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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 "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, 22 January 2021**

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I. Introduction

1. The Defence for Mr Al Hassan’s application (“Request”) for leave to appeal Trial Chamber X’s (“Chamber”) “Decision on application for notice of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court” (“Decision”) should be dismissed.¹

2. In its Request, the Defence identified five purportedly appealable issues (“Issues”) which allegedly arise from the Decision. However, none of these issues constitute an appealable “issue” within the terms of article 82(1)(d) of the Statute.

3. Should the Chamber decide not to dismiss the Request on the basis that it does not demonstrate appealable issues arising from the Decision, the Request should in any event be denied as the Issues fail to meet the remaining cumulative criteria under rule 82(1)(d) of the Statute. The proposed Issues do not significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, nor do they require immediate resolution by the Appeals Chamber to materially advance the proceedings.

II. Confidentiality

4. Pursuant to regulation 23bis(2) of the Regulations of the Court (“Regulations”), this response is filed confidentially because it responds to a Request and makes reference to a Decision of the same classification.

III. Submissions

A. The Issues do not constitute appealable issues within the terms of article 82(1)(d)

i. The First Issue: 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

5. The First Issue brought by the Defence in its Request is not an appealable issue arising from the Decision, but merely a disagreement with the timing of the Chamber’s Decision, as well as a misunderstanding of the Decision regarding the basis for such timing and of the

¹ ICC-01/12-01/18-1211-Conf (“Decision”); ICC-01/12-01/18-1251-Conf (“Request”).

² Request, para. 2-8.

Decision's content.

6. The Defence argument that in relation to the Decision's timing, the Chamber abused its discretion to the detriment of Mr Al Hassan's fair trial rights,³ amounts to a disagreement with such timing and misunderstands the basis for it. As noted by the Chamber in the section of the Decision dealing with the applicable law,⁴ regulation 55(2) of the Regulations expressly indicates that it may be invoked 'at any time during the trial',⁵ including "the phase after the Chamber has been seised of the case and before opening statements, as well as deliberations."⁶ The Chamber also recognised that "a Regulation 55(2) notice should always be given as soon as possible."⁷

7. The Defence does not challenge these findings,⁸ but rather maintains without substantiation that the Decision's timing was inconsistent with Mr Al Hassan's rights. In doing so, it simply expresses its disagreement with the Chamber's assessment. The Defence also fails to address the Chamber's finding that giving notice for the possible re-characterisations does not cause unfairness to the Accused at this stage of the proceedings,⁹ among other reasons because the notice comes at an early point in the trial proceedings, allowing the Defence to have an adequate opportunity to adapt its strategy as necessary.¹⁰ Contrary to the Defence contention,¹¹ the Chamber took into account the procedural history in this case.¹² Moreover it correctly noted, in connection with the possible re-characterisation of facts related to crimes, that "the Defence is aware that Regulation 55 notice is a possibility in light of PTC I's clear legal findings on the matter in the Charging Documents."¹³

8. In addition, the Defence is not accurate when it states that the Decision "is not based on the Trial Chamber's appreciation of evidence submitted at trial, but rather its interpretation of

³ Request, para. 8.

⁴ See Decision, section II.A ("The scope of the Chamber's inquiry and the applicable law").

⁵ See Decision, para. 9.

⁶ Decision, para. 9, citing *inter alia* ICC-02/11-01/15-369 ("[Gbagbo Regulation 55\(2\) AD](#)"), para. 51, 57, 67 and ICC-01/04-01/07-3363 ("[Katanga Regulation 55 AD](#)"), para. 17, 21, 24 and 93.

⁷ Decision, para. 9, citing *inter alia* [Katanga Regulation 55 AD](#), para. 24 and 102.

⁸ See Request, para. 4.

⁹ Decision, para. 83, 112.

¹⁰ Decision, para. 84, 112.

¹¹ See Request, para. 7-8.

¹² See Decision, para. 1-8, and references to ICC-01/12-01/18-461-Conf-Corr ("Confirmation Decision") and ICC-01/12-01/18-767-Conf-Corr ("23 April 2020 Decision"), in particular para. 54-55, 84.

¹³ Decision, para. 84. See also para. 16, referring to Confirmation Decision, para. 315, 676 and 681-682; 23 April 2020 Decision, para. 94-97, 125, 103-104 and 136.

the Pre-Trial Chamber's findings."¹⁴ Nor is the Defence accurate when it says that there is "no objective justification" for the lapse of time between the filing of the Prosecution application for regulation 55(2) notice and the issuance of the Decision.¹⁵

9. The Chamber noted that "notice of any legal re-characterisation essentially depends on *whether and when it appears to the Chamber* that legal re-characterisation may be possible in this case."¹⁶ While for the majority of the possible re-characterisations in the Decision, such appearance arose from "(i) the 'facts and circumstances' described in the charges", for one of them such appearance arose from "(i) the 'facts and circumstances' described in the charges; and/or (ii) the evidence led at trial." This can be seen from the wording of the Chamber's Decision with respect to these potential re-characterisations.¹⁷ Related to the seven cases that were the subject of a proposed re-characterisation under article 25(3)(c), the Chamber noted it had received a body of evidence,¹⁸ namely the Islamic Police reports and Islamic Tribunal judgements allegedly related to them.¹⁹ The Chamber referred to its email decisions on submitted material for P-0007 and P-0102 dated 18 September 2020 and 1 October 2020, respectively.²⁰ Additionally, in declining the Prosecution requests for certain possible re-characterisations, the Chamber took into account the point in time at which it was assessing whether it appeared to it that the legal characterisation may be subject to change, including that it was "prior to the hearing of *further* evidence".²¹

10. Furthermore, the Defence inaccurately portrays the Decision when it argues that the Decision's content was inconsistent with Mr Al Hassan's fair trial rights. The Defence argues that it is not apparent that the goal of closing accountability gaps applies to the Decision since it "primarily concerns re-characterisations of a duplicative or aggravated nature".²² To the contrary, with respect of the possible re-characterisations of facts related to crimes, the Chamber gave notice of possible re-characterisations that were not duplicative and in doing

¹⁴ Request, para. 3.

¹⁵ Request, para. 3.

¹⁶ Decision, para. 12 (emphasis in original).

¹⁷ *Compare* Decision, para. 23, 32, 42, 51, 70, 80 (using similar wording to the following "Having regard to the elements required on the face of article[...] and the facts and circumstances described in the charges, as set out in paragraph [...] [of one of the Charging Decisions]" with para. 110 ("Having regard to the elements required on the face of [...] and the facts and circumstances described in the charges, as set out in paragraphs [...] of the Confirmation Decision, *as well as the evidence received*") (emphasis added).

¹⁸ Decision, para. 112.

¹⁹ Decision, para. 108.

²⁰ Decision, para. 108, fn. 135.

²¹ *See* Decision, para. 125, 135, 140 (emphasis added).

²² Request, para. 7.

so referred to the objective of regulation 55 “to change the legal characterisation of the facts in order to ‘close accountability gaps’”.²³ This is apparent from its findings giving notice of possible re-characterisations. For example, for P-1134 and P-0609 (torture as a crime against humanity and as a war crime), the Chamber found that the requests for notice in relation to these incidents raised issues which could result in an accountability gap and that the Chamber should not be precluded from convicting for the crime which most properly describes the acts committed and which has a distinct value in terms of accountability and establishment of the truth.²⁴ It is also apparent from its findings declining notice of possible re-characterisations for example for P-0609 (passing of irregular sentences) and P-1708 (outrages upon personal dignity), finding that it was not necessary to address any accountability gap given the nature of the various crimes already available to the Chamber in relation to the alleged conduct.²⁵

11. Given that it is based on a disagreement with, and an incorrect understanding of the Decision, the First Issue does not arise from it, and therefore does not constitute an appealable issue.

ii. The Second Issue: 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.²⁶

12. The Second Issue brought by the Defence in its Request is not an appealable issue because the Defence misrepresents the 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

13. For its argument under the Second Issue, the Defence refers to certain paragraphs of the

²³ Decision, para. 9. *See also* para. 11.

²⁴ *See* Decision, para. 25, 34. *See also* Decision, para. 53 (regarding P-0570, 0547, 0574 and 0542 (rape as a crime against humanity and as a war crime), 82 (Dédéou Maiga (mutilation as a war crime)). *See further* Decision, para. 70 (regarding P-0542 (other inhumane acts as a crime against humanity and cruel treatment as a war crime)) (as regards P-0547 and P-0570, the Chamber declined to provide notice of the possible re-characterisations at this stage finding that it would be in a better position to make its assessment for these incidents at a later stage, upon hearing the testimony of the relevant witnesses in court).

²⁵ *See* Decision, para. 35, 44.

²⁶ Request, para. 9-12.

²⁷ Request, para. 12.

Decision relating to P-1134 and P-0609 (torture as a crime against humanity and as a war crime) and P-0570, P-0547, P-0574 and P-0542 (rape as a crime against humanity and as a war crime).²⁸ In these paragraphs, in connection with the Prosecution's requests for possible re-characterisation of facts related to *crimes*²⁹ (as opposed to re-characterisation of facts related to modes of liability),³⁰ the Chamber indicated that what was at stake was whether the legal elements of the proposed crime were covered by the facts and circumstances linked to the acts committed against the relevant victims, without having regard to the criminal responsibility of Mr Al Hassan at that stage.³¹

14. The Defence takes these paragraphs out of context and misunderstands the Decision when it argues that the Chamber did not have 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".³²

15. First, in the Decision, the Chamber addressed the Defence arguments in this regard. Thus, with respect to P-0570, P-0547, P-0574 and P-0542 (rape as a crime against humanity and as a war crime), the Chamber addressed the Defence argument that there were no confirmed facts and circumstances on which to base a conclusion that Mr Al Hassan made knowing or intentional contributions to the commission of these incidents.³³ It found that in the 23 April 2020 Decision amending the charges, PTC I confirmed Mr Al Hassan's liability under article 25(3)(d) of the Statute for crimes of rape in detention, including his alleged knowledge and contributions to acts of a sexual nature allegedly committed against women while they were detained and under the control of members of the armed groups.³⁴ Also with respect to this possible re-characterisation (P-0570, P-0547, P-0574 and P-0542 (rape as a crime against humanity and as a war crime)), the Chamber noted that "the relevant facts and circumstances, which were confirmed under count 13 of the charges, remain unchanged".³⁵ Accordingly, the facts and circumstances relating to the individual criminal responsibility of Mr Al Hassan as confirmed by the PTC would already cover the facts and circumstances of the possibly re-characterised crimes. It then found that "the alleged link between each

²⁸ Request, para. 9, citing Decision, para. 26, 36, 56.

²⁹ See Decision, section II.B.1 ("Re-characterisations of facts related to crimes").

³⁰ See Decision, section II.B.2 ("Re-characterisations of facts related to modes of liability").

³¹ See Decision, para. 26, 36, 56.

³² Request, para. 9.

³³ See Decision, para. 50 (setting out the Defence submissions).

³⁴ Decision, para. 54-55, citing 23 April 2020 Decision.

³⁵ Decision, para. 56.

incident and the common purpose of the armed groups, as well as Mr Al Hassan's alleged knowledge and contributions" will be fully considered and addressed in the Chamber's final judgment.³⁶ The Chamber reiterated this finding in relation to P-1134 and P-0609 (torture as a crime against humanity and as a war crime), when it concluded that the analysis of this link will be addressed in the final judgement of the Chamber.³⁷

16. Second, contrary to the Defence contention that the Chamber failed to identify the mode of liability for the crimes for which it gave notice of possible re-characterisation,³⁸ the Chamber expressly set out this mode. According to the Chamber, it was the same mode of liability confirmed by PTC I for other counts related to the incidents in respect of which it gave notice of possible re-characterisation, namely article 25(3)(d) of the Statute.³⁹ In this connection, the Pre-Trial Chamber had already found that the crimes (torture as a crime against humanity and as a war crime, and rape as a crime against humanity and as a war crime) fell within the common purpose of article 25(3)(d), and that Mr Al Hassan had made a contribution to the crimes with the relevant *mens rea*.⁴⁰

iii. The Third Issue: 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 (confirmed in respect of the crime of persecution under count 13) in its assessment and analysis of counts 1 to 5, violates Mr Al Hassan's right to detailed and timely notice of the nature, cause and content of counts 1 to 5.⁴¹

17. The Third Issue is not an appealable issue arising from the Decision. The Defence does not correctly represent the Chamber's findings and many of its arguments are mere disagreements with the Decision.

18. First, the Defence inaccurately states that the Chamber took into account "any facts and circumstances that *might* be relevant to the charges" in finding that it may take into account the allegations of acts of a sexual nature under counts 1 to 5 (for P-0574) and under count 5

³⁶ Decision, para. 56.

³⁷ Decision, para. 26, 36. *See also* para. 22, 31 (setting out the Defence submissions).

³⁸ *See* Request, para. 12. *See also* para. 10(b) ("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").

³⁹ Decision, para. 86.

⁴⁰ *See* Confirmation Decision, para. 954-1010 (article 25(3)(d)); 23 April 2020 Decision, para. 173-175, 177-196.

⁴¹ Request, para. 13-22.

(for P-0542, P-0570 and P-0547).⁴² Rather, the Chamber rightly found that it may “consider all relevant facts and circumstances, *confirmed by the pre-trial chamber*, in assessing each count”.⁴³ The Defence ignores the Chamber’s pronouncement of this well-established principle and states instead that the Chamber “look[ed] beyond” the specific paragraphs cited by the Pre-Trial Chamber as the factual basis for each count and “unravel[led] the very certainty that the Pre-Trial Chamber attempted to construct”.⁴⁴ The Defence’s erroneous view of the Chamber’s ability to consider all facts and circumstances confirmed by the Pre-Trial Chamber undermines its arguments in respect of the Third Issue.

19. As the Chamber has previously held, it has a “broad discretion to interpret the facts” and is entitled to “draw out the ‘facts and circumstances’ of the charges, as it considers appropriate, from the decision of the Pre-Trial Chamber in its totality, while respecting the Pre-Trial Chamber’s findings as to the scope of the charges”.⁴⁵ The Trial Chamber is therefore not bound by the Pre-Trial Chamber’s narrative of the confirmed facts.⁴⁶ This is because the structure of the confirmation decision is not necessarily determinative.⁴⁷ What matters is that the charges are clear and unambiguous.⁴⁸ Accordingly, the Chamber was *not* precluded from finding that the facts and circumstances relating to certain victims under one count in the Confirmation Decision may be relevant to the charges involving those same victims under other counts. Nor would it give rise to an issue of lack of notice.⁴⁹ Provided the facts are confirmed by the Pre-Trial Chamber, the Trial Chamber may reasonably draw upon them—however differently it may appreciate or organise the facts—to find that the Accused has been provided with sufficient notice of the facts establishing the relevant crimes or modes

⁴² Request, para. 13 (emphasis added).

⁴³ Decision, para. 60 (concerning P-0574), 68 (referring to and relying upon its reasoning for P-0574 in respect of P-0542, P-0570 and P-0547) (emphasis added).

⁴⁴ Request, para. 15.

⁴⁵ ICC-01/12-01/18-789-AnxA (“[Conduct of Proceedings Directions](#)”), para. 9-10. See also [2019 ICC Chambers Practice Manual](#), para. 58 (“The description of the facts and circumstances in the charges as confirmed by the Pre-Trial Chamber is binding on the Trial Chamber”).

⁴⁶ [Katanga Regulation 55 AD](#), para. 58 (“The Appeals Chamber also does not accept that a change in the narrative exceeds *per se* the facts and circumstances described in the charges. As pointed out by the Trial Chamber, focusing on certain facts to the exclusion of others will necessarily alter the narrative: indeed, it would appear inevitable that a change in characterisation would result in a change of narrative to a certain extent. Whether the change of narrative is of such an extent or nature that it does, in fact, exceed the facts or circumstances is something on which the Appeals Chamber will only be able to rule if and when the Trial Chamber has changed the legal characterisation in its decision under article 74 of the Statute”).

⁴⁷ [2019 ICC Chambers Practice Manual](#), para. 38 (stating, albeit in the context of the Prosecutor, that “[t]he Pre-Trial Chamber shall bear in mind that the decision on what to charge, as well as how the charges shall be formulated, is fully within the responsibility of the Prosecutor”).

⁴⁸ [2019 ICC Chambers Practice Manual](#), para. 59 (stating that the “charges presented by the Prosecutor and those finally confirmed by the Pre-Trial Chamber [must be] clear and unambiguous [...]”).

⁴⁹ *Contra* Request, para. 14, 21, 22.

of liability.⁵⁰

20. Second, the Chamber did not leave the Defence in doubt as to how or in what manner it would consider these allegations regarding these victims in its adjudication of counts 1 to 5.⁵¹ In claiming otherwise, the Defence cites only to the Chamber's conclusion that it would take these allegations into account,⁵² while ignoring the Chamber's reasoning explaining its approach in paragraphs 60 to 61 of the Decision. There, the Chamber clearly stated that a legal re-characterisation of the facts concerning acts of a sexual nature was unnecessary and that—if the evidence is sufficient to establish the acts—the acts of a sexual nature perpetrated against P-0574 would be “highly relevant to the assessment of whether acts of violence and other forms of mistreatment were committed” under counts 1 to 5. The Chamber concurred with the Pre-Trial Chamber that it is “impossible in practice to dissociate” the acts of rape from the other conditions of detention given that it was the same victim who experienced these events at the same time or within a very short space of time..⁵³ The lack of clarity that the Defence alleges, which underlies its claim of a lack of adequate notice, does not arise from the Decision.

21. The Defence also misunderstands the Chamber's approach by arguing that the Chamber failed to address the Accused's mental element or personal culpability for the incidents of rape against P-0542, P-0570 and P-0547,⁵⁴ as it in any event did not need to do so where the acts of rape had not been legally re-characterised to the crimes in counts 1 to 5.⁵⁵

22. Third, the Defence's claim that the allegations regarding the rape of three of the victims (P-0542, P-0570 and P-0547) are vague or lack specificity is based on an artificially delineated reading of the Decision and the Confirmation Decision.⁵⁶ The allegations concerning the acts of a sexual nature were not simply comprised of one sentence in the Confirmation Decision.⁵⁷ The allegations concerning these victims were contained under different parts of the Confirmation Decision, and concerned their experiences of events that

⁵⁰ See e.g. ICC-01/14-01/18-703-Red (“[Yekatom & Ngaissona Scope of Charges Decision](#)”), para. 27-37 (interpreting the facts contained in the confirmation decision and concluding that the Accused, Yekatom, had received sufficient notice of the facts establishing the objective elements of co-perpetration).

⁵¹ *Contra* Request, para. 13, 18.

⁵² See e.g. Request, fn. 22, 23, citing Decision, para. 62, 68.

⁵³ Decision, para. 61, citing Confirmation Decision, para. 102 (emphasis added).

⁵⁴ *Contra* Request, para. 13.

⁵⁵ *Compare* Decision, para. 47, 54-55 with para. 60-62.

⁵⁶ Request, para. 16.

⁵⁷ *Contra* Request, para. 16.

took place at the same time or within a very short space of time.⁵⁸ The charges must be read as a whole,⁵⁹ and the Chamber did just that in finding that the allegations of acts of a sexual nature concerning P-0570, P-0547, P-0574 and P-0542 as set out in the section on count 13 (persecution) in the Confirmation Decision, should be read together with the allegations concerning the same victims in the sections on counts 1 to 5 to understand the full circumstances of the incidents of violence that the victims were exposed to.⁶⁰ The allegations read together in that manner provide sufficiently specific details regarding the time, place and manner of commission of the acts of a sexual nature. The Defence does not try to argue otherwise, instead focusing narrowly on the details provided under count 13 alone and providing incomplete references to support its arguments.⁶¹ In any event, further details about the charges may, depending on the circumstances, also be contained in other auxiliary documents, and need not be exclusively limited to the charging documents,⁶² even where the details concern facts that were subject to potential legal re-characterisation.⁶³

23. Fourth, the Defence raises inapposite arguments concerning the anonymous and uncorroborated nature of the evidence underlying the allegations of rape concerning three of the victims (P-0542, P-0570 and P-0547) which do not arise from the Decision.⁶⁴ The Defence ignores that the Pre-Trial Chamber had already relied upon the evidence of this nature in confirming the charges involving these victims for counts 1 to 5.⁶⁵ Moreover it stated in *obiter* that it considered the elements of the crime of rape as a crime against humanity and war crime were established to the requisite standard, based on the same evidence.⁶⁶ The evidence was therefore sufficient for the purposes of confirming the charges under several counts, and the Chamber was not called upon to interrogate this finding—nor

⁵⁸ Confirmation Decision, para. 334, 677 (P-0570); 337, 678 (P-0547); 282, 679 (P-0574); 331, 680 (P-0542). See also Decision, para. 51.

⁵⁹ *Prosecutor v. Prlić et al.*, IT-04-74-A, [Judgement \(Vol. 1\)](#), 29 November 2017, para. 27; *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-A, [Judgement \(Vol. 1\)](#), 14 December 2015, para. 510.

⁶⁰ Decision, para. 51, 61-62, 68.

⁶¹ See Request, fn. 35 (citing only a conclusory sentence of the Confirmation Decision), 36 (providing no specific paragraph citation).

⁶² ICC-01/04-01/06-3121-Red (“[Lubanga AJ](#)”), para. 124; ICC-01/04-02/06-2359 (“[Ntaganda TJ](#)”), para. 37.

⁶³ [Katanga Regulation 55 AD](#), para. 101 (stating that “more detailed information about the factual allegations to which the potential change in legal characterisation of the facts relate will therefore often be required to enable the accused to defend himself or herself effectively. Such information, however, may be provided not only at the time of giving notice under regulation 55(2) of the Regulations of the Court, but also, in an adequate manner, subsequently in the proceedings”).

⁶⁴ Request, para. 14.

⁶⁵ Confirmation Decision, para. 330, 333, 336.

⁶⁶ Confirmation Decision, para. 682 (finding that although the crimes were established to the requisite standard, it did not confirm the facts under those particular crimes as this was not the manner in which the Prosecution had presented its case in the Document Containing the Charges).

was it required to do so. The Defence [REDACTED]⁶⁷ without explaining its relevance to the Defence's claim of a violation of the Accused's right to detailed and timely notice of the charges, which is the crux of the Third Issue. In any case it is settled law in this Court that evidence need not be corroborated, particularly when relating to acts of sexual violence,⁶⁸ and the Prosecutor is authorised to rely on witnesses whose identities are unknown to the defence at the confirmation hearing.⁶⁹

24. Finally, the Defence's claim that the Chamber provides untimely notice of the rape allegations in counts 1 to 5 amounts to a mere disagreement with the Decision.⁷⁰ The Defence has been on notice since 30 September 2019 of the facts regarding the incidents of rape against the four victims since those facts were confirmed by the Pre-Trial Chamber under count 13 (persecution) where the Pre-Trial Chamber also foreshadowed a possible re-characterisation of those facts to rape as a crime against humanity and war crime.⁷¹ The Defence also does not address the Chamber's finding that the Defence will have adequate opportunity to adapt its strategy because notice comes at an early point in the trial proceedings.⁷²

iv. The Fourth Issue: 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

⁶⁷ [REDACTED].

⁶⁸ Rule 63(4), Rules of Procedure and Evidence: Without prejudice to article 66, paragraph 3, a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence. See [Ntaganda TJ](#), para. 75-76; ICC-01/05-01/08-3343 (["Bemba TJ"](#)), para. 245-246; ICC-01/04-02/12-271-Corr (["Ngudjolo AJ"](#)), para. 148 (noting that while corroboration is an element that a reasonable trier of fact may consider in assessing evidence, the question of whether or not to consider it forms part of the Trial Chamber's discretion).

⁶⁹ ICC-01/04-01/06-773 (["Lubanga First Redactions AD"](#)), para. 50 ("[T]he use of summaries [...] may affect the ability of the suspect pursuant to article 61 (6) (b) to challenge the evidence presented by the Prosecutor at the confirmation hearing in two respects: first, the Prosecutor is authorised to rely on witnesses whose identities are unknown to the defence (anonymous witnesses); second, the ability of the defence to evaluate the correctness of the summaries is restricted because the defence does not receive prior to the confirmation hearing the witness statements and other documents that form the basis of the summaries. However, this does not mean that the use of such summaries at the confirmation hearing is necessarily prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial").

⁷⁰ *Contra* Request, para. 17.

⁷¹ Confirmation Decision, para. 682. See also Decision, para. 84.

⁷² Decision, para. 84.

circumscribed by article 74(2).⁷³

25. The Fourth Issue is not an appealable issue arising from the Decision. This is because it is predicated on an incorrect reading of the Chamber’s findings on the possible re-characterisation of facts under counts 2 and 4.

26. The Defence argues that in respect of P-0547 and P-0570, “after finding that it could take into account allegations of rape in the context of counts 1 to 5 (Issue 3), the 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”.⁷⁴ But the Defence overlooks that the Chamber ultimately *declined* to give notice of a possible re-characterisation to include counts 2 and 4 for these victims.⁷⁵ The Chamber explicitly stated that, “[b]earing in mind the negative finding of PTC I regarding the required threshold of suffering for count 2, the Chamber finds that it would be in a better position to make its assessments for these incidents at a later stage, upon hearing the testimony of the relevant witnesses in court. The Chamber therefore *declines to provide notice of the possible re-characterisations sought under count 2 and count 4 at this stage*”.⁷⁶ The Fourth Issue therefore does not arise from the Decision. To the extent that the Defence contends that the Issue arises from the Chamber’s stated approach as to how it may address this re-characterisation in the future, that is only a hypothetical—and therefore non-appealable—question at this stage. The Defence’s remaining arguments in respect of the Fourth Issue should therefore be dismissed *in limine*.⁷⁷

27. However, even if, *arguendo*, the Chamber had given notice of a possible re-characterisation under counts 2 and 4 for P-0547 and P-0570, it was not precluded from legally re-characterising facts to a more serious offence or mental element provided those facts and circumstances were described in the charges.⁷⁸ While the Defence emphasises the lack of a finding in the Confirmation Decision regarding the *degree of suffering* required for

⁷³ Request, para. 23-27.

⁷⁴ Request, para. 23.

⁷⁵ Decision, para. 74.

⁷⁶ Decision, para. 74 (emphasis added); *see also* para. 86 (listing out the facts and circumstances whose legal characterisation may be subject to change. The list does not include the incidents related to P-0547 and P-0570 and the possible re-characterisation under counts 2 and 4).

⁷⁷ Request, para. 24-27.

⁷⁸ *Contra* Request, para. 26-27.

other inhumane acts as a crime against humanity,⁷⁹ this concerns a *legal* finding of one of the material elements of the crime. Provided the Trial Chamber's eventual determination of the degree of suffering of the victims is based on facts contained in the charges—and bearing in mind that findings of harm or suffering for other inhumane acts may be inferred from the facts in the case⁸⁰—then it will not exceed the facts and circumstances of the charges. There would consequently be no intrusion into the procedures set out in article 61.⁸¹ Nor does regulation 55 limit the changes in legal characterisation that may be permissible.⁸² Ultimately, the fundamental interest to be protected in either process is that the Defence is afforded adequate time and facilities to prepare its case in light of the possible re-characterisation. Whether that is the case is a matter to be determined on the facts of the specific case. In this case, as noted above, the question is merely hypothetical and does not arise from the Decision.

v. The Fifth Issue: 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.⁸³

28. The Fifth Issue brought by the Defence in its Request is not an appealable issue, but merely a disagreement with the Chamber's Decision. Further, to the extent that the Defence mischaracterises the Decision, the Fifth Issue similarly does not arise from it.

29. The Fifth Issue concerns the Chamber's finding that it appeared that “the legal characterisation of the facts and circumstances described in the charges may be subject to change as follows: the facts and circumstances underlying the incidents related to the individuals referred to in [REDACTED], under count 6 of the charges, may be subject to change to include Mr Al Hassan's liability under Article 25(3)(c) of the Statute.”⁸⁴

30. In the Fifth Issue, the Defence essentially argues that the Chamber exceeded the facts

⁷⁹ Request, para. 23.

⁸⁰ See e.g., *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, [Judgement](#), 2 November 2001, para. 208-209; *Prosecutor v. Kupreškić et al.*, IT-95-16-T, [Judgement](#), 14 January 2000, para. 818-820; *Prosecutor v. Kajelijeli*, ICTR-98-44A-T, [Judgement and Sentence](#), 1 December 2003, para. 936; *Prosecutor v. Krstić*, IT-98-33-T, [Judgement](#), 2 August 2001, para. 523; *Prosecutor v. Khieu Samphan et al.*, Case 002/01, [Appeal Judgement](#), 23 November 2016, para. 656-657.

⁸¹ *Contra* Request, para. 27. See ICC-01/04-01/06-2205 (“[Lubanga Regulation 55\(2\) AD](#)”), para. 97.

⁸² [Lubanga Regulation 55\(2\) AD](#), para. 100.

⁸³ Request, para. 28-31.

⁸⁴ Decision, para. 114.

and circumstances confirmed in the charges by impermissibly adding unconfirmed facts regarding Mr Al Hassan's alleged authorship of the specific Islamic Police reports, and the connection between these Islamic Police reports and the specific written Islamic Tribunal judgements. The Defence argues that this constitutes a *de facto* amendment of the charges.⁸⁵ However, the Chamber in the Decision found that "the legal elements are covered by the relevant facts and circumstances and the possible re-characterisation would not exceed the facts and circumstances described in the charges."⁸⁶ With its Fifth Issue, the Defence merely disagrees with the Chamber's assessment, and therefore does not identify an appealable issue.

31. The Defence also misunderstands the Decision where it argues that the Chamber impermissibly added unconfirmed facts regarding Mr Al Hassan's alleged authorship of the specific Islamic Police reports, and the connection between these Islamic Police reports and the specific written Islamic Tribunal judgements.⁸⁷ The Chamber referred to findings of PTC I in the Confirmation Decision regarding the victims' in the seven cases being sentenced by the Islamic Tribunal.⁸⁸ It noted "that the Islamic Police reports and Islamic Tribunal judgements allegedly related to the seven cases have been formally submitted on the case record."⁸⁹ Rather than unconfirmed facts, the Chamber found by reference to findings of PTC I in the Confirmation Decision that Mr Al Hassan's role in the drafting of Islamic Police reports and their transmission to the Islamic Tribunal, "form[ed] an integral part of PTC I's factual findings and narrative."⁹⁰ On this basis, it concluded that "[h]aving regard to the elements required on the face of Article 25(3)(c) of the Statute and the facts and circumstances described in the charges [referring to paragraphs of the Confirmation Decision] as well as the evidence received" the Prosecution had demonstrated "that the legal elements of Article 25(3)(c) of the Statute in relation to the seven cases under count 6 may be derived from the facts and circumstances confirmed by PTC I."⁹¹

32. The Defence also misstates the law when it states that the Pre-Trial Chamber's failure to find that the Islamic Police reports were allegedly drafted and signed by the Accused and

⁸⁵ Request, para. 30-31.

⁸⁶ Decision, para. 111. *See also* Decision, para. 13 ("In deciding whether a re-characterisation is possible, a Chamber should take into account the elements of the offence and how these elements are covered by the 'facts and circumstances'").

⁸⁷ Request, para. 30-31.

⁸⁸ Decision, para. 107.

⁸⁹ Decision, para. 108.

⁹⁰ Decision, para. 109.

⁹¹ Decision, para. 110.

corresponded to the Islamic Tribunal written judgements for the seven cases, was not a finding “of a legal nature that could be subject to a legal requalification”.⁹² As indicated in the response to the Fourth Issue above, there is no requirement that a legal finding be the subject of possible re-characterisation. Furthermore, as noted by the Chamber, a trial chamber can re-characterise facts and circumstances to include a mode of liability that was considered, but not confirmed by the pre-trial chamber, so long as the facts and circumstances that could potentially be re-characterised were confirmed by that pre-trial chamber.⁹³ In this connection, the Chamber noted 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 judgements, as submitted by the Prosecution, and made no explicit finding in this regard.”⁹⁴

33. Finally, under this issue, the Defence also takes facts out of context. The Defence maintains that in the Document Containing the Charges (“DCC”), the Prosecution “recognised that it only had submitted evidence related to authorship of some of the reports”.⁹⁵ Rather, the Prosecution submitted that the Prosecution had documentary evidence showing that Mr Al Hassan wrote and signed multiple reports.⁹⁶ It submitted that Mr Al Hassan had recognised and identified his own signature and handwriting in reports that were shown to him,⁹⁷ and that expertise confirmed the authenticity and signature of Mr Al Hassan in many of these documents,⁹⁸ while Mr Al Hassan himself admitted that he had written reports which bore his sole signature which was considered as sufficient.⁹⁹ The Defence also incorrectly states that the Prosecution “conceded that it did not allege that Mr Al Hassan drafted the police report for the case of [REDACTED] in the DCC”.¹⁰⁰ Rather, the Prosecution simply stated that this report [REDACTED].¹⁰¹ While the Defence is correct that the DCC [REDACTED],¹⁰² [REDACTED],¹⁰³ and the 2020 Request for amendment to the

⁹² Request, para. 30 (emphasis in the original).

⁹³ Decision, para. 90.

⁹⁴ Decision, para. 107.

⁹⁵ Request, para. 29, referring to ICC-01/12-01/18-335-Conf-Corr (“DCC”), para. 302.

⁹⁶ See DCC, para. 299-303.

⁹⁷ DCC, para. 301.

⁹⁸ DCC, para. 302.

⁹⁹ DCC, para. 302.

¹⁰⁰ Request, para. 29, citing [REDACTED].

¹⁰¹ [REDACTED]. See also ICC-01/12-01/18-568-Conf, para. 11.

¹⁰² Request, para. 29. The Prosecution believes that the reference to [REDACTED] in this para. of the Request is in error, as this document is mentioned [REDACTED].

¹⁰³ See DCC, [REDACTED].

PTC clearly referred to [REDACTED] and its duplicate [REDACTED].¹⁰⁴

B. The Issues do not meet the remaining criteria for leave to appeal under article 82(1)(d)

i. The Issues do not affect the fair and expeditious conduct of the proceedings or the outcome of the trial

34. The Request should be dismissed because it fails to articulate how, if at all, the *possibility* of legal re-characterisation affects the fair and expeditious conduct of the proceedings or outcome of the trial. The Chamber clearly prefaced its findings explaining that the issue for its determination was “not a question of *actual* legal re-characterisation of any facts under Regulation 55(1) of the Regulations”, but rather, “whether notice of the *possibility* of such a re-characterisation should be given under Regulation 55(2) of the Regulations”.¹⁰⁵ Its findings throughout the Decision are thus framed in hypothetical terms,¹⁰⁶ and without prejudice to any decision the Chamber takes under regulation 55(1) and article 74 of the Statute.¹⁰⁷ Critically, it is in the article 74 decision where the Chamber decides whether to make the proposed re-characterisation for which notice was given.¹⁰⁸

35. It was for this reason that the Trial Chamber in *Gbagbo & Blé Goudé* declined to certify two appealable issues arising from a regulation 55(2) decision, finding that the impact on the proceedings was unduly speculative and thus did not meet the other cumulative criteria in article 82(1)(d) of the Statute.¹⁰⁹ Similarly in *Katanga*, the Appeals Chamber found that without knowing the precise nature of the re-characterisation or the evidence relied upon in support, it could not determine whether the proposed re-characterisation would adversely

¹⁰⁴ See ICC-01/12-01/18-568-Conf, para. 11, fn. 22, 24. See also [REDACTED].

¹⁰⁵ Decision, para. 11.

¹⁰⁶ See *e.g.* Decision, para. 52 and 71 (stating that the “possible re-characterisation would not exceed the facts and circumstances described in the charges”), 86 (stating, “[i]t appears to the Chamber that the legal characterisation of the facts and circumstances described in the charges *may* be subject to change as follows: [...]”) (emphasis added), 114, p. 45 (Disposition).

¹⁰⁷ Decision, para. 24, 33, 43, 52, 71, 81, 111.

¹⁰⁸ Decision, para. 10(iii).

¹⁰⁹ ICC-02/11-01/15-212 (“[Gbagbo Regulation 55\(2\) ALA Decision](#)”), para. 13 (“At this stage, the parties and participants were only notified of a *possibility* that the legal characterisation of the facts and circumstances described in the charges may be subject to change. As stressed in the Impugned Decision, this is without prejudice to any future decision under Regulation 55(1) of the Regulations and Article 74 of the Statute”), 14 (“Accordingly, without prejudice to whether or not the Category Two Issues constitute appealable issues, the Chamber is not satisfied that they meet the other cumulative criteria set out in Article 82(1)(d) of the Statute. Their impact on the proceedings is unduly speculative. They cannot have any significant impact on the fair and expeditious conduct of the proceedings or outcome of the trial, and appellate resolution could not materially advance the proceedings”).

affect the accused's right to an effective defence.¹¹⁰ In this context, the Second to Fifth Issues raised by the Defence fail to demonstrate how the alleged impact on the proceedings is anything more than speculative at this stage. The Defence cannot merely speculate in the abstract that a decision causes prejudice to the rights of an accused in order to invoke arguments regarding the fairness of the proceedings.¹¹¹

36. To the extent that the Defence argues that the timing of the Decision necessarily impacts on the fairness and expeditious conduct of the proceedings,¹¹² this claim is similarly misplaced. Regulation 55(2) expressly provides that the Trial Chamber has the discretion to give notice to the parties of a possible re-characterisation of the facts, “[i]f, at any time during the trial” it appears that the legal characterisation of the facts may be subject to change. The Appeals Chamber has held that it does not consider a change of the legal characterisation of the facts pursuant to regulation 55 to automatically lead to undue delay of the trial; whether that is the case will depend on the specific circumstances of the case.¹¹³ While the Defence cites a decision of Trial Chamber I in *Gbagbo & Blé Goudé* certifying for appeal two issues relating to the timeliness of a decision under regulation 55(2), that decision is inapposite to the particular facts of this case. In *Gbagbo & Blé Goudé*, the certified issues concerned the Trial Chamber's ability to issue a regulation 55(2) notice *prior* to the commencement of the trial, thus raising the question of the Trial Chamber's powers as opposed to the (un)timely exercise of it—a question which the Appeals Chamber resolved by finding that regulation 55(2) can be issued *at any time* once the Trial Chamber is seised of a case and *before the issuance of the article 74 decision*.¹¹⁴ By contrast, the First Issue raised by the Defence concerns the timeliness of the Trial Chamber's exercise of discretion under regulation 55(2)

¹¹⁰ [Katanga Regulation 55 AD](#), para. 95-96. While in *Katanga* the Appeals Chamber examined whether the re-characterisation contemplated by the Trial Chamber would exceed the facts and circumstances, the Appeals Chamber held that its appellate review in this regard could go no further than determining whether it was “immediately apparent” to the Appeals Chamber at that stage that the contemplated change in legal characterisation would exceed the facts and circumstances described in the charge: [Katanga Regulation 55 AD](#), para. 46.

¹¹¹ See [ICC-01/04-168](#), para. 10; [ICC-02/04-01/05-316](#), p. 6; [ICC-01/09-02/11-211](#), para. 33 and 39; [ICC-01/09-02/11-88](#), para. 25, *see also* para. 23-27; [ICC-01/04-01/06-2109](#), para.22; [ICC-01/05-01/08-680](#), para. 36; [ICC-01/09-02/11-275](#), para. 28-29; [ICC-01/09-01/11-301](#), para. 30.

¹¹² Request, para. 32-34, 39.

¹¹³ [Lubanga Regulation 55\(2\) AD](#), para. 86; [Katanga Regulation 55 AD](#), para. 94, 98 (finding that Katanga's arguments regarding the proposed re-characterisation—notice of which was given during the deliberation stage—and the violation of his right to be tried without undue delay are premature).

¹¹⁴ ICC-02/11-01/15-193 (“[Gbagbo Regulation 55\(2\) ALA](#)”), para. 11; [Gbagbo Regulation 55\(2\) ALA Decision](#), para. 2, 3, 12; [Gbagbo Regulation 55\(2\) AD](#), para. 51.

after the commencement of trial—a matter which is uncontroversial.¹¹⁵

37. The Defence’s arguments regarding the scale of the potential re-characterisation and the impact on the Accused’s right to adequate time and facilities to prepare his defence are generic and unsubstantiated.¹¹⁶ The Defence bases its arguments on the alleged impropriety of the notice of possible re-characterisation being issued in the terms the Chamber has done.¹¹⁷ The Defence argues that the Chamber effectively infringed the Pre-Trial Chamber’s prerogative to confirm the charges,¹¹⁸ and that the Prosecution has availed itself of an opportunity to bypass the evidentiary threshold for confirming the charges and modes of liability.¹¹⁹ These general arguments fail to address the settled law in this Court regarding the use and purpose of regulation 55, including that: it serves to close impunity gaps by ensuring that the Trial Chamber is not unnecessarily constrained by the precise characterisations established by the Pre-Trial Chamber at a much earlier stage of the proceedings and with a necessarily more restricted view of the case as a whole;¹²⁰ that the notice of a possible legal re-characterisation may be given in the course of the trial and even at the deliberations stage, provided the trial remains fair¹²¹—principles interpreted no differently in internationally recognised human rights;¹²² and that the procedure does not require a formal amendment to the charges.¹²³

38. Moreover, the Defence’s general arguments fail to identify any specific and realistic concern regarding the impact on the proceedings and outcome *in this case*. In particular, the Defence has not articulated how the Chamber’s possible consideration of facts relating to victims identified in counts 1 to 5 of the charges places any additional burden on the Defence that it is not already required to meet in order to defend count 13 where the same facts are relied upon and counts 11 and 12 where the facts may be subject to possible re-characterisation.¹²⁴ Nor was the Decision untimely,¹²⁵ or leave the Accused in doubt as to the

¹¹⁵ See *below* para. 37.

¹¹⁶ *Contra* Request, para. 34-46.

¹¹⁷ See Request, paras. 36-37.

¹¹⁸ Request, para. 36.

¹¹⁹ Request, para. 40-41.

¹²⁰ [Katanga Regulation 55 AD](#), para. 57.

¹²¹ [Katanga Regulation 55 AD](#), para. 1, 17, 20-21, 94; [Gbagbo Regulation 55\(2\) AD](#), para. 49; [Lubanga Regulation 55\(2\) AD](#), para. 84.

¹²² [Katanga Regulation 55 AD](#), para. 93.

¹²³ [Lubanga Regulation 55\(2\) AD](#), para. 84.

¹²⁴ See Decision, para. 59-63, 68-69. *Contra* Request, para. 42.

¹²⁵ See *above* para. 5-7.

facts and circumstances relied upon to support the possible re-characterisations.¹²⁶ The Defence misreads the Decision in claiming that the Accused lacks notice of the mental element and culpability as a result of the possible legal re-characterisations; and that the Decision introduces more serious charges concerning crimes that were not confirmed by the Pre-Trial Chamber.¹²⁷ Further, the Defence is incorrect in asserting that the Chamber expanded or extrapolated the facts in any way.¹²⁸ In relation to the Fifth Issue, the Decision giving notice of possible re-characterisation of Mr Al Hassan’s responsibility pursuant to article 25(3)(c) does not affect the Chamber’s appearance of impartiality, in general or regarding any future litigation concerning the inadmissibility under article 69(7) of the Accused’s interview and related material.¹²⁹

ii. An immediate resolution of the Issues would not materially advance the proceedings

39. The Defence does not argue—let alone demonstrate—that the immediate resolution of the Issues by the Appeals Chamber would materially advance the proceedings.¹³⁰ The Defence’s failure to show this in itself constitutes a sufficient basis to reject the Request.

40. In addition, because any suggested unfairness is speculative given that the actual re-characterisation of the facts has not (yet) occurred, it follows that an immediate resolution of the issue by the Appeals Chamber would not materially advance the proceedings.¹³¹ Nothing arising from the Decision taints the fairness of the proceedings or the outcome of the Decision;¹³² indeed, the Chamber recognised that the notice of the possible legal re-characterisations at this early stage of the trial informs the Defence in detail of the facts and circumstances relied upon for the proposed re-characterisation, and allows the Defence the opportunity to adapt its strategy as necessary.¹³³ In that regard, the Trial Chamber in the *Ruto et al.* case held that “[h]aving regard to the [...] speculative nature of the Defence’s arguments of prejudice”, an immediate resolution of the Issue would not materially advance

¹²⁶ See above para. 20. *Contra* Request, para. 43.

¹²⁷ See above para. 12-16, 18-19, 21-22, 26.

¹²⁸ See above para. 27. *Contra* Request, para. 36.

¹²⁹ See above para. 29-33. *Contra* Request, para. 38. See Decision, para. 107, 109 (“allegedly”).

¹³⁰ The Defence’s arguments focus on the alleged impact of the Issues on the fair and expeditious conduct of the proceedings. This also applies to the Defence’s argument that because the Issues involve the fairness of the proceedings, they must be resolved immediately by the Appeals Chamber: Request, para. 41.

¹³¹ [ICC-01/04-01/06-2109](#), para. 22.

¹³² [ICC-01/04-168](#), para. 14.

¹³³ Decision, para. 85, 112-113.

the proceedings.¹³⁴

IV. Requested Relief

41. For the reasons set out above, the Prosecution requests that the Chamber deny the Defence Request.



Karim A. A. Khan QC, Prosecutor

Dated this 30th day of July 2021

At The Hague, The Netherlands

¹³⁴ [ICC-01/09-01/11-1154](#), para 28.