



Original: English

No. ICC-01/12-01/18

Date: 8 October 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

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

To be notified in accordance with Regulation 31 of the *Regulations of the Court* to:**The Office of the Prosecutor**

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Legal Representatives of Applicants**Unrepresented Victims****Unrepresented Applicants for
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TRIAL CHAMBER X of the International Criminal Court, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, having regard to Article 82(1)(d) of the Rome Statute (the ‘Statute’), issues the following ‘Decision on Defence request for leave to appeal “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 and submissions

1. On 20 September 2021, the Chamber issued its ‘Second Decision on notice of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court’ (the ‘Impugned Decision’) in which it notably provided notice pursuant to Regulation 55(2) of the Regulations of the Court (the ‘Regulations’) that the legal characterisation of the facts and circumstances in relation to the incident concerning [REDACTED] under counts 1 to 5 (the ‘Incident’) may be subject to change to include Mr Al Hassan’s responsibility under Article 25(3)(a) of the Statute.¹
2. On 27 September 2021, the Defence filed a request seeking leave to appeal the Impugned Decision (the ‘Request’) with respect to the following issue: ‘[w]hether Trial Chamber X erred in law by exceeding the facts and circumstances confirmed by Pre-Trial Chamber I when issuing notice of possible recharacterisation of Mr Al Hassan’s responsibility as a direct perpetrator for the charged incident involving [REDACTED] pursuant to Article 25(3)(a) of the Statute.’² The Defence submits that the Impugned Decision’s determination as concerns the Incident goes beyond the facts and circumstances confirmed by Pre-Trial Chamber I (‘PTC I’) given that it relies on an alleged material fact that was rejected by PTC I.³ The Defence further submits that the issue significantly affects the fairness of the proceedings, given *inter alia* its close link with

¹ ICC-01/12-01/18-1739-Conf (a public redacted version was filed on the same date).

² Defence request for leave to appeal ‘Second Decision on notice of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court’, ICC-01/12-01/18-1773-Conf.

³ Request, ICC-01/12-01/18-1773-Conf, paras 26-28.

fundamental human rights and its impact on Defence investigations and preparation.⁴ The Defence also avers that an immediate resolution by the Appeals Chamber on this issue would materially advance the proceedings.⁵

3. On 30 September 2021, the Office of the Prosecutor (the ‘Prosecution’) filed its response to the Request (the ‘Response’).⁶ The Prosecution submits that the Request does not present an ‘appealable issue’ but merely expresses the Defence’s disagreement with the Impugned Decision.⁷ In particular, the Prosecution submits that the Defence’s arguments that the Impugned Decision entailed a notice of the possibility of a change in the statement of facts, rather than of a change in the legal characterisation of the facts is a mischaracterisation and misunderstanding of the Impugned Decision.⁸ Further, the Prosecution submits that, in any event, the remainder of the cumulative requirements of Article 82(1)(d) of the Statute are not fulfilled.⁹

II. Analysis

4. The Chamber incorporates by reference the legal framework applicable to the assessment of requests for leave to appeal pursuant to Article 82(1)(d) of the Statute.¹⁰
5. The Chamber recalls that the Impugned Decision explicitly acknowledged that the Trial Chamber may provide notice pursuant to Regulation 55(2) of the Regulations only when the facts and circumstances that could potentially be re-characterised were confirmed by the Pre-Trial Chamber, and concluded that the

⁴ Request, ICC-01/12-01/18-1773-Conf, paras 30-36.

⁵ Request, ICC-01/12-01/18-1773-Conf, para. 37.

⁶ Prosecution response to Defence request for leave to appeal ‘Second Decision on notice of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court’, ICC-01/12-01/18-1794-Conf.

⁷ Response, ICC-01/12-01/18-1794-Conf, paras 3-13.

⁸ Response, ICC-01/12-01/18-1794-Conf, paras 14-21.

⁹ Response, ICC-01/12-01/18-1794-Conf, paras 22-30.

¹⁰ Decision on Defence request for reconsideration and, in the alternative, leave to appeal the ‘Decision on witness preparation and familiarisation’, 9 April 2020, ICC-01/12-01/18-734, para. 12.

recharacterisation of the accused's responsibility as concerns the Incident remains within the confirmed facts and circumstances of the case.¹¹

6. The Chamber has also been mindful of the findings of the Appeals Chamber which confirmed that 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.¹² Indeed, the Chamber notes that, following the Appeals Judgment, it read the Confirmation Decision together with the subsequent relevant decision rendered by PTC I, referred to by the Appeals Chamber as the 'First Amendment Decision', which considered the content of the document containing the charges and the relevant evidence.¹³
7. Furthermore, in the Impugned Decision, the Chamber: (1) expressly considered the parts of the Confirmation Decision highlighted by the Defence in the Request regarding the lack of evidence and factual basis for the personal flogging of [REDACTED] by the accused; (2) explained why the fact that the accused *participated* in the flogging, a fact that was established by PTC I, was a sufficient ground for giving notice on the basis of Regulation 55 of the Regulations;¹⁴ and (3) recalled PTC I's findings according to which (a) 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; and (b) it had already confirmed the facts notably with respect to the Incident.¹⁵
8. In the view of the Chamber, instead of identifying an 'appealable issue', such as an identifiable subject or topic requiring a decision for its resolution, the Defence

¹¹ Impugned Decision, ICC-01/12-01/18-1739-Red, para. 29.

¹² Impugned Decision, ICC-01/12-01/18-1739-Red, para. 29 *citing* 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-Red (hereinafter: 'Appeals Judgment'), para. 94.

¹³ Impugned Decision, ICC-01/12-01/18-1739-Red, para. 29.

¹⁴ Impugned Decision, ICC-01/12-01/18-1739-Red, paras 31-32, 37-38.

¹⁵ Impugned Decision, ICC-01/12-01/18-1739-Red, para. 33. The Chamber observes that these findings of PTC I were also taken into account by the Appeals Chamber. *See* Appeals Judgment, ICC-01/12-01/18-1562-Red, para. 80.

merely expresses its disagreement with the Chamber's assessment of the parameters of the facts and circumstances, by ignoring the holistic assessment made on the basis of the Appeals Chamber's findings and by referring to parts of the Confirmation Decision that were already considered by the Chamber in the Impugned Decision.¹⁶

9. Accordingly, the Chamber finds that the issue identified by the Defence is not an 'appealable issue'. Thus it is unnecessary to address the remainder of the cumulative requirements of Article 82(1)(d) of the Statute.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

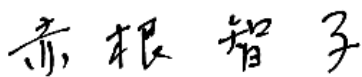
REJECTS the Request; and

INSTRUCTS the Defence and the Prosecution to file public redacted versions of ICC-01/12-01/18-1773-Conf and ICC-01/12-01/18-1794-Conf, respectively, within 20 days of notification of the present decision.

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 Friday, 8 October 2021
At The Hague, The Netherlands

¹⁶ See Impugned Decision, ICC-01/12-01/18-1739-Red, paras 31-32, 34.