted to the amount of

³² Article 81(1)(a) Rome Statute.

³³ Article 81(1)(b) Rome Statute.

³⁴ [ICC-01/12-01/18-2665](#), para. 13.

³⁵ [ICC-01/04-01/07-3505](#), para. 13.

³⁶ Ground 1.1 encompassed matters pertaining to the Court's use of information and evidence obtained from Mr Al Hassan, while he was detained in a location where he has alleged that he was subjected to continuous forms of torture.

³⁷ ECHR: *Del Rio Prada v. Spain* (Grand Chamber) [42750/09](#) paras 89-93.

reparations.³⁸ Article 21(3) of the Statute also does not establish an independent right for victims to appeal an acquittal or the length of a sentence.³⁹ The outcome is not altered by the application of human rights law. The right to an effective investigation concerns the existence and conduct of the judicial process;⁴⁰ this right does not extend to a particular outcome in the form of a conviction or specific punishment.⁴¹

23. Nor have the LRVs raised any foundation capable of supporting a determination that the victims' right of access to justice had not been respected in the present case. The views and concerns expressed through the LRVs concern the legal status of a judgment issued by three professional ICC judges and a decision taken by the Prosecution, an organ of the ICC. Their grievances include the accusation that the Prosecutor betrayed them, and further, sentiments of 'revulsion', 'bitterness', an 'absence of justice' and 'dismay'.⁴² These sentiments (concerning Mr Al Hassan's acquittals) were also raised and fully heard during the sentencing hearing,⁴³ preceding the penalty issued by the Trial Chamber. In raising such grievances, the LRVs do not identify any procedural denial of justice in the trial or sentencing process, or any legal basis for controverting Prosecutorial independence in this case. The Prosecution notice of appeal also did not include grounds pertaining to an alleged absence of a fair trial for victims nor did either

³⁸ Art.499 al. 4 du Code de procédure pénale du Mali, Loi n°01-80 du 20 août 2001 portant Code de procédure pénale modifiée par [la loi n°2013-016/ du 21 mai 2013](#): La partie civile ne peut, en cause d'appel, former aucune demande nouvelle ; toutefois elle peut demander une augmentation des dommages intérêts pour le préjudice subi depuis la décision de première instance.

³⁹ Perez-Leon-Acevedo, J. P. (2021) [Victims and appeals at the International Criminal Court \(ICC\): evaluation under international human rights standards](#). *The International Journal of Human Rights*, 25(9), 1598–1624: "Nevertheless, the lack of victims' right to appeal final decisions is unproblematic. There is no such right in international/national criminal jurisdictions. As Cassese rightly remarked, victim participants can 'exercise some procedural rights before the Appeals Chamber' but they 'are not vested with the right to appeal against a judgment'". See also footnote 126, citing "STL President, Rules of Procedure and Evidence-Memorandum (2010), para. 17".

⁴⁰ ECHR: *Costello-Roberts v United Kingdom*, [13134/87](#) para 40: "...the effectiveness of a remedy for the purposes of Article 13 (art. 13) does not depend on the certainty of a favourable outcome..." *Finucane v the United Kingdom*, [29178/95](#), para 69 (noting that the duty to investigate is "not an obligation of result, but of means").

⁴¹ ECHR: *Giuliani and Gaggio v. Italy*, Grand Chamber, [23458/02](#) para 306: "However, it cannot be inferred from the foregoing that Article 2 may entail the right to have third parties prosecuted or sentenced for a criminal offence (...) or an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence"; *Hanan v. Germany*, Grand Chamber, [4871/16](#) para 210: "Article 2 does not entail the right to have third parties prosecuted or convicted for a criminal offence (...). To date, the Court has not faulted a prosecutorial decision which flowed from an investigation which was in all other respects Article 2 compliant (see *Armani Da Silva*, cited above, § 259), or required the competent domestic court to order a prosecution if that court had taken the considered view that application of the appropriate criminal legislation to the known facts would not result in a conviction".

⁴² [ICC-01/12-01/18-2671](#) para. 17.

⁴³ T-217, p. 46, lns 13-14.

the Prosecution or the LRVs raise concerns during the trial or sentencing process that they had not been afforded a fair opportunity to investigate or present evidence concerning gender-based crimes or to be heard on such matters. The Prosecution's discontinuance does not deny the victims their right of access to justice as the related allegations have been fully investigated and prosecuted. Victims of sexual and gender-based violence cases maintain the right to be heard in connection with both future ICC cases concerning the same facts and also domestic proceedings. The case concerning Mr Al Hassan is not the proper vehicle for remedying all crimes that occurred in Timbuktu and its environs during the relevant period.

24. Both the Defence and the Prosecution consulted with the LRVs prior to the withdrawal of the appeals. Immediately following the issuance of the Trial Judgment, the Defence reached out to the LRVs and continued to seek the views of the victims, through the LRVs, in advance of the submission of its notice of withdrawal. The explanation provided by the Prosecutor in relation to its discretionary decision to withdraw an appeal is also consistent with the victims' right to be heard or to be notified of prosecutorial decisions, including the decision not to appeal, as understood by human rights law.⁴⁴
25. The LRVs also overlook the fact that the outcome of both appeals was unknown, and may or may not have produced their desired result. If the Appeals Chamber had accepted further to Ground 1.1 of the Defence appeal that torture-tainted evidence had been used to investigate, detained, prosecute or convict Mr Al Hassan, then a potential remedy under human rights law would have been to quash the judgment in its entirety, invalidating both existing convictions and also factual findings concerning the existence of crimes, for which Mr Al Hassan was acquitted.⁴⁵ The withdrawal of both appeals is also consistent with victims' right to speedy reparations,⁴⁶ which is

⁴⁴ ECHR: *Gorou v. Greece* (No. 2) Grand Chamber, [12686/03](#), paras 24, 38-42.

⁴⁵ ECHR: *Ibrahims v. United Kingdom* Grand Chamber, [50541/08](#), [50571/08](#), [50573/08](#) para 254; IACHR, *Cabrera García and Montiel Flores v. Mexico*, Case 12,449, para. 166: "the annulment of procedural documents resulting from torture or cruel treatment is an effective measure to halt the consequences of a violation of judicial guarantees". See also *Gafgen v. Germany*, Grand Chamber, [22978/05](#) para. 128.

⁴⁶ See ACmHPR (2017) [General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment \(Article 5\)](#), para. 26: "Victims of torture and other ill-treatment should access and obtain redress promptly. Promptness is also required during hearing claims for civil damages and when victims seek other means of reparation, including rehabilitation, which is crucial for the recovery process of victims". See also 'Resolution on the Right to Rehabilitation for Victims of Torture' [ACHPR/Res.303\(LVI\)2015](#), calling for efficient and effective rehabilitation services for victims.

particularly important given that the crimes occurred in 2012, and at least one victim and witness have died in the interim.⁴⁷



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Dated this 9th day of January 2025

At The Hague, The Netherlands

⁴⁷ Dedeou Maiga and P-0125.