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TRIAL CHAMBER X

Before: Judge Antoine Kesia-Mbe Mindua, Presiding
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**

Public

Public Redacted Version of “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’”

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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Introduction¹

1. On 17 December 2020, the Trial Chamber issued the ‘Decision on application of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court’ (‘the Regulation 55 Decision’).² The Decision raises a series of significant issues (‘the Five Issues’) concerning the Chamber’s obligation to exercise its discretion in a manner consistent with fair trial rights, its competence to make new determinations on material facts, and the nature of a charge. An incorrect adjudication will undermine the impartiality and integrity of these proceedings and result in a flawed verdict that is subject to reversal on appeal, or an order for re-trial, that will unnecessarily and unfairly prolong the process. Mr. Al Hassan’s right to expeditious proceedings thus militates in favour of an immediate appellate determination as to the correctness of the Trial Chamber’s approach on these issues.

Submissions

Issue 1: The Trial 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 Decision

2. The Prosecution filed its request on 23 June 2020, and the Defence response was filed on 8 July 2020.³ The Decision was issued almost 6 months later, after:
 - a. the Chamber heard 19 witnesses, including a witness whom the Chamber recognized to have considerable significance [REDACTED];
 - b. the Chamber put questions to multiple witnesses; and
 - c. the Defence advanced positive lines of defence, and submitted multiple items of evidence.
3. The Regulation 55 Decision is not based on the Trial Chamber’s appreciation of evidence submitted at trial, but rather its interpretation of the Pre-Trial Chamber’s findings. There is, therefore, no objective justification for such a significant lapse of time between the filing of the Regulation 55 request and the issuance of the Decision. Moreover, although the Trial Chamber has recognized that its findings regarding [REDACTED] amount to an entirely new count,⁴ the Chamber has only ordered the

¹ Pursuant to Regulation 23bis(2) of the Regulations of Court (‘RoC’), this response has been filed confidentially as it refers to filings and decisions of the same classification.

² ICC-01/12-01/18-1211-Conf.

³ Regulation 55 Decision, paras. 7-8.

⁴ Regulation 55 Decision, para. 87.

Prosecution to file an addendum to its Trial Brief after the completion of the testimony of [REDACTED].

4. Article 67(1)(a) of the Statute enshrines Mr. Al Hassan's right to prompt notification of the charges. This right extends to the legal characterisation of the charges.⁵ For this reason, resort to Regulation 55 should be exceptional,⁶ and given as "early as possible" - preferably, "before the start of the trial".⁷ As explained in *Ruto*:⁸

Despite any additional preparation time which comes from giving Regulation 55(2) Notice, waiting to give such notice increases the chances of prejudice to the Defence. The remediation of this prejudice may involve pressures either to reopen the case in certain respects, recall witnesses that have already testified or, out of respect for the rights of the accused, to forego legal recharacterisation that might otherwise have been in the interests of justice in the case. Such pressures are highly undesirable, and if earlier notice is given then they are avoidable.

5. Various Chambers have also underscored the impropriety of resorting to Regulation 55 as a vehicle for reintroducing charges or modes of liability that were not confirmed by the Pre-Trial Chamber, particularly in circumstances where there have been no evidential developments justifying a departure from the Confirmation Decision.⁹
6. These considerations were clearly relevant to the current case. Several proposed re-characterisations concerned charges or modes of liability that had been dismissed by the Pre-Trial Chamber.¹⁰ Others were brought to the Prosecution's attention by the Pre-Trial Chamber, between 9 and 14 months ago,¹¹ or were the subject of an explicit

⁵ *I.H. v. Austria*, [42780/98](#), para. 34.

⁶ [Chambers Practice Manual \(2019\)](#) para. 67; [ICC-01/04-01/07-3363](#), Dissenting opinion of Judge Cuno Tarfusser, 27 March 2013, para. 5.

⁷ [ICC-01/04-01/07-3363](#), paras. 24 and 102.

⁸ [ICC-01/09-01/11-1122](#), para. 27.

⁹ [ICC-01/05-01/13-1250](#), para. 11: "While in exceptional circumstances it might be necessary to provide notice at this stage of the proceedings, the Chamber does not consider that this should be a mechanism whereby the Prosecution immediately seeks to start a procedure which aims at modifying the legal characterisation of the confirmed charges and reintroduces modes of liability which were just rejected by the Pre-Trial Chamber. In the present case, the Prosecution did not provide any exceptional circumstances or any other reasons, nor are they apparent to the Chamber, which justify providing notice at this time." See also [ICC-02/11-01/15-185](#), paras. 8, 12; See also [Chambers Practice Manual \(2019\)](#), para. 67.

¹⁰ Classification under Article 25(3)(c): [ICC-01/12-01/18-461-Conf-Corr](#), paras. 887-888; Other inhumane acts: [ICC-01/12-01/18-461-Conf-Corr](#), paras. 338 and 353.

¹¹ Acts of torture (counts 1 and 3) for P-1134: [ICC-01/12-01/18-767-Conf-Corr](#), para. 102; Acts of torture and passing of irregular sentences (counts 1, 3 and 6) for P-0609: [ICC-01/12-01/18-767-Conf-Corr](#), paras. 103, 136; Outrages upon personal dignity (count 5) for P-1708: [ICC-01/12-01/18-767-Conf-Corr](#), para. 125; Rape (counts 11 and 12) for P-0570, P-0547, P-0574, and P-0542: [ICC-01/12-01/18-461-Conf-Corr](#), para. 682; [ICC-01/12-](#)

recommendation that any requalification should occur before the start of the trial.¹² Some notified re-characterisations also turn on facts confirmed by the Pre-Trial Chamber less than three months before the start of the trial,¹³ pursuant to a truncated confirmation procedure that did not afford the Defence a hearing, or the right to adduce evidence. The Pre-Trial Chamber justified their decision not to conduct such a confirmation hearing by stressing that the amendments did not amount to new or more serious ‘charges’, but rather additional detail concerning existing charges (such as that of persecution).¹⁴ And yet, in using this ‘additional detail’ to substantiate potential new charges concerning rape and torture, the Trial Chamber gave no consideration to the fact that this ‘additional detail’ was not produced through a full confirmation process that adhered to the relevant safeguards set out in Article 61 and Rule 121.

7. Significantly, the 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 particular procedural history as concerns the amendment and mutation of charges in this case. Nor is it self-evident that the ‘goal of eliminating impunity gaps’ applies to re-characterisations of a cumulative nature. Whereas a failure to requalify a charge to include a lesser included offence could lead to an acquittal if one of the elements of the existing charge is not fulfilled, the Decision primarily concerns re-characterisations of a duplicative or aggravated nature. If the Prosecution fails to meet their evidential burden as concerns the existing charges, the defendant will be acquitted even if the additional charges are added.
8. Given the impact of the Decision on Mr. Al Hassan’s right to prompt notice of the charges, and adequate time to prepare in relation to complicated and convoluted legal descriptions of his alleged responsibility (embodied in a 457 page DCC confirmed by a 467 page decision, and a 72 page amendment decision), the issue arises as to whether the Trial Chamber abused its discretion by failing to consider the impact of the timing and content of its Decision on Mr. Al Hassan’s fair trial rights.

01/18-767-Conf-Corr, paras. 94-97; Act of mutilation pursuant to Article 8(2)(c)(i) [REDACTED]: ICC-01/12-01/18-461-Conf-Corr, para. 315.

¹² ICC-01/12-01/18-461-Conf-Corr, para. 682: [REDACTED].

¹³ Regulation 55 Decision, para. 54.

¹⁴ CC-01/12-01/18-767-Corr-Red, para. 6; ICC-01/12-01/18-608-Conf, para. 51.

Issue 2: Whether the ‘notice’ requirements and objective of Regulation 55 are satisfied in circumstances where the Trial Chamber declines to identify the charged facts and circumstances related to the defendant’s individual criminal responsibility for the crime in question

9. In relation to several counts, the Trial Chamber found that the elements for re-characterisation were fulfilled, “without having regard to the criminal responsibility of Mr Al Hassan at the present stage”.¹⁵ The Trial Chamber thus concluded that Regulation 55 permitted the Chamber 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 to whether the specific knowledge and intent requirements that pertain to these crimes were also met, on the basis of the facts confirmed by the Pre-Trial Chamber.

10. This approach is predicated on the assumptions that:

- a. it is possible to sever the crime base elements from the related knowledge and intent requirements concerning the defendant, for that particular crime;
- b. the defendant’s right to adequate notice as concerns the nature, cause and content of the potential requalification is satisfied even if the Trial Chamber provides no particulars as concerns the confirmed facts and circumstances related to the defendant’s involvement and knowledge and intent as concerns the crime in question or the mode of liability that might apply.

11. These assumptions are not established by existing ICC case law, and as such, an appealable issue arises from the Trial Chamber’s resolution of this matter. Various Pre-Trial Chambers have affirmed the indivisible nature of the link between the historical incident (the crime base), and the conduct and responsibility of the defendant.¹⁶ In the context of admissibility proceedings, the Appeals Chamber has further underlined that “the defining elements of a concrete case before the Court are the individual and the alleged conduct”.¹⁷ The ICTY Appeals Chamber has found that an indictment will be impermissibly vague and defective if it fails to set out, in detail, the role of the defendant in the alleged criminal conduct.¹⁸ The ECHR has further

¹⁵ Regulation 55 Decision, paras. 26, 36, 56.

¹⁶ [ICC-01/14-01/18-403-Red-Corr](#), para. 59; [ICC-02/05-02/09-243-Red](#), para. 5.

¹⁷ [ICC-01/09-02/11-274](#), para. 39. See also the position of the Prosecution: “A case before the ICC must therefore be based on particular facts, incidents and conduct related to a crime within the jurisdiction of the Court allegedly committed by an identified individual”, [ICC-01/09-01/11-183](#), para. 93, and “The charges in the ICC encompass “the facts, including the time and place of the alleged crimes, which provide a sufficient basis to bring the person or persons to trial”. This necessarily includes the conduct of a specific suspect or accused”, [ICC-01/09-01/11-183](#), para. 95.

¹⁸ *Prosecutor v. Kupreskic*, [Appeals Judgment](#), para. 95.

specified that the mental element of a particular crime is an inseverable element of the crime: the principle of legality thus dictates that the defendant must know “what acts and omissions will make him criminally liable.”¹⁹ This, in turn, “requires the existence of a mental link through which an element of liability may be detected in the conduct of the person who physically committed the offence”.²⁰ It follows from the above that the particulars of the ‘individual’s’ knowledge and contribution to the commission of the historical incident are an inseverable element of the charge. This is consistent with Regulation 52(c) of the RoC, which specifies that the document containing the charges must contain “[a] legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28”.

12. Accordingly, in line with the principle of individual responsibility in Article 25(1) of the Statute, the Decision raises the issue as to whether the ‘notice’ requirements and objective of Regulation 55 are satisfied in circumstances where the Chamber declines to identify the charged facts and circumstances and modes of liability pertaining to the defendant’s individual criminal responsibility for the crime in question.

Issue 3: Whether the Trial 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

13. After noting firstly, that the Prosecution’s submissions “presents unique issues in terms of the application of Regulation 55 of the Regulations”,²¹ and secondly, that the Prosecution had conceded that “PTC I did not reference its findings on the alleged acts of a sexual nature committed against P-0574 while in detention in confirming the charges under counts 1 to 5”, the Trial Chamber found that “the Chamber may take into consideration alleged acts of sexual violence committed against P-0574 in its assessment and analysis of counts 1 to 5”.²² The Trial Chamber then reached an identical conclusion in relation to P-0542, P-0570, and P-0547.²³ The Trial Chamber further found that it was unnecessary to rely on Regulation 55, as the Trial Chamber had a broader power to take into consideration any facts and circumstances that might

¹⁹ Case of *G.I.E.M. S.R.L. & Ors v. Italy*, [1828/06 34163/07 19029/11](#), para. 242

²⁰ Case of *G.I.E.M. S.R.L. & Ors v. Italy*, [1828/06 34163/07 19029/11](#), para. 242

²¹ ICC-01/12-01/18-1211-Conf, para. 59.

²² ICC-01/12-01/18-1211-Conf, para. 62.

²³ ICC-01/12-01/18-1211-Conf, para. 68.

be relevant to the charges.²⁴ The Trial Chamber did not specify how, or in what manner these allegations could inform its adjudication as concerns the existing counts, for example, whether it would do so as an aggravating factor in the event of conviction, or as a material fact that could satisfy the elements of the offences. Neither the Confirmation Decision²⁵ nor the DCC²⁶ contain detail concerning the mental element of Mr. Al Hassan in relation to alleged acts of rape concerning P-0542, P-0570, and P-0547, a matter not addressed by the Trial Chamber. Nor is there any detail as concerns how these allegations of rape could inform Mr. Al Hassan's personal culpability for the existing counts. The finding that these allegations could be considered in connection with these counts was also issued five months after the start of the trial.

14. The impact of this finding on Mr. Al Hassan's right to prompt notice of the nature, content and cause of the charges must also be considered in the context of the specific information provided to the Defence in the lead up to the trial. At the confirmation hearing, the Prosecution relied on uncorroborated, anonymous statements to support the charges concerning P-0542, P-0570, and P-0547, which also included allegations concerning unidentified perpetrators. The Prosecution also explicitly averred that it did not intend for the allegations of rape to be included in charges under Counts 1 to 5 for these victims.²⁷ Although past case law has suggested that such evidence would not satisfy the evidential threshold for confirmation of the charges,²⁸ the Pre-Trial Chamber found that there were sufficient indicia of reliability to establish specific facts pertaining to counts 1 to 5, which the Pre-Trial Chamber then identified in its Confirmation Decision.²⁹ These facts were restricted to those allegations, in relation to which the witnesses had provided detail concerning the identity of the alleged perpetrators of their detention,³⁰ but not the alleged perpetrators of the rapes.³¹ In its April 2020 Amendment Decision, the Pre-Trial Chamber further affirmed that the

²⁴ ICC-01/12-01/18-1211-Conf, paras. 62, 68.

²⁵ ICC-01/12-01/18-461-Conf-Corr.

²⁶ 9 ICC-01/12-01/18-335-Conf-Corr.

²⁷ ICC-01/12-01/18-461-Conf-Corr, para. 676: [REDACTED].

²⁸ [ICC-01/05-01/08-424](#), para. 50; [ICC-02/05-03/09-121-Corr-Red](#), para. 41

²⁹ ICC-01/12-01/18-461-Conf-Corr, paras. 331-332, 334-335, 337-338, 355.

³⁰ P-0542: ICC-01/12-01/18-461-Conf-Corr, paras. 331-332, 407. P-0570: ICC-01/12-01/18-461-Conf-Corr, paras. 334, 405.

³¹ P-0542: ICC-01/12-01/18-461-Conf-Corr, para. 680. P-0570: ICC-01/12-01/18-461-Conf-Corr, para. 677. P-0547: ICC-01/12-01/18-461-Conf-Corr, para. 678.

Confirmation Decision should be read as confirming the facts set out in the following paragraphs, in relation to Counts 1 to 5 for P-0542, P-0570 and P-0547 as described in paragraphs 331-332, 334-335, 337-338 and 355 of the Confirmation Decision.³²

15. The Pre-Trial Chamber clearly determined that it was necessary to refer to specific paragraphs in order to ensure clarity as concerns the factual basis of these counts. The Trial Chamber's determination that it can look beyond these paragraphs to facts referenced in an entirely different context³³ unravels the very certainty that the Pre-Trial Chamber attempted to construct.
16. The dispositive section of the Confirmation Decision (Part X) also sets out the charge of persecution in extremely vague terms, without any reference to specific incidents or victims.³⁴ This stems from the fact that the allegations in the DCC were pleaded in sparse terms: the persecution allegation concerning [REDACTED] was comprised of one sentence,³⁵ and does not refer to a date, location, or perpetrator/s of rape (even by reference to a group or subgroup).³⁶ The Pre-Trial Chamber thus never confirmed incidents of rape, concerning these victims, in a manner which would conform to the requirements of Regulation 52. This issue of vagueness also cannot be cured at a later stage: otherwise, there would be a risk that the Prosecution could mould its case to the manner in which the evidence unfolds at trial.³⁷
17. Since the Prosecution did not include these allegations in Counts 1 to 5 at the confirmation stage, the issue as to whether these allegations were pleaded in a sufficiently detailed and precise manner, in relation to such Counts, did not arise. Nor could the Defence preemptively address matters pertaining to the evidential foundation for establishing personal responsibility on the part of Mr. Al Hassan for

³² ICC-01/12-01/18-767-Conf-Anx, p. 10.

³³ ICC-01/12-01/18-461-Conf-Corr, paras. 677, 678 and 679 concerning allegations of perpetration.

³⁴ ICC-01/12-01/18-461-Conf-Corr, p. 465, [REDACTED].

³⁵ "Elles ont été détenues puis violées au cours de leur détention": ICC-01/12-01/18-335-Conf-Corr, para. 970.

³⁶ ICC-01/12-01/18-461-Conf-Corr, para.

³⁷ ICC-01/04-01/07-1547-tENG, para. 23: "it is incumbent upon the Prosecutor to present, during the pre-trial phase, all of the facts and circumstances relating to his case. To hold otherwise would be to call into question the very purpose of a pre-trial phase, at the close of which the charges are fixed and settled. Such a solution would, moreover, render useless the months of work devoted by the Pre-Trial Chamber to preparing the case for trial and, to a large extent, would make it pointless even to hold a confirmation hearing where evidence is presented, and at the close of which the trial is supposed to commence. As the ad hoc international criminal tribunals have stressed, the Prosecutor "is expected to know [his] case before it goes to trial. It is not acceptable for the Prosecut[or] to omit the material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.""

such acts, under the legal framework of Courts 1 to 5. The Prosecution's Regulation 55 Application was filed on 22 June 2020: after the deadline for raising any issues concerning the conduct of the pre-trial proceedings, or the form or content of the self-contained set out charges issued by the Trial Chamber. Since the Trial Chamber has affirmed that it has no power to address defects in the charges after the start of the trial,³⁸ the current change in approach thus saddles the defendant with the adverse penal consequences of charges, which were never confirmed in accordance with the safeguards that apply to the confirmation hearing.

18. The manner in which the Trial Chamber adjudicated the issue also leaves the defendant in the dark as concerns the purposes for which the allegations could be used, including the manner in which they might inform the legal qualification of the charges. As noted by Judge Van den Wyngaert,³⁹

Charges are not merely a loose collection of names, places, events, etc., which can be ordered and reordered at will. Instead, charges must represent a coherent description of how certain individuals are linked to certain events, defining what role they played in them and how they related to, and were influenced by, a particular context. Charges therefore constitute a narrative in which each fact belonging to the 'facts and circumstances' has a particular place. Indeed, the reason why facts are included in the 'facts and circumstances' is precisely because of how they are relevant to the narrative in a particular way. Taking an isolated fact and fundamentally changing its relevance by using it as part of a different narrative would therefore amount to a "change in the statement of facts", something the Appeals Chamber has found to be clearly prohibited by regulation 55(1).

19. To ensure fairness and certainty, each 'charge' must be pleaded with sufficient detail to allow the defendant to know the facts that could result in criminal liability for that charge. In the absence of such clarity, the charge as a whole or in part may be defective. The ICTR Appeals Chamber thus affirmed that:⁴⁰

the Prosecution's failure to expressly state that a paragraph in the Indictment supports a particular count in the Indictment is indicative that the allegation is not charged as a crime. The Appeals Chamber therefore considers that the mistreatment underlying Muvunyi's conviction for other inhumane acts as a crime against humanity was not charged in his Indictment. The omission of a

³⁸ ICC-01/12-01/18-923-Conf, para. 93.

³⁹ [ICC-01/04-01/07-3436-AnxI](#), para. 32.

⁴⁰ *Prosecutor v. Muvunyi*, [Appeals Judgment](#), para. 156.

count or charge from an indictment cannot be cured by the provision of timely, clear, and consistent information

20. In line with this approach, the ICC Chamber's practice manual specifies that:⁴¹

The charges on which the Prosecutor intends to bring the person to trial to be presented prior to the confirmation hearing (cf. Article 61(3)(a) of the Statute) shall be spelt out in a clear, exhaustive and self-contained way and shall include all, and not more than, the 'material facts and circumstances' (i.e. the facts and circumstances that must be described in the charges (cf. Article 74(2) of the Statute) and which are the only facts subject to judicial determination to the applicable standard of proof at confirmation and trial stages, respectively) and their legal characterisation; [...] If the Prosecutor chooses to include submissions in the document containing the charges rather than in a separate filing, the two sections – 'charges' and 'submissions' – must be kept clearly separate, and no footnotes containing cross- references or reference to evidence must be included in the charges.

21. Even if these recommendations are not binding, they inform the manner in which the parties appearing before the Chamber understand the confirmed charges and have proper notice of the distinction between relevant facts, and evidence. The recommendations are thus relevant to the issue of the defendant's right to timely and clear notice of the charges. The Trial Chamber recognized as such, in its decision to issue a self-contained set of charges ('SSC'), which had the objective of ensuring a "common understanding on the part of the parties, participants, and the Chamber as to the facts and circumstances of the charges prior to the start of trial".⁴² Notably, whereas counts 4 and 5 of the SSC lists [REDACTED]. Although afforded an opportunity to do so,⁴³ the Prosecution did not contest this omission, or otherwise raise

⁴¹ [Chambers Practice Manual \(2019\)](#), para. 35.

⁴² "The Confirmation Decision in this case contains a list of the charges in the concluding section at pages 451 to 466. However, this part of the decision sets out only the very basic contours of the charges without a description of the relevant facts and circumstances. Instead, the Pre-Trial Chamber opted to include a series of cross-references within each count referring back to the relevant paragraphs of the decision. The cross-referenced paragraphs in each instance contain the full reasoning by the Pre-Trial Chamber and thus include descriptions of evidence, legal analysis as well as factual findings. As a result of the methodology utilised by the Pre-Trial Chamber there is no self-contained part of the decision which sets out the charges in full. Therefore, if only pages 451 to 466 of the Confirmation Decision are read to the accused, as suggested by the Prosecution, the requirement of Article 64(8) of the Statute to read 'the charges' would not be met, since the necessary facts and circumstances which the charges must identify are not sufficiently described in that part of the decision. Given this, the Chamber is of the view that a clarification of the charges is necessary. It is relevant not only for the requirements of Article 64(8) of the Statute, but also to ensure the accused is fully aware of the charges against him and that there is a common understanding on the part of the parties, participants, and the Chamber as to the facts and circumstances of the charges prior to the start of trial": [ICC-01/12-01/18-789-AnxA](#), paras. 6-9.

⁴³ [ICC-01/12-01/18-831](#), paras. 19-20.

issues concerning the linkages between acts set out in counts 13, and counts 1 to 5, prior to the crystallisation of the SCC before the start of the trial.

22. The Defence and Mr. Al Hassan were thus entitled to conduct preparation on the basis that the material facts pertaining to Counts 1 to 5 were those identified as such in the DCC, Confirmation Decision, and SCC. The issue thus arises as to whether the Trial 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 was consistent with Mr. Al Hassan's right to timely notice of the nature, cause and content of the charges pertaining to counts 1 to 5.

Issue 4: Whether the Trial 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).

23. The Pre-Trial Chamber 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 of other inhumane acts as a crime against humanity.⁴⁴ The Prosecution did not appeal this finding, nor did it subsequently introduce additional evidence, pursuant to Article 61(8) and (9). Nonetheless, after finding that it could take into account allegations of rape in the context of counts 1 to 5 (Issue 3), the Trial Chamber further found that it could, "proprio motu or following a request", give notice as to a re-characterisation to include counts 2 and 4 for P-0547 and P-0570.⁴⁵

24. The Trial Chamber's 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, raises the issue as to whether the use of Regulation 55 for this purpose, in the particular circumstances of this case, is inconsistent with the safeguards and delineation of powers set out in Article 61(7)-(9) of the Statute, and the defendant's right to a fair and impartial trial, circumscribed by Article 74(2).

⁴⁴ ICC-01/12-01/18-461-Conf-Corr, para. 335.

⁴⁵ Regulation 55 Decision, paras. 72-74.

25. This appealable issue turns on whether and when the Trial Chamber can interpret confirmed facts to cover additional factual elements that had been expressly rejected by the Pre-Trial Chamber, and the point at which ‘interpretation’ becomes ‘expansion’, and thus, an amendment of the charges. In the current case, as a result of the Pre-Trial Chamber’s finding that the evidential threshold for inhumane acts was not satisfied, the Confirmation Decision contains no confirmed facts regarding the existence 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.
26. According to established pleading principles at the ICTY, “all legal prerequisites to the application of the offences charged constitute material facts, and must be pleaded in the indictment (....) This fundamental rule of pleading, however, is not complied with if the pleading merely assumes the existence of the pre-requisite.”⁴⁶ *Mens rea* is a material fact that must be pleaded by reference to the perpetrator and defendant’s state of mind, or the facts from which this state of mind can be inferred.⁴⁷ Accordingly, if the evidence at trial discloses the existence of a more serious mental element, a conviction on the basis of this more serious element is foreclosed unless the charges are first amended to plead this element.⁴⁸
27. The question thus arises as to whether Regulation 55 can be invoked in the absence of such particulars, or whether they can only be incorporated through an amendment introduced in accordance with the procedures set out in Article 61. Specifically, in the event that charges are found to be evidentially deficient, Articles 61(7) and (8) provide the Pre-Trial Chamber and the Prosecution with defined procedural avenues for remedying such a deficiency: specifically, if the Pre-Trial Chamber considers that more evidence or clarification of evidence is required to satisfy the confirmation standard, it may adjourn the confirmation hearing and invite further submissions. If a charge is rejected for lack of evidence, the Prosecution can also adduce additional evidence pursuant to Article 61(8). The Prosecution also possesses the right to seek leave to appeal the Confirmation Decision. The Statute is, however, clear that once the

⁴⁶ *Prosecutor v. Hadzihasanovic et al.*, [Decision on Form of the Indictment](#), 7 December 2001, para. 10.

⁴⁷ *Prosecutor v. Kanyarukiga*, [Decision on Interlocutory Appeal of Decision in Exclusion of Evidence](#), para. 9.

⁴⁸ *Prosecutor v. Kupreskic*, [Trial Judgment](#), paras. 742, 747.

trial starts, no further amendments can be made. In order to preserve the object and purposes of this prohibition, Regulation 55 must not be employed in a manner that “would circumvent article 61 (9) of the Statute and (...) blur the distinction between the two provisions.”⁴⁹ By taking the resolution of this issue outside the framework of Articles 61(7), (8) and (9), the question arises as to whether the manner in which the Trial Chamber resolved Issue 4 has disturbed the proper balance between eliminating impunity gaps, and preserving the defendant’s right to timely notice of the charges.

Issue 5: Whether the Trial Chamber’s reliance on unconfirmed facts to give notice of a potential requalification of Mr. Al Hassan’s individual liability, exceeded the scope of Regulation 55, and constituted a de facto amendment to the charges

28. The Trial Chamber’s decision to give notice concerning the potential requalification of Mr. Al Hassan’s individual responsibility from Article 25(3)(d) to Article 25(3)(c) for specific cases is predicated on Mr. Al Hassan’s alleged role in drafting the Islamic Police Reports related to the cases in question, and the related extent to which this had an outcome on the judgment.⁵⁰ The Trial Chamber thus considered Mr. Al Hassan’s alleged authorship of these reports and their transmission to the Tribunal to be of material relevance to the degree and nature of his contribution. And yet, the Trial Chamber’s description of the ‘facts’ that it relied upon to justify this aspect of the Decision cannot be reconciled with the plain text of the Confirmation Decision, and thus appears to constitute an extrapolation or addition to the existing confirmed facts.

29. The Trial Chamber acknowledged that “in its assessment of the seven cases and the facts and circumstances underlying each of them, PTC I did not refer to Islamic Police reports allegedly drafted and signed by the accused and corresponding to these written Islamic Tribunal judgments”.⁵¹ This was not an inadvertent omission on the part of the Pre-Trial Chamber but a reflection of the lack of evidence on this point. [REDACTED].⁵² In its 2020 amendment request, the Prosecution also conceded that it did not allege that Mr. Al Hassan drafted the police report for [REDACTED] in the DCC,⁵³ but in fact, the DCC also completely failed to refer to [REDACTED] and failed to make any attribution to [REDACTED]. Indeed, [REDACTED] is also not a

⁴⁹ [ICC-01/04-01/06-2205](#), para. 94.

⁵⁰ Regulation 55 Decision, paras. 104, 109.

⁵¹ Regulation 55 Decision, para. 107.

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

⁵³ ICC-01/12-01/18-894-Conf, para. 19.

signed report; there is no indication that it emanated from the Islamic Police or Mr. Al Hassan. Thus, when the Pre-Trial Chamber set out its findings concerning the specific reports for which it found sufficient evidence to establish authenticity and authorship on the part of Mr. Al Hassan, the Chamber did not include [REDACTED].

30. The linkage between reports and specific judgments was also a factual matter which fell to the Prosecution to demonstrate, and yet the Pre-Trial Chamber ultimately confirmed no linkage.⁵⁴ The Pre-Trial Chamber's findings were not, therefore, of a legal nature that could be subject to a legal requalification. It follows that in finding that there may be grounds to demonstrate such a linkage on the basis of Mr. Al Hassan's alleged authorship of these reports, and connection to specific Islamic Court judgments, the Trial Chamber effectively stepped into the shoes of the Pre-Trial Chamber, expanding, and thus exceeding, the factual matrix of the confirmed charges.

31. Regulation 55 allows the Trial Chamber to requalify the legal characterisation of existing facts and circumstances: it does not permit the Trial Chamber to amend or supplement the facts confirmed by the Pre-Trial Chamber. Given that Mr. Al Hassan's alleged authorship of these specific reports, and the linkage between reports and specific judgments were of material importance to the decision to requalify the mode of liability from Article 25(3)(d) to Article 25(3)(c), the issue arises as to whether the Trial Chamber's 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 issues significantly impact on the fairness and expeditious conduct of the proceedings, and an immediate decision of the Appeals Chamber would material advance the proceedings

32. The five appealable issues concern the timing and magnitude of the Regulation 55 Decision (issue 1), the specificity of the proposed requalifications (issues 2 and 3), and the extent to which proposed requalifications exceed the confirmed facts and circumstances of this case through the expansive reading of existing facts, or the incorporation of unconfirmed facts (issues 4 and 5). To the extent that the Regulation 55 Decision provides notice of a series of additional potential charges, and the inclusion of additional facts and an additional mode of liability for existing charges, it

⁵⁴ ICC-01/12-01/18-461-Conf-Corr, paras. 457 [REDACTED], 466-467 [REDACTED], 462 [REDACTED], 448 [REDACTED], 469 [REDACTED], 436 [REDACTED], 472 [REDACTED].

necessarily impacts on the outcome of the trial, as it changes the legal matrix of any potential acquittal or conviction, and the gravity of those convictions.

33. The question of timing, raised by Issue 1, falls squarely within the parameters of Trial Chamber I's determination, in *Gbagbo*, that its approach to the timing of the issuance of a Regulation 55 decision met the criteria for interlocutory appellate review, since:⁵⁵

if the timing of the Impugned Decision was in error, the related proceedings may continue on an unsound legal basis. In light of the above, the Chamber is satisfied that appellate resolution of these issues could 'ensur[e] that the proceedings follow the right course', thereby removing any doubt that any consequences of the Impugned Decision - such as the additional investigations or changes in strategy the Gbagbo Defence claims to be necessary - are justified. Accordingly, the Chamber considers that Issues One and Two satisfy the leave to appeal criteria: they may have a significant impact on the fair and expeditious conduct of the proceedings or outcome of the trial, and immediate appellate resolution may materially advance the proceedings.

34. The sheer scale of the potential re-characterisation, which is the subject of Issue 1, also affects the defendant's right to adequate time and facilities to prepare his defence, on the basis of clearly, and timeously defined charges. Apart from the goal of eliminating impunity gaps, the Appeals Chamber noted in *Lubanga* that the objective of Regulation 55 was to ensure streamlined proceedings: that is, rather than following the cumulative charging process employed at the *ad hoc* Tribunals, Regulation 55 was adopted to allow the ICC to proceed to trial on the basis of what the Pre-Trial Chamber considered to be the most appropriate legal characterisation, while leaving open the possibility that the Trial Chamber could requalify these charges, in case the evidence appeared to support a different charge at trial.⁵⁶ This objective of promoting streamlined trials is undermined in circumstances where the Pre-Trial Chamber allows cumulative charging, and the Trial Chamber then resorts to Regulation 55 to incorporate further charges and potential variations, after the trial has commenced. Regulation 55, when employed in conjunction with cumulative charging, burdens the trial process with the complications of multiple charges, and the uncertainty of

⁵⁵ [ICC-02/11-01/15-212](#), para. 12.

⁵⁶ In *Lubanga*, the Appeals Chamber cited the following publications in support of its understanding of the objectives of Regulation 55 ([ICC-01/04-01/06-2205](#), fn. 152): Hans-Peter Kaul, "Construction Site for More Justice: The International Criminal Court after Two Years", in *The American Journal of International Law*, Vol. 99, No.2 (2005), p.377; Carsten Stahn, "Modification of the Legal Characterization of Facts in the ICC System; A Portrayal of Regulation 55" in *Criminal Law Forum*, Vol. 16 (2005), p. 3. Both publications state that the Regulation 55's objective was to provide an alternative to cumulative charging, and to ensure focused and streamlined proceedings.

potential requalifications. The net result, in this case, is inconsistent with the Trial Chamber's positive duty to ensure that this particular defendant (Mr. Al Hassan) can understand and meaningfully respond to charges that have been brought in a trial environment that has already been severely complicated by a range of extrinsic and intrinsic factors (including Mr. Al Hassan's mental health, impediments to Defence investigation and preparation caused by the COVID-19 pandemic, and late amendments to the charges granted by the Pre-Trial Chamber).

35. The extent to which the findings in the Regulation 55 Decision satisfies the requirements of Article 67(1)(a) and Regulation 52 (as set out in Issues 2, 3, and 4) also has profound consequences for the conduct of the trial proceedings. The defendant's knowledge and contribution to crimes are material facts, which must be pleaded in the charges.⁵⁷ 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. It also cannot be assumed that facts underpinning the defendant's knowledge and intent for one crime, can automatically be transposed to the 're-characterised' crime since some crimes, such as torture, have specific knowledge and intent requirements,⁵⁸ which apply to both the perpetrator and the accused.⁵⁹ For this reason, within the context of Regulation 55 re-characterisations, the ICC Appeals Chamber placed particular emphasis on the extent to which a proposed re-characterisation in the *Katanga* case fell within the scope of identified confirmed facts concerning the defendant's knowledge, and awareness as concerns the intent of the group to commit the crimes in question.⁶⁰ This link cannot be verified in the absence of any judicial findings concerning the defendant's alleged responsibility for the crimes, which are the subject of the presaged re-characterisation.

⁵⁷ [ICC-01/05-01/08-424](#), para. 208; [ICC-01/04-01/06-222](#), para. 29. See also *Prosecutor v. Krnojelac*, [Decision on Defence Preliminary Motion on the Form of the Indictment](#), paras. 12-13; *Prosecutor v. Uwinkindi*, [Decision on Defence Appeal Against the Decision Denying Motion Alleging Defects in the Indictment](#), paras. 4-5; *Prosecutor v. Sainovic et al.*, [Appeals Judgment](#), para. 214.

⁵⁸ "The perpetrator inflicted the pain or suffering for such purposes as obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind".

⁵⁹ Article 30(1), Statute ; Paragraph 8, General Introduction to the Elements of the Crimes specifies that, "As used in the Elements of Crimes, the term "perpetrator" is neutral as to guilt or innocence. The elements, including the appropriate mental elements, apply *mutatis mutandis*, to all those whose criminal responsibility may fall under articles 25 and 28 of the Statute". See also ICTY, *Prosecutor v. Martinovic & Naletilic*, [Appeals Judgment](#), paras. 114, 118; *Prosecutor v. Kunarac et al.* [Appeals Judgment](#), Judgment, paras. 102-104; ICTR, *Prosecutor v. Kayishema & Ruzindana*, [Trial Judgment](#), para. 134

⁶⁰ [ICC-01/04-01/07-3363](#), para. 55.

36. The use of Regulation 55 to resurrect rejected charges or modes of liability (Issues 4 and 5) raises significant issues of fairness, including as concerns the principle of legal certainty, and the impartiality of the Trial Chamber. The right to an impartial Trial Chamber demands a clear separation between the role of the Pre-Trial Chamber in confirming charges, as compared to the role of the Trial Chamber in determining whether the evidence satisfies the confirmed charges. If the Trial Chamber adopts an overly active and broad approach in interpreting the facts (or extrapolating new facts), so as to allow for a range of additional, and more serious charges, this will raise the question as to whether the Trial Chamber has in fact donned the mantle of an investigating/confirming judge, in violation of internationally recognized human rights law.⁶¹ In line with this concern, in *Lubanga*, the Appeals Chamber cautioned that “[t]o give the Trial Chamber the power to extend proprio motu the scope of a trial to facts and circumstances not alleged by the Prosecutor [in the charges] would be contrary to the distribution of powers under the Statute”.⁶² The prerogative for defining the factual elements of the charges also rests solely with the Pre-Trial Chamber: subsequent updates or clarifications risk promoting uncertainty, and prolonging the proceedings.⁶³
37. There is also a critical distinction between the scenario, in which the Pre-Trial Chamber declines to confirm a mode of liability due to the fact that it was not charged or its position that another mode of liability was more apt, as compared to the scenario in which the Pre-Trial Chamber makes an explicit determination that the evidence adduced during the confirmation hearing fails to satisfy the evidential threshold for confirming a specific charge or mode of liability. The latter finding should become final, unless the Prosecution appeals, or avails itself of the procedure under Article 61(9). The prospect of the Trial Chamber using Regulation 55 to reopen such determinations would affect the principle of legality, in light of the well-established principle that “the Court’s statutory framework does not provide for the possibility of a review of confirmation decisions by trial chambers”.⁶⁴
38. As concerns Issue 5, the Trial Chamber’s determination is predicated on factual findings concerning Mr. Al Hassan’s alleged authorship of these reports: that there

⁶¹ *De Cubber v. Belgium*, [9186/80](#), paras. 27-30

⁶² [ICC-01/04-01/06-2205](#), para. 94.

⁶³ [ICC-01/05-01/13-992](#), paras. 16-17; ICC-01/12-01/18-548, para. 17; [ICC-01/05-01/13-2275-Red](#), para. 196.

⁶⁴ [ICC-01/14-01/18-542](#), para. 15.

are, in essence, substantial grounds to believe that he drafted and or signed these reports. The evidence relied upon by the Prosecution to support this allegation was comprised of P-0620's expert report and [REDACTED].⁶⁵ [REDACTED]. The Trial Chamber's determination thus affects the appearance of impartiality of the Chamber, both as concerns the outcome of this pending litigation and as concerns the trial process, in light of the implications as concerns the use of materials that are allegedly tainted by torture.

39. The Statutory proscription against adding new charges after the commencement of the trial is tied to the defendant's right to a speedy trial, and related right to adequate time and facilities to prepare his defence, on the basis of charges that have been notified in a timely manner. This issue thus clearly affects the expeditious conduct of the proceedings, in particular, in light of the burden caused by re-examining and adjusting Defence strategy and investigations, in the middle of trial proceedings.

40. In terms of the impact on expedition, the matters raised in Issues 1, 2, 3, 4 and 5 could and should have been addressed within the framework of the confirmation process. Although prompted by the Pre-Trial Chamber to consider the option, the Prosecution deliberately chose not to charge various allegations under Counts 1 to 5. The Prosecution has also been in possession of the Islamic Police Reports since 2013, but failed to adduce clear and sufficient evidence to demonstrate the authorship and linkage of various reports during the confirmation hearing. The Prosecution also decided not to appeal the Pre-Trial Chamber's findings that the Prosecution had failed to satisfy the evidential threshold for various charges and modes of liability. The Appeals Chamber has affirmed that the imperative of ensuring expeditious proceedings dictates that issues concerning the formulation of the charge should be resolved before the start of the trial, in accordance with the procedure set out by Rule 134(1) and (2).⁶⁶ This is because:⁶⁷

the purpose of rules 134 and 122 of the Rules is to safeguard the nature of the judicial process as an orderly succession of procedural acts provided by law that ensure the proper administration of justice, including the expeditious conduct of the proceedings

⁶⁵ ICC-01/12-01/18-461-Conf-Corr, paras. 712, 719.

⁶⁶ [ICC-02/04-01/15-1562](#), paras. 130-132, 142.

⁶⁷ [ICC-02/04-01/15-1562](#), para. 131.

41. The Appeals Chamber further averred that “the duty to act in a diligent and expeditious manner applies to all those involved in the proceedings”;⁶⁸ there is thus no logical rationale for imposing a strict obligation on the part of the Defence to comply with this requirement, while affording the Prosecution leeway to obtain rulings on similar challenges, through the vehicle of a Regulation 55 Decision issued after the commencement of the trial.

42. Moreover, as is the case with Issues 1 and 2, the changes presaged by Issue 3 further augment and complicate Defence preparation. It also increases the scope of work, and evidence that must be introduced to meet these counts. For example, whereas the Defence could have addressed and rebutted the count of persecution by focusing on persecutory intent, if the acts of rape are shift and added to Counts 1 and 5, the Defence must now address these acts in addition to the existing material facts concerning arrest and detention, in the absence of any clear indication as to which acts will be relied upon to establish the threshold of severity, mental elements, or the connection to a shared criminal objective.⁶⁹ The absence of certainty as concerns the purposes, in relation to which the acts can be relied upon, also multiplies the volume of Defence argumentation since the Defence must now shadow-box a range of different possibilities. It is notable that the Appeals Chamber critiqued the *Lubanga* Regulation 55 Decision as being “extremely thin” in its reasoning, due to the fact that “the Trial Chamber neither provided any details as to the elements of the offences the inclusion of which it contemplated, nor did it consider how these elements were covered by the facts and circumstances described in the charges.”⁷⁰

43. The manner in which the Trial Chamber resolved these Issues has introduced a significant degree of uncertainty into the proceedings. This necessarily impedes and

⁶⁸ [ICC-02/04-01/15-1562](#), para. 152.

⁶⁹ [ICC-01/04-01/07-3436-AnxI](#), para. 33: “It is crucial to note that it is insufficient to simply compare ‘stories’ in order to see to what extent they contain some of the same elements. It is equally important to analyse the legal significance of each fact within the framework of each narrative, because this determines how an accused would defend him or herself against the charges as formulated. It matters a great deal, in this respect, how important certain parts of the story are within each narrative. A similar fact may be a mere detail in one narrative, but constitute the linchpin of another. Accordingly, a defendant may have chosen not to devote scarce resources to such a fact because it could not be expected to have any tangible effect on the outcome of the case, whereas he or she would in all likelihood concentrate all his or her investigative efforts on that same fact if that fact were to perform a different function in an alternative narrative. The same is true for trial time spent on such issues, the number and type of questions posed during cross-examination, the evidence called to rebut the allegation, or indeed the facts admitted or agreed to.”

⁷⁰ [ICC-01/04-01/06-2205](#), para. 109.

augments Defence preparation in relation to the scope of evidence that should be challenged or introduced by the Defence in order to meet these potential charges. The Article 82(1)(d) element of expeditiousness is met in such circumstances because:⁷¹

the course of the trial may be significantly changed by the decision on whether changing the legal characterisation of the facts can extend to including crimes under Articles 7(1)(g), 8(2)(b)(xxvi), 8(2)(e)(vi), 8(2)(a)(ii) and 8(2)(c)(i). As with Defence Issue 1, this is likely to have consequences as regards the evidence which it is considered necessary to put before the Chamber, as well as the time needed for future preparation by, and the resources of, the parties and participants.

44. The preliminary nature of the notice also does not lessen the ramifications. Thus, in *Katanga*, Trial Chamber II explained in the context of a Regulation 55 notice, that:⁷²

There can also be little doubt that the Impugned Decision has the clear potential to significantly affect the expeditiousness of the proceedings as well. That the impact of the Impugned Decision in this regard cannot be determined with absolute certainty, as is argued by the prosecution, is not a sufficient reason to refuse leave to appeal. Absolute certainty about how a decision will affect the expeditiousness of the proceedings is not a precondition under Article 82(1)(d). Moreover, it is not a precondition that the Impugned Decision causes an undue delay, only that the expeditiousness of the proceedings be significantly affected.

45. Since a Regulation 55 notice impacts directly on the scope and content of the Article 74 judgment, immediate appellate intervention is also necessary to secure the integrity of the verdict, since:⁷³

[w]hile it is true that the Defence could also raise its objections against the Impugned Decision after the Chamber has rendered its judgment under Article 74 of the Statute, it is clear that waiting until then may create the undesirable situation in which the Chamber would have pronounced itself on the guilt or innocence of the accused and may have passed sentence and awarded reparations, even though the legality of the Impugned Decision is still unresolved.

46. If the Trial Chamber has resolved these Issues in an erroneous manner, the Trial Chamber's reliance on these acts for improper purposes could invalidate their findings concerning these Counts. Immediate appellate resolution would ensure that the trial proceedings along the correct lines by ridding the trial of errors that could legally or

⁷¹ [ICC-01/04-01/06-2107](#), para. 33.

⁷² [ICC-01/04-01/07-3327](#), para. 14.

⁷³ [ICC-01/04-01/07-3327](#), para. 16.

procedurally invalidate the outcome, or otherwise result in unnecessary litigation and evidential debate concerning allegations that fall outside the proper scope of the case.

Relief Sought

47. For the reasons set out above, the Defence respectfully requests the Trial Chamber to grant leave to appeal in relation to the Five Issues identified above.



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Dated this 18th Day of January 2021
At The Hague, The Netherlands