

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/12-01/18

Date: 24 February 2021

TRIAL CHAMBER X

Before:

**Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Kimberly Prost**

SITUATION IN THE REPUBLIC OF MALI

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

Confidential

**Decision on Defence request for leave to appeal the ‘Decision on application for
notice of possibility of variation of legal characterisation pursuant to Regulation
55(2) of the Regulations of the Court’**

Decision to be notified in accordance with Regulation 31 of the *Regulations of the Court* to:

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Detention Section

**Victims Participation and Reparations
Section**

Other

TRIAL CHAMBER X of the International Criminal Court, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, having regard to Article 82(1)(d) of the Rome Statute (the 'Statute') and Regulation 55 of the Regulations of the Court (the 'Regulations'), issues the following decision.

I. Procedural history

1. On 17 December 2020, the Chamber issued a decision partially granting a request from the Office of the Prosecutor (the 'Prosecution' and the 'Prosecution Request'),¹ for notice to be given pursuant to Regulation 55(2) of the Regulations in relation to certain facts and circumstances (the 'Impugned Decision').²
2. On 18 January 2021, the Defence requested leave to appeal the Impugned Decision (the 'Request').³ Specifically, the Defence seeks leave to appeal the following issues (together, the 'Issues'):
 - whether the Chamber abused its discretion by failing to exercise it in a manner consistent with Mr Al Hassan's Article 67(1) rights as concerns the timing and content of the Impugned Decision (the 'First Issue');⁴
 - whether the 'notice' requirements and objective of Regulation 55 are satisfied in circumstances where the Chamber declines to identify the charged facts and circumstances related to the defendant's individual criminal responsibility for the crime in question (the 'Second Issue');⁵
 - whether the Chamber's 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, violates the Mr Al Hassan's right to detailed and timely notice of the nature, cause and content of counts 1 to 5 (the 'Third Issue');⁶

¹ Prosecution's application for notice to be given pursuant to regulation 55(2) of the Regulations of the Court, 23 June 2020, ICC-01/12-01/18-894-Conf (a corrigendum was notified on 19 February 2021, ICC-01/12-01/18-894-Conf-Corr).

² 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.

³ Defence request for leave to appeal 'Decision on application of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court', ICC-01/12-01/18-1251-Conf.

⁴ See Request, ICC-01/12-01/18-1251-Conf, paras 2-8 and generally 32-46.

⁵ See Request, ICC-01/12-01/18-1251-Conf, paras 9-12 and generally 32-46.

⁶ See Request, ICC-01/12-01/18-1251-Conf, paras 13-22 and generally 32-46.

- whether the Chamber's finding that it may, after the commencement of the trial, reinstate more serious charges rejected by the Pre-Trial Chamber due to insufficiency of evidence, is predicated on an overly expansive interpretation of confirmed facts, which is inconsistent with the safeguards and delineation of powers in Article 61(7)-(9) of the Statute, and the defendant's right to a fair and impartial trial, as circumscribed by Article 74(2) (the 'Fourth Issue');⁷ and
 - whether 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 (the 'Fifth Issue').⁸
3. On 22 January 2021, the Prosecution responded to Request, seeking that it be denied.⁹

II. Analysis

4. The Chamber incorporates by reference the applicable legal framework for granting leave to appeal pursuant to Article 82(1)(d) of the Statute, as set out in its previous decisions.¹⁰ In particular, the Chamber recalls that as regards the possibility to grant leave to appeal, the following cumulative criteria shall be fulfilled: (a) the matter must be an 'appealable issue'; (b) the issue at hand is one that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (c) an immediate resolution by the Appeals Chamber may materially advance the proceedings.
5. At the outset, the Chamber notes that the Defence's arguments under each of the Issues are extensive and frequently overlapping. They also often touch upon the merits of Issues themselves. The Chamber has highlighted below only the aspects of these arguments considered most relevant in the Chamber's assessment of whether the Issues meet the requirements under Article 82(1)(d) of the Statute.

⁷ See Request, ICC-01/12-01/18-1251-Conf, paras 23-27 and generally 32-46.

⁸ See Request, ICC-01/12-01/18-1251-Conf, paras 28-31 and generally 32-46.

⁹ Prosecution response to Defence request for leave to appeal "Decision on application for notice of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court", ICC-01/12-01/18-1261-Conf.

¹⁰ See, for example, Decision on Defence request for reconsideration and, in the alternative, leave to appeal the 'Decision on witness preparation and familiarisation', 9 April 2020, ICC-01/12-01/18-734; Decision on Defence request for leave to appeal the 'Decision on the conduct of proceedings', 28 May 2020, ICC-01/12-01/18-831.

A. The First Issue: whether the Chamber abused its discretion by failing to exercise it in a manner consistent with Mr Al Hassan's Article 67(1) rights as concerns the timing and content of the Impugned Decision

1. Submissions

6. The Defence makes a series of arguments in relation to the First Issue.¹¹ Notably, it alleges that there is no objective justification for the significant lapse of time between the filing of the Prosecution Request and the Impugned Decision, particularly as the Impugned Decision is based on the Chamber's interpretation of the findings of Pre-Trial Chamber I ('PTC I') rather than an assessment of the evidence submitted at trial.¹² Further, according to the Defence, the Impugned Decision does not include any explanation as to the 'exceptional circumstances' which justified invoking Regulation 55 at this stage of the proceedings, taking into account the procedural history in relation to the amendment and 'mutation' of charges in this case.¹³ Given the impact of the Impugned Decision on Mr Al Hassan's right to prompt notice of the charges and adequate time to prepare under Article 67(1) of the Statute, the Defence submits that the issue arises whether the Chamber abused its discretion by failing to consider the impact of the timing and content of its Impugned Decision on Mr Al Hassan's fair trial rights.¹⁴
7. The Prosecution submits that the First Issue is not an appealable issue arising from the Impugned Decision, but merely a disagreement with the Decision's timing, as well as a misunderstanding of the basis for such timing and of the Decision's content.¹⁵ The Prosecution further submits that the First Issue fails to meet the remaining criteria of Article 82(1)(d).¹⁶

2. Determination

8. The Chamber considers that the First Issue is not an appealable issue arising from the Impugned Decision, but merely constitutes a disagreement with the timing and content of the Impugned Decision. Concerning the timing of the Impugned

¹¹ See Request, ICC-01/12-01/18-1251-Conf, paras 2-8 and generally 32-46.

¹² Request, ICC-01/12-01/18-1251-Conf, para. 3.

¹³ Request, ICC-01/12-01/18-1251-Conf, paras 4-7.

¹⁴ Request, ICC-01/12-01/18-1251-Conf, para. 8.

¹⁵ Response, ICC-01/12-01/18-1261-Conf, paras 5-11.

¹⁶ Response, ICC-01/12-01/18-1261-Conf, paras 34-40.

Decision, the Chamber recalls that it noted that while a notice under Regulation 55(2) of the Regulations should always be given as soon as possible, this Regulation may be invoked 'at any time during the trial'.¹⁷ Further, in considering whether to give notice pursuant to Regulation 55(2), the Chamber duly took into account the rights of the accused and relevant factors, including the timing of prospective witnesses' testimony and the fact that this notice came at an early point in the trial proceedings, allowing the Defence to have an adequate opportunity to adapt its strategy as necessary.¹⁸ Based on this assessment, the Chamber found that giving notice for the possible re-characterisations at that stage of the proceedings did not cause unfairness to the accused.¹⁹ The Chamber considers that under the First Issue, the Defence merely expresses its wish for the Impugned Decision to have been issued earlier. The Chamber considers that, in particular, this is not an 'issue' in the meaning of Article 82 of the Statute, as it is not a subject-matter that requires a decision for its resolution, which would be essential for the determination of matters arising in the judicial cause under examination.

9. Concerning the content of the Impugned Decision, the Chamber notes in particular that the Defence challenges 'the sheer scale of the potential re-characterisation'²⁰ and argues that it is not 'self-evident that the "goal of eliminating impunity gaps" applies to re-characterisations of a cumulative nature'.²¹ However, the Chamber recalls that the Impugned Decision did not make any affirmative findings about the possibility to re-characterise a fact in a cumulative way. As such, the Defence argument is premature and does not arise from the Impugned Decision. Furthermore, the Defence contends that the Chamber gave no consideration to the fact that details used by it to substantiate potential new charges concerning rape and torture were not 'produced through a full confirmation process that adhered to the relevant safeguards set out in Article 61 and Rule 121 of the Rules'.²² However, once again this issue does not arise

¹⁷ Impugned Decision, ICC-01/12-01/18-1211-Conf, para. 9.

¹⁸ Impugned Decision, ICC-01/12-01/18-1211-Conf, paras 83-84, 112.

¹⁹ Impugned Decision, ICC-01/12-01/18-1211-Conf, paras 83-84, 112.

²⁰ Request, ICC-01/12-01/18-1251-Conf, paras 34, 36-37.

²¹ Request, ICC-01/12-01/18-1251-Conf, para. 7.

²² Request, ICC-01/12-01/18-1251-Conf, para. 6.

from the Impugned Decision. The Impugned Decision only addressed the issue of whether the legal elements of the crimes may be derived from the relevant facts and circumstances described in the Charging Documents,²³ in accordance with the powers and duties of trial chambers and following the scope of trial chambers' inquiry pursuant to Regulation 55. In this determination, the Chamber cannot review the proceedings before PTC I nor reconsider the procedural and substantive decisions made by PTC I.

10. As a result, the Chamber finds that the First Issue is not an 'appealable issue'. It is therefore unnecessary to address the remainder of the cumulative requirements of Article 82(1)(d) for the First Issue.

B. The Second Issue: whether the 'notice' requirements and objective of Regulation 55 are satisfied in circumstances where the Chamber declines to identify the charged facts and circumstances related to the defendant's individual criminal responsibility for the crime in question

1. Submissions

11. According to the Defence, the Chamber concluded that Regulation 55 permitted it to give notice as concerns the potential re-characterisation of one crime to another, on the basis of some of the 'crime base' elements, without regard of whether the specific knowledge and intent requirements that pertain to these crimes were also met on the basis of the facts confirmed by PTC I.²⁴ The Defence alleges that this approach is predicated on assumptions that are not established by existing ICC case law, namely that: (i) it is possible to sever the crime base elements from the related knowledge and intent requirements concerning the defendant for a particular crime; and (ii) the defendant's right to adequate notice is satisfied even if the Chamber provides no particulars as concerns the confirmed facts and circumstances related to the accused's involvement, knowledge and intent concerning the crime in question or the mode of liability that might apply.²⁵

²³ Charging Documents is defined as per Impugned Decision as the Confirmation Decision (ICC-01/12-01/18-461-Conf-Corr), together with PTC I's 23 April 2020 Decision (ICC-01/12-01/18-767-Conf).

²⁴ Request, ICC-01/12-01/18-1251-Conf, para. 9.

²⁵ Request, ICC-01/12-01/18-1251-Conf, paras 10-12.

12. The Defence further argues that the defendant's knowledge and contribution to crimes are material facts, which must be pleaded in the charges; accordingly, in the event that the confirmed charges fail to specify the precise form of participation, and responsibility for the crime in question, the charges would be defective.²⁶
13. The Prosecution submits that the Second Issue is not an appealable issue because the Defence misrepresents the Impugned Decision when it argues that the Chamber declined to identify 'the charged facts and circumstances and modes of liability' pertaining to Mr Al Hassan's individual criminal responsibility for the crimes for which notice of possible re-characterisation was given.²⁷ The Prosecution further submits that the Second Issue fails to meet the remaining criteria of Article 82(1)(d).²⁸

2. Determination

14. The Chamber considers that the Second Issue misrepresents the Impugned Decision and misconstrues specific paragraphs, taking them out of context. The Chamber recalls that for each proposed notice of re-characterisation in relation to crimes, it assessed whether the Prosecution had demonstrated that the legal elements of the crimes could be derived from the facts and circumstances confirmed by PTC I, having regard to the elements of crime required on the face of the relevant articles of the Statute. The contested paragraphs,²⁹ however, must be read in conjunction with the Chamber's express conclusion that the legal characterisation of the confirmed facts and circumstances may be subject to change *with the same mode of liability confirmed by PTC I for other counts related to each incident, namely Article 25(3)(d) of the Statute*.³⁰ Consequently, the Chamber considers that the Defence misconstrues the Impugned Decision as well as PTC I's findings in the Charging Documents, through a partial and selective reading of these documents. Rather than raising an appealable issue, the Defence merely expresses its disagreement with the conclusions reached by the

²⁶ Request, ICC-01/12-01/18-1251-Conf, para. 35.

²⁷ Response, ICC-01/12-01/18-1261-Conf, paras 12-16.

²⁸ Response, ICC-01/12-01/18-1261-Conf, paras 34-40.

²⁹ Impugned Decision, ICC-01/12-01/18-1211-Conf, paras 26, 36, 56.

³⁰ Impugned Decision, ICC-01/12-01/18-1211-Conf, para. 86.

Chamber, as well as PTC I. Accordingly, the Chamber finds that the Second Issue is not an appealable issue. As a result, it is not necessary to address the remainder of the cumulative requirements of Article 82(1)(d) for the Second Issue.

C. The Third Issue: whether the Chamber's 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, violates the Mr Al Hassan's right to detailed and timely notice of the nature, cause and content of counts 1 to 5

1. Submissions

15. The Defence alleges that the Chamber did not specify how, or in what manner, allegations of sexual violence committed against P-0574, P-0542, P-0570 and P-0547 could inform the Chamber's adjudication as concerns the existing counts, notably the manner in which they might inform the legal qualification of the charges.³¹ The Defence further submits that it was entitled to conduct preparation on the basis that the material facts pertaining to counts 1 to 5 were those identified as such in the Prosecution's document containing the charges, the Confirmation Decision and the Chamber's self-contained charges document.³² According to the Defence, in finding that it may take into consideration alleged acts of sexual violence committed against alleged victims in its assessment and analysis of counts already confirmed by PTC I for these incidents, without relying on Regulation 55, the issue arises as to whether the Chamber violated Mr Al Hassan's right to detailed and timely notice of the nature, cause and content of counts 1 to 5.³³
16. The Prosecution submits that the Third Issue is not an appealable issue arising from the Impugned Decision since the Defence does not correctly represent the Chamber's findings and many of its arguments are mere disagreements with the Impugned Decision.³⁴ The Prosecution further submits that the Third Issue fails to meet the remaining criteria of Article 82(1)(d).³⁵

³¹ Request, ICC-01/12-01/18-1251-Conf, para. 13.

³² Request, ICC-01/12-01/18-1251-Conf, para. 22.

³³ Request, ICC-01/12-01/18-1251-Conf, para. 22; and generally 13-21.

³⁴ Response, ICC-01/12-01/18-1261-Conf, paras 17-24.

³⁵ Response, ICC-01/12-01/18-1261-Conf, paras 34-40.

2. Determination

17. The Chamber considers that the Third Issue constitutes an appealable issue. In the Impugned Decision, the Chamber found that it may assess the facts and circumstances concerning specific incidents, that were confirmed by PTC I in relation to a particular count, as a relevant factual basis in relation to the same incidents with respect to other counts of the Charging Documents.³⁶ As such, the Third Issue arises from the Impugned Decision and raises the question as to whether the approach of the Chamber on the matter was correct, whether Regulation 55 would have been the proper procedural avenue, and whether the proposed exercise would exceed the facts and circumstances described in the charges.
18. Further, the Chamber finds that the Third Issue affects the fair and expeditious conduct of the proceedings considering that, as the Defence alleges, it is entitled to conduct preparation on the basis of the facts and circumstances relevant to counts 1 to 5 and which can be identified in the Charging Documents. In addition, it appears that an immediate resolution of this issue by the Appeals Chamber, which is linked to the identification of the relevant facts and circumstances as mentioned, would materially advance the proceedings.

D. The Fourth Issue: whether the Chamber's finding that it may, after the commencement of the trial, reinstate more serious charges rejected by the Pre-Trial Chamber due to insufficiency of evidence, is predicated on an overly expansive interpretation of confirmed facts, which is inconsistent with the safeguards and delineation of powers in Article 61(7)-(9) of the Statute, and the defendant's right to a fair and impartial trial, as circumscribed by Article 74(2)

1. Submissions

19. In relation to the Fourth Issue, the Defence notes that PTC I expressly declined to confirm the charges of other inhumane acts in relation to P-0547 and P-0570 - due to the fact that it was not satisfied that the Prosecution had satisfied its evidential burden of demonstrating that the degree of suffering met the threshold for this crime.³⁷ The Defence alleges that, in light of this, the Chamber's

³⁶ Impugned Decision, ICC-01/12-01/18-1211-Conf, paras 59-63, 68-69.

³⁷ Request, ICC-01/12-01/18-1251-Conf, para. 23.

determination that it could rely on Regulation 55 for the purpose of adding additional charges, based on a different assessment as to whether the evidential threshold was satisfied, is inconsistent with Articles 61(7)-(9) and 74(2) of the Statute.³⁸ According to the Defence, this issue turns on whether the Chamber can interpret confirmed facts to cover additional factual elements that had been expressly rejected by PTC I, as the Confirmation Decision contains no confirmed facts regarding the evidence of great suffering or serious injury to body or to mental or physical health, or awareness on the part of the perpetrator and Mr Al Hassan as concerns the factual circumstances that establish the character of the act.³⁹ The Defence submits that these particulars can only be incorporated through an amendment in accordance with Article 61 of the Statute.⁴⁰

20. The Prosecution submits that the Fourth Issue is not an appealable issue arising from the Impugned Decision, since it is predicated on an incorrect reading of the Chamber's findings on the possible re-characterisation of facts under counts 2 and 4.⁴¹ The Prosecution further submits that the Fourth Issue fails to meet the remaining criteria of Article 82(1)(d).⁴²

2. *Determination*

21. The Chamber considers that the Fourth Issue is not an appealable issue which arises from the Impugned Decision. In relation to the relevant incidents, the Chamber recalls that it noted PTC I's negative finding regarding the required threshold of suffering for count 2 and ultimately declined to provide notice of re-characterisation at the current stage.⁴³ As such, the Defence's request in relation to the Fourth Issue is premature and concerns a hypothetical legal question. Consequently, the issue does not arise from the Impugned Decision and is not appealable. It is unnecessary to address the remainder of the cumulative requirements of Article 82(1)(d) for this Issue.

³⁸ Request, ICC-01/12-01/18-1251-Conf, para. 24.

³⁹ Request, ICC-01/12-01/18-1251-Conf, para. 25.

⁴⁰ Request, ICC-01/12-01/18-1251-Conf, paras 26-27.

⁴¹ Response, ICC-01/12-01/18-1261-Conf, paras 25-27.

⁴² Response, ICC-01/12-01/18-1261-Conf, paras 34-40.

⁴³ Impugned Decision, ICC-01/12-01/18-1211-Conf, para. 74.

E. The Fifth Issue: whether 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

1. Submissions

22. According to the Defence, the Chamber's decision to give notice for the 'seven cases' under Article 25(3)(d) is predicated on Mr Al Hassan's alleged role in drafting the Islamic Police reports related to the cases and the extent to which this had an outcome on the judgment.⁴⁴ As such, the Chamber considered Mr Al Hassan's alleged authorship of police reports and their transmission to the Islamic tribunal to be of material relevance to the degree and nature of his contribution.⁴⁵ However, according to the Defence, the description of the facts the Chamber relied upon in the Impugned Decision cannot be reconciled with the plain text of the Confirmation Decision and constitute an addition to the existing confirmed facts.⁴⁶
23. The Defence submits that the lack of findings from PTC I on the authorship of the reports linked to the seven cases is not an inadvertent omission but is a reflection of the lack of evidence on this point.⁴⁷ Further, the linkage between reports and judgments was a factual matter which fell to the Prosecution to demonstrate and PTC I ultimately confirmed no linkage.⁴⁸ In the Defence's view, PTC I's findings were not of a legal nature that could be subject to a legal requalification and, while Regulation 55 allows the Chamber to requalify the legal characterisation of confirmed facts and circumstances, it does not allow it to amend or supplement the facts confirmed by PTC I.⁴⁹ Consequently, given that Mr Al Hassan's alleged authorship of the reports and the linkage between reports and judgments were of material importance to the Impugned Decision, the

⁴⁴ Request, ICC-01/12-01/18-1251-Conf, para. 28.

⁴⁵ Request, ICC-01/12-01/18-1251-Conf, para. 28.

⁴⁶ Request, ICC-01/12-01/18-1251-Conf, para. 28.

⁴⁷ Request, ICC-01/12-01/18-1251-Conf, para. 29.

⁴⁸ Request, ICC-01/12-01/18-1251-Conf, para. 30.

⁴⁹ Request, ICC-01/12-01/18-1251-Conf, paras 30-31.

Defence alleges that the issue arises as to whether the Chamber's notice exceeded the scope of Regulation 55 and constituted a *de facto* amendment to the charges.⁵⁰

24. The Prosecution submits that the Fifth Issue is not an appealable issue, but merely represents a disagreement with and mischaracterisation of the Impugned Decision.⁵¹ The Prosecution further submits that the Fifth Issue fails to meet the remaining criteria of Article 82(1)(d).⁵²

2. Determination

25. The Chamber considers that the Fifth issue arises from the Impugned Decision and is appealable. In the Impugned Decision, the Chamber was of the view that Mr Al Hassan's potential responsibility under Article 25(3)(c) was predicated on facts and circumstances which 'formed an integral part of PTC I's factual findings and narrative'.⁵³ The Chamber notably referred to sections of the Confirmation Decision addressing Mr Al Hassan's functions and powers within the Islamic Police, which include his drafting and signing of Islamic Police reports and their transmission to the Islamic Tribunal.⁵⁴ Accordingly, when referring to the evidence adduced to support that Mr Al Hassan allegedly authored the reports linked to the seven cases at stake,⁵⁵ the Chamber linked the evidence to the facts and circumstances already included in the Confirmation Decision and concluded that they were therefore not exceeded – which is a precondition to provide notice under Regulation 55(2).
26. However, the Defence submits that PTC I had made no specific findings as to the authorship of the reports linked to the seven cases because it lacked evidence on the point⁵⁶ and, accordingly, that this linkage constituted a 'factual matter' that PTC I ultimately did not confirm.⁵⁷ In essence, the Defence advances that the accused's alleged writing and signing of these Islamic Police reports actually

⁵⁰ Request, ICC-01/12-01/18-1251-Conf, para. 31.

⁵¹ Response, ICC-01/12-01/18-1261-Conf, paras 28-33.

⁵² Response, ICC-01/12-01/18-1261-Conf, paras 34-40.

⁵³ Impugned Decision, ICC-01/12-01/18-1211-Conf, paras 107-109.

⁵⁴ Impugned Decision, ICC-01/12-01/18-1211-Conf, para. 109.

⁵⁵ Impugned Decision, ICC-01/12-01/18-1211-Conf, para 108.

⁵⁶ Request, ICC-01/12-01/18-1251-Conf, para. 29.

⁵⁷ Request, ICC-01/12-01/18-1251-Conf, para. 30.

bears 'material importance to the Decision'.⁵⁸ With this, the Defence identifies a 'subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination'.⁵⁹ What needs therefore to be resolved by the Appeals Chamber is whether the existing facts relied on by the Chamber provided a sufficient basis to issue notice under Regulation 55(2) or whether the Chamber added facts, as opposed to evidence, not originally included in the Charging Documents and that PTC I did not confirm.

27. Further, the Chamber is of the view that the Fifth Issue would affect the outcome of the trial, as the Chamber may re-characterise the applicable mode of liability to accord with Article 25(3)(c) of the Statute in relation to the seven cases under consideration relevant to count 6.
28. The Chamber is also of the opinion that a resolution by the Appeals Chamber would materially advance the proceedings, as it may 'ensur[e] that the proceedings follow the right course'.⁶⁰ In other words, if the Regulation 55(2) notice was based on unconfirmed facts, a decision of the Appeals Chamber clarifying the subject matter reflected in paragraph 26 would set the proceedings in the right course thereby assisting to advance the proceedings.

⁵⁸ Request, ICC-01/12-01/18-1251-Conf, paras 28 and 31.

⁵⁹ Appeals Chamber, *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9.

⁶⁰ ICC-01/04-168, para. 15.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

PARTIALLY GRANTS the Request in relation to the Third Issue and the Fifth Issue;
and

REJECTS the remainder of the Request.

Done in both English and French, the English version being authoritative.



Judge Antoine Kesia-Mbe Mindua
Presiding Judge



Judge Tomoko Akane



Judge Kimberly Prost

Dated 24 February 2021

At The Hague, The Netherlands