



Original: English

**No. ICC-01/12-01/18
Date: 20 September 2021**

TRIAL CHAMBER X

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

SITUATION IN THE REPUBLIC OF MALI

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

Public redacted version of

**Second Decision on notice of possibility of variation of legal characterisation
pursuant to Regulation 55(2) of the Regulations of the Court**

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

The Office of the Prosecutor

Karim A. A. Khan

James Stewart

Counsel for the Defence

Melinda Taylor

Legal Representatives of Victims

Seydou Doumbia

Mayombo Kassongo

Fidel Luvengika Nsita

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

TRIAL CHAMBER X of the International Criminal Court, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, having regard to Articles 64(2) and 67(1) of the Rome Statute (the ‘Statute’) and Regulations 52 and 55 of the Regulations of the Court (the ‘Regulations’), issues the following ‘Second Decision on notice of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court’.

I. Procedural history

1. On 30 September 2019, Pre-Trial Chamber I (hereinafter: ‘PTC I’) confirmed charges against Mr Al Hassan (the ‘Confirmation Decision’).¹
2. On 31 January 2020, the Office of the Prosecutor (the ‘Prosecution’) filed a request for corrections and amendments of the Confirmation Decision before PTC I (the ‘Prosecution Request to Amend the Charges’).²
3. On 21 February 2020, PTC I issued a decision in which it *inter alia* rejected Parts I and II of the Prosecution Request to Amend the Charges (the ‘21 February 2020 Decision’).³

¹ Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18-461-Conf (a corrected version of the decision was filed on 8 November 2019, ICC-01/12-01/18-461-Conf-Corr; a public redacted version was filed on 13 November 2019, ICC-01/12-01/18-461-Conf-Corr-Red).

² Prosecution Request for corrections and amendments concerning the Confirmation Decision, ICC-01/12-01/18-568-Conf (with confidential Annexes A to D; a public redacted version was filed on 17 February 2020, ICC-01/12-01/18-568-Red).

³ Decision on the Applicable Procedure following the Prosecutor’s Filing of Her Request for Corrections and Amendments of the Decision to Confirm the Charges, 21 February 2020, ICC-01/12-01/18-608-Conf-tENG (a public redacted version was filed on the same date, ICC-01/12-01/18-608-Red-tENG; English translations of the decision were notified on 15 April 2020 and 27 July 2020 respectively).

4. On 23 April 2020, following submissions from the Prosecution⁴ and the Defence,⁵ PTC I issued a decision, *inter alia*, amending the confirmed charges against Mr Al Hassan (the ‘23 April 2020 Decision’).⁶
5. On 23 June 2020, the Prosecution filed before this Chamber an application for notice to be given pursuant to Regulation 55(2) of the Regulations (the ‘Notice Application’).⁷
6. On 8 July 2020, the Defence filed its response to the Notice Application (the ‘Response’).⁸
7. On 17 December 2020, the Chamber issued its ‘Decision on application for notice of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court’ (the ‘First Decision’).⁹ On this occasion, the Chamber granted certain Prosecution requests seeking that the Chamber provide notice that the legal characterisation of discrete facts and circumstances set out in the charges may be subject to change and rejected remaining requests. While declining to provide notice of possible re-characterisation for some of the incidents, the Chamber noted that its assessment in the First Decision was without prejudice to provide notice at a later point in time, either *proprio motu* or

⁴ Prosecution’s further observations regarding its request for corrections and amendments concerning the Confirmation Decision, 4 March 2020, ICC-01/12-01/18-625-Conf-Exp (with confidential Annexes A and B; a confidential redacted version was filed on the same date, ICC-01/12-01/18-625-Conf-Red; a public redacted version was filed on 17 April 2020, ICC-01/12-01/18-625-Red2).

⁵ Defence response to Prosecution Request for Corrections and Amendments concerning the Confirmation Decision, 16 March 2020, ICC-01/12-01/18-664-Conf (with confidential Annexes A and C and confidential *ex parte* Annex B, only available to the Defence and the Prosecution; a public redacted version was filed on 17 April 2020, ICC-01/12-01/18-664-Red).

⁶ Décision portant modification des charges confirmées le 30 septembre 2019 à l’encontre d’Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18-767-Conf (with a confidential Annex, ICC-01/12-01/18-767-Conf-Anx; a corrected version of the decision was filed on 1 May 2020, ICC-01/12-01/18-767-Conf-Corr; a public redacted version of the decision was filed on 8 May 2020, ICC-01/12-01/18-767-Corr-Red, with an Annex, ICC-01/12-01/18-767-Anx-Red).

⁷ Prosecution’s application for notice to be given pursuant to regulation 55(2) of the Regulations of the Court, ICC-01/12-01/18-894-Conf-Corr (a corrected version was filed on 19 February 2021).

⁸ Defence response to “Prosecution’s application for notice to be given pursuant to regulation 55(2) of the Regulations of the Court” (ICC-01/12-01/18-894-Conf), ICC-01/12-01/18-941-Conf.

⁹ Decision on application for notice of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court, ICC-01/12-01/18-1211-Conf (a public redacted version thereof was filed on 25 June 2021).

following a request, should it consider it to be appropriate to do so at the relevant time.

8. On 17 May 2021, the Chamber issued its ‘Decision on requests related to the submission into evidence of Mr Al Hassan’s statements’ (the ‘Article 69(7) Decision’), in which it admitted into evidence the audio recordings and transcripts of Mr Al Hassan’s security assessments and interviews, rejecting the Defence’s request to exclude those items pursuant to Article 69(7) of the Statute.¹⁰
9. On 1 July 2021, the Appeals Chamber issued its judgment confirming the First Decision (the ‘Appeals Judgment’).¹¹ The Appeals Chamber notably found that, while the Chamber committed an error of law by finding that it was unnecessary to resort to Regulation 55 of the Regulations in order to consider acts of rape under counts 1 to 5, the aforesaid error did not materially affect the First Decision as the Chamber ensured that the rights of the accused in the process of legal re-characterisation of facts would be preserved, consistent with the goal of Regulation 55 of the Regulations.¹²
10. On 13 July 2021, the Chamber issued its ‘Decision on the introduction into evidence of P-0570’s prior recorded testimony pursuant to Rule 68(2)(c) of the Rules’ (the ‘P-0570 Decision’) in which it authorised the introduction into evidence of the prior recorded testimony of P-0570 and associated material pursuant to Rule 68(2)(c) of the Rules.¹³

¹⁰ Decision on requests related to the submission into evidence of Mr Al Hassan’s statements, ICC-01/12-01/18-1475-Conf (a public redacted version was filed on 20 May 2021). The Defence’s request for leave to appeal the decision was rejected by the Chamber. See Decision on Defence requests for leave to appeal two decisions related to the submission into evidence of Mr Al Hassan’s statements, 24 June 2021, ICC-01/12-01/18-1542.

¹¹ Judgment on the appeal of Mr Al Hassan against the decision of Trial Chamber X entitled ‘Decision on application for notice of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court’, 1 July 2021, ICC-01/12-01/18-1562-Conf (a public redacted version was filed on the same day).

¹² Appeals Judgment, ICC-01/12-01/18-1562-Red, paras 21-68.

¹³ Decision on the introduction into evidence of P-0570’s prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, ICC-01/12-01/18-1588-Conf (a public redacted version was filed on 11 August 2021). The Defence’s request for leave to appeal the decision was rejected by the Chamber. See Decision on Defence requests for leave to appeal the ‘Decision on the introduction into evidence of P-0570’s prior recorded testimony pursuant to Rule 68(2)(c) of the Rules’, 16 August 2021, ICC-01/12-01/18-1658.

II. Analysis

11. For the purpose of the present decision, the Chamber incorporates by reference the applicable legal framework set out in the First Decision.¹⁴ It is recalled, in particular, that the activation of Regulation 55 of the Regulations is a discretionary decision and 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.¹⁵
 12. On the basis of the evidence currently submitted, and in light of the findings of the Appeals Chamber, the Chamber considers it appropriate to re-assess *proprio motu* the possibility of providing notice as regards: (i) P-0574, P-0542, P-0570 and P-0547 (acts of sexual violence under counts 1 to 5); (ii) P-0570 (counts 2 and 4); and (iii) the incident concerning [REDACTED] (Article 25(3)(a) for acts falling under counts 1 to 5).
 13. The present decision is without prejudice to the Chamber providing further notice pursuant to Regulation 55(2) of the Regulations at a later point in time, either *proprio motu* or following a request, should it consider it appropriate to do so at the relevant time.
- A. P-0574, P-0542, P-0570 and P-0547 (acts of sexual violence under counts 1 to 5)**
14. The Chamber recalls that, in the First Decision, it declined to provide notice pursuant to Regulations 55(2) of the Regulations of the possible re-characterisations sought for P-0574 under counts 1 to 5¹⁶ and for P-0542, P-0570 and P-0547 under count 5.¹⁷ The Chamber was of the view that in order to take into consideration alleged acts of sexual violence committed against these victims under these counts, notice pursuant to Regulation 55(2) of the Regulations was unnecessary.

¹⁴ First Decision, ICC-01/12-01/18-1211-Red, paras 9-14.

¹⁵ First Decision, ICC-01/12-01/18-1211-Red, paras 11-12.

¹⁶ Counts 1 and 3 (torture), 2 (other inhumane acts), 4 (cruel treatment), 5 (outrage upon personal dignity).

¹⁷ First Decision, ICC-01/12-01/18-1211-Red, paras 59-63, 68-69.

15. The Chamber has had due regard to the Appeals Chamber's determination that the Chamber committed an error of law by deciding that it was unnecessary to resort to Regulation 55 of the Regulations even when the possibility of considering alleged acts of sexual violence under counts 1 to 5 had arisen. The Chamber therefore intends to rectify the approach in the present decision.
16. Having had regard to the elements required on the face of Articles 7(1)(f), 7(1)(k), 8(2)(c)(i) and 8(2)(c)(ii) of the Statute and all the facts and circumstances described in the charges in relation to P-0574, which are set out in paragraphs 282 and 679 of the Confirmation Decision, it appears to the Chamber that the legal elements of the crime of torture, the crime of other inhumane acts, the crime of cruel treatment and the crime of outrages upon personal dignity may be derived from the facts and circumstances confirmed by PTC I in relation to P-0574, as alleged by the Prosecution. Further, having had regard to the elements required on the face of Article 8(2)(c)(ii) of the Statute and all facts and circumstances described in the charges in relation to P-0570, P-0547 and P-0542, which are set out in paragraphs 334 and 677 (for P-0570), 337 and 678 (for P-0547), as well as 331 and 680 (for P-0542) of the Confirmation Decision, it appears to the Chamber that the legal elements of the crime of outrages upon personal dignity may be derived from all facts and circumstances confirmed by PTC I in relation to P-0570, P-0547 and P-0542, as alleged by the Prosecution.
17. The Chamber considers that for the present purposes and without prejudice to any decision under Regulation 55(1) of the Regulations and Article 74 of the Statute, the legal elements of the relevant crimes are covered by the relevant facts and circumstances and the possible re-characterisation does not exceed the facts and circumstances described in the charges. This assessment is made without making any determination as to the legal interpretation of the relevant legal elements.
18. The Chamber also considers that providing notice at this stage of the proceedings does not unduly prejudice the rights of the accused. In addition, and as confirmed by the Appeals Chamber, the First Decision has already provided sufficient notice

so as to enable necessary preparations for the accused's defence.¹⁸ This is therefore not a new matter for the Defence.

19. Accordingly, pursuant to Regulation 55(2) of the Regulations, the Chamber provides notice that the legal characterisation of the facts and circumstances described in the charges may be subject to change to include: (i) alleged acts of sexual violence committed against P-0574 under counts 1 to 5; and (ii) alleged acts of sexual violence committed against P-0542, P-0570 and P-0547 under count 5. The applicable mode of liability is the same as that confirmed by PTC I for other counts related to these incidents, namely Article 25(3)(d) of the Statute.

B. P-0570 (counts 2 and 4)

20. In relation to P-0570, the Prosecution suggested in its Notice Application re-characterising the alleged rapes in detention of P-0570, together with the other facts already retained under count 5 (outrage upon personal dignity), as other inhumane acts (count 2) and cruel treatment (count 4). The Chamber refers to the submissions made by the parties on this issue as previously summarised.¹⁹
21. The Chamber recalls that it had already indicated in the First Decision that 'looking at all forms of ill-treatment [P-0547 and P-0570] suffered from, including the acts of a sexual nature, as a whole, may potentially lead to a different assessment' than that conducted by PTC I.²⁰ The Chamber nonetheless declined to provide notice as regards counts 2 and 4 for these individuals 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 witness in court.²¹
22. As recalled above, on 13 July 2021, the Chamber subsequently authorised the introduction into evidence of P-0570's prior recorded testimony pursuant to Rule 68(3)(c) of the Rules given that P-0570 is unable to testify orally.²² Hence, the

¹⁸ Appeals Judgment, ICC-01/12-01/18-1562-Red, paras 66-67. The Chamber had indicated in the First Decision that it may take into consideration alleged acts of sexual violence committed against P-0574 in its assessment and analysis of counts 1 to 5 and against P-0542, P-0570 and P-0547 in its assessment and analysis of count 5. First Decision, ICC-01/12-01/18-1211-Red, paras. 62, 69.

¹⁹ First Decision, ICC-01/12-01/18-1211-Red, paras 64-67.

²⁰ First Decision, ICC-01/12-01/18-1211-Red, para. 73.

²¹ First Decision, ICC-01/12-01/18-1211-Red, para. 74.

²² P-0570 Decision, ICC-01/12-01/18-1588-Red.

relevant evidence has now been introduced into evidence and the Chamber can now assess its content in order to conduct its examination for the purpose of Regulation 55 of the Regulations.

23. Having had due regard to the evidence before it, most notably the prior recorded testimony of P-0570, and considering the elements required on the face of Articles 7(1)(k) and 8(2)(c)(i) of the Statute and all the facts and circumstances described in the charges, which are set out in paragraphs 334 and 677 of the Confirmation Decision, it appears to the Chamber that the legal elements of the crime of other inhumane acts (count 2) and the crime of cruel treatment (count 4) may be derived from all relevant facts and circumstances, taken together, as confirmed by PTC I in relation to P-0570. In reaching this conclusion, the Chamber has been mindful of the fact that ‘it is impossible in practice to dissociate [the act of rape and the other conditions of a victim’s detention as a whole] and reach the conclusion that the victim suffered inhumane acts and cruel treatment “on the one hand” and a rape “on the other”, because it was the same victim, the same person, who experienced those events at the same time or within a very short space of time’ and that accordingly ‘[t]he act of rape does not exist separately from the context of other inhumane acts and cruel treatment but aggravates that context.’²³ The Appeals Chamber also emphasised that ‘the crimes charged under counts 1 to 5 involve the infliction of “severe physical or mental pain or suffering upon one or more persons” or a violation of the person’s dignity’ and that ‘[i]f the acts of rape are considered in addition to the facts and circumstances initially charged under counts 1 to 5, the gravity of the crimes charged under these counts may increase.’²⁴ In addition, the Appeals Chamber stated as follows:

The Appeals Chamber notes [...] that the relevant acts of rape allegedly occurred during the detention of P-0574, P-0542, P-0570 and P-0547. This detention, its conditions and the related mistreatment are facts and circumstances underlying the crimes charged under counts 1 to 5. Furthermore, the acts of rape that allegedly occurred during the same detention and against the same victims are charged under count 13, and,

²³ First Decision, ICC-01/12-01/18-1211-Red, para. 61 *citing* 23 April 2020 Decision, ICC-01/12-01/18-767-Conf, para. 102.

²⁴ Appeals Judgment, ICC-01/12-01/18-1562-Red, para. 45.

pursuant to a ruling in the Impugned Decision not under appeal, may potentially be considered also under counts 11 and 12. Given the close link between these acts of rape and the crimes charged in relation to the detention of P-0574, P-0542, P-0570 and P-0547, the Appeals Chamber finds that the Impugned Decision, in addition to the Confirmation Decision and other documents, provides sufficient notice to Mr Al Hassan of the relevant charges against him.²⁵

24. The Chamber considers that for present purposes and without prejudice to any decision under Regulation 55(1) of the Regulations and Article 74 of the Statute, the legal elements are covered by the relevant facts and circumstances and the possible re-characterisation does not exceed the facts and circumstances described in the charges. This assessment is made without making any determination as to the legal interpretation of the relevant legal elements.
25. Further, the Chamber considers that providing notice pursuant to Regulation 55(2) of the Regulations on this matter at this stage of the proceedings does not unduly prejudice the accused. Indeed, the Chamber notes that the Defence is informed in detail of the facts and circumstances relied upon for the proposed re-characterisations. The Chamber also observes that the Defence has been aware of the possibility of a Regulation 55(2) notice in light of PTC I's clear indication to that effect.²⁶
26. Accordingly, pursuant to Regulation 55(2) of the Regulations, the Chamber provides notice that the legal characterisation of the facts and circumstances underlying the incident relating to P-0570 may be considered as the crime against humanity of other inhumane acts and the war crime of cruel treatment, under counts 2 and 4 of the charges. The applicable mode of liability is the same as that confirmed by PTC I for other counts related to this incident, namely Article 25(3)(d) of the Statute.

²⁵ Appeals Judgment, ICC-01/12-01/18-1562-Red, para. 66.

²⁶ 23 April 2020 Decision, ICC-01/12-01/18-767-Conf, para. 97. *See also* Confirmation Decision, ICC-01/12-01/18-461-Conf, para. 682.

C. The incident concerning [REDACTED] (re-characterisation of the accused's responsibility to Article 25(3)(a) of the Statute)

27. In its Notice Application, the Prosecution sought notice of possible re-characterisation of Mr Al Hassan's responsibility as direct perpetrator pursuant to Article 25(3)(a) of the Statute in relation to [REDACTED] under counts 1 and 3 (torture), 2 (other inhumane acts), 4 (cruel treatment) and 5 (outrages upon personal dignity). According to the Prosecution, this mode of liability would be alternative to Mr Al Hassan's responsibility under Article 25(3)(c) and Article 25(3)(d) of the Statute as confirmed by PTC I in relation to this victim for these counts.²⁷
28. The Chamber refers to the submissions made by the parties on this issue as previously summarised.²⁸ It recalls in particular the argument made by the Defence regarding PTC I's statement that 'that the Prosecution had failed to substantiate the factual aspects of its allegation that Mr. Al Hassan made a sufficient contribution to the incident concerning [REDACTED] to be characterized as a direct perpetrator.'²⁹ For the Defence, '[t]he allegation that Mr. Al Hassan personally flogged [REDACTED] does not, therefore, form part of the confirmed facts and circumstances of this case.'³⁰
29. The Chamber notes that a Trial Chamber can re-characterise facts and circumstances pursuant to Regulation 55 of the Regulations 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.³¹ Further, as recognised by the Appeals

²⁷ Notice Application, ICC-01/12-01/18-894-Conf, para. 13.

²⁸ First Decision, ICC-01/12-01/18-1211-Red, paras 92-96.

²⁹ Response, ICC-01/12-01/18-941-Conf, para. 13.

³⁰ Response, ICC-01/12-01/18-941-Conf, para. 13. The Defence added that '[s]pecifically, the Chamber found that the Prosecution had not established that Mr Al Hassan had admitted having flogged [REDACTED] but rather the Pre-trial Chamber considered the evidential material presented by the Prosecution to be sufficient to establish that Mr Al Hassan was present during the flogging along with other man ensuring the security between the person flogged and the public'(Response, ICC-01/12-01/18-941-Conf, para. 15).

³¹ First Decision, ICC-01/12-01/18-1211-Red, para. 90 *citing* Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled "Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court", 18 December 2015, ICC-02/11-01/15-369, para. 32.

Chamber, a Trial Chamber may view the confirmation decision holistically in its interpretation of how the Pre-Trial Chamber set out to delimit the scope of the ‘facts and circumstances’ at issue for trial, reading the confirmation decision together with the document containing the charges and subsequent amendments if necessary.³²

30. The Chamber also shares PTC I’s understanding that, ‘[w]hile the Trial Chamber is barred under article 74(2) of the Statute from exceeding the “facts and circumstances described in the charges”, it may nonetheless “evaluate them differently”’ and accordingly that this Chamber may be brought to re-assess Mr Al Hassan’s responsibility pursuant to Regulation 55 of the Regulations.³³
31. The Chamber notes the facts and circumstances as confirmed by PTC I that Mr Al Hassan participated in the flogging of [REDACTED].³⁴ PTC I indeed found that Mr Al Hassan signed the report of the Islamic Police concerning [REDACTED], that he was present during the flogging and that Mr Al Hassan himself declared that he participated in the flogging.³⁵
32. The Chamber also notes that PTC I, when analysing the statements of the accused in the Confirmation Decision, did not find that Mr Al Hassan had admitted to flogging [REDACTED], but was of the view that the exact form of his

³² Appeals Judgment, ICC-01/12-01/18-1562-Red, para. 94.

³³ 21 February 2020 Decision, ICC-01/12-01/18-608-Red-tENG, paras 46-47.

³⁴ Confirmation Decision, ICC-01/12-01/18-461-Conf, para. 307 (n.858), to be read in conjunction with para. 789. In paragraph 307 of the Confirmation Decision, which relates to the factual findings, PTC I stated the following: ‘La Chambre considère que le Procureur produit suffisamment d’éléments de preuve permettant d’établir, au standard requis, que M. Al Hassan a signé le rapport de la Police islamique concernant [REDACTED]. Le [REDACTED] 2012, [REDACTED] ont été flagellés, de 100 coups de fouet chacun, [REDACTED], après avoir été condamnés par le Tribunal islamique [REDACTED]. Le Tribunal islamique les a condamnés à 100 coups de fouet, [REDACTED]. La Chambre considère que les éléments de preuve montrent que M. Al Hassan était présent lors de la flagellation [REDACTED] et avec les hommes assurant un « cordon de sécurité » entre la personne qui était flagellée et le public, [REDACTED].’ In footnote 858 to paragraph 307, PTC I indicated that ‘[I]a Chambre ne considère pas que, comme l’avance le Procureur, M. Al Hassan ait « admis avoir flagellé [...] [REDACTED] », mais y avoir « participé », sans que l’on sache en quoi sa participation a consisté.’ In paragraph 789 of the Confirmation Decision, PTC I noted that Mr Al Hassan declared having participated in the flogging but that it could not know what his participation consisted in.

³⁵ Confirmation Decision, ICC-01/12-01/18-461-Conf, para. 307 to be read in conjunction with paras 789 and 912.

participation was unknown and accordingly declined to confirm Article 25(3)(a) of the Statute as an applicable mode of liability.³⁶

33. The Chamber finally notes that when requested by the Prosecution to correct the ‘errors in the assessment/evaluation of evidence’ after the issuance of the Confirmation Decision and before the start of the trial, including the error concerning the case of [REDACTED],³⁷ PTC I indicated that it considered that the corrections requested by the Prosecution did not concern an amendment of the factual scope of the charges already confirmed within the meaning of Article 61(9) of the Statute.³⁸ In this regard, it recalled that it had already confirmed the facts notably with respect to the victim [REDACTED].³⁹ PTC I added that the relevant corrections requested by the Prosecution on the facts as found by PTC I could be canvassed at trial and that the ‘errors’, if any, could be rectified by the Trial Chamber, if necessary.⁴⁰ PTC I added that it fell within the ultimate discretion of the Trial Chamber to determine ‘the sequence of events in detail on the basis of the evidence adduced and canvassed by the parties before the Bench.’⁴¹
34. As stated above, the Chamber has now admitted into evidence the audio recordings and transcripts of Mr Al Hassan’s interviews with the Prosecution, which are relevant to evaluate the request of the Prosecution concerning [REDACTED] The Chamber is now in a better position to assess, based on evidence currently before it, the circumstances under which the accused allegedly participated in the flogging of [REDACTED] and whether it accordingly appears,

³⁶ Confirmation Decision, ICC-01/12-01/18-461-Conf, paras 307 (n.858), 789-790.

³⁷ Prosecution Request to Amend the Charges, ICC-01/12-01/18-568-Conf, paras 16-19. *See also* 21 February 2020 Decision, ICC-01/12-01/18-608-Red-tENG, para. 28. The Prosecution pointed out that PTC I overlooked information in the DCC and that, had it taken that information into account, it would have reached a different conclusion. The Prosecution referred, *inter alia*, to the victim [REDACTED], with respect to whom PTC I confirmed the charges against Mr Al Hassan under counts 1 to 6 and on the basis of the modes of liability under Article 25(3)(c) and (d) of the Statute but not, as sought by the Prosecutor in the DCC, on the basis of the mode of liability under Article 25(3)(a) of the Statute. The Prosecutor adverted to evidence, such as extracts of Mr Al Hassan’s statements cited in the DCC, to argue that PTC I should also have confirmed the charges on the basis of that mode of liability of direct perpetration pursuant to Article 25(3)(a) of the Statute.

³⁸ 21 February 2020 Decision, ICC-01/12-01/18-608-Red-tENG, para. 44.

³⁹ 21 February 2020 Decision, ICC-01/12-01/18-608-Red-tENG, para. 44.

⁴⁰ 21 February 2020 Decision, ICC-01/12-01/18-608-Red-tENG, para. 45.

⁴¹ 21 February 2020 Decision, ICC-01/12-01/18-608-Red-tENG, para. 46.

according to the standard applicable under Regulation 55 of the Regulations, that such participation may be legally re-characterised as direct participation under Article 25(3)(a) of the Statute.

35. The Chamber notes in particular that, during the course of his interviews with the Prosecution, the accused indicated that he was the one who flogged the person [REDACTED].⁴²
36. Having had regard to Article 25(3)(a) of the Statute and the facts and circumstances described in the charges, as set out in paragraph 307 read in conjunction with paragraphs 789 and 912 of the Confirmation Decision, as well as the evidence received, it appears to the Chamber that the legal elements of Article 25(3)(a) of the Statute in relation to the incident concerning [REDACTED] under counts 1 to 5 may be derived from the facts and circumstances confirmed by PTC I.
37. The Chamber is aware that, in its assessment of the accused's participation to the flogging of [REDACTED], PTC I did not refer to all the relevant passages of the transcripts of Mr Al Hassan's statements. The Chamber is of the view that, had PTC I taken into account the aforementioned passage where the accused stated that he personally administered the flogging, PTC I would have considered the accused's responsibility under Article 25(3)(a) of the Statute.
38. The Chamber considers that for present purposes and without prejudice to any decision under Regulation 55(1) of the Regulations and Article 74 of the Statute, 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. This assessment is made without making any determination as to the legal interpretation of the relevant legal elements.
39. Furthermore, the Chamber considers that notice pursuant to Regulation 55(2) of the Regulations in relation to this incident raises an issue which could result in an accountability gap. As stated above, there is a possibility that ultimately the

⁴² See MLI-OTP-0062-1058 at 1081-1082, in particular line 790 ('C'est moi qui l'ai flagellée'). See also MLI-OTP-0051-0967 at 0988.

evidence could demonstrate that Mr Al Hassan's alleged participation in the flogging of [REDACTED] was of such a nature so as to meet the constitutive elements of direct participation under Article 25(3)(a) of the Statute. In such circumstances, the Chamber should not be precluded from rendering a judgment ultimately, and having regard to the submissions of the Defence, under the mode of liability which most accurately describes the accused's participation in the alleged crime.

40. Finally, the Chamber finds that issuing notice of the possible re-characterisation of Mr Al Hassan's responsibility pursuant to Article 25(3)(a) of the Statute in respect of [REDACTED] under counts 1 to 5 does not cause unfairness to the accused at this stage of the proceedings. Indeed, the Chamber notes that the Defence is informed in detail of the facts and circumstances relied upon for the proposed re-characterisations, as well as the relevant evidentiary basis. The Chamber also considers that, having had regard to the current stage of the proceedings, the Defence has adequate time to prepare its defence and adapt its strategy as necessary.
41. Accordingly, pursuant to Regulation 55(2) of the Regulations, the Chamber provides notice that the legal characterisation of the facts and circumstances in relation to the incident concerning [REDACTED] under counts 1 to 5 may be subject to change to include Mr Al Hassan's responsibility under Article 25(3)(a) of the Statute, in addition to Articles 25(3)(c) and 25(3)(d) of the Statute.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

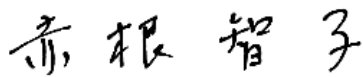
NOTIFIES the parties and participants of the possibility that the legal characterisation of the facts and circumstances set out in the charges in relation to P-0574, P-0542, P-0570 and P-0547 may be subject to change, as described in paragraphs 19 and 26 above; and

NOTIFIES the parties and participants of the possibility that the legal characterisation of the facts and circumstances set out in the charges in relation to the incident concerning [REDACTED] may be subject to change, as described in paragraph 41 above.

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



Judge Antoine Kesia-Mbe Mindua
Presiding Judge



Judge Tomoko Akane



Judge Kimberly Prost

Dated this Monday, 20 September 2021

At The Hague, The Netherlands