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**International
Criminal
Court**

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No.: **ICC-01/12-01/18**
Date: **27 September 2021**
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October 2021**

TRIAL CHAMBER X

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

SITUATION IN THE REPUBLIC OF MALI

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

Public

Public Redacted Version of “Defence request for leave to appeal ‘Second Decision on notice of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court’”, 27 September 2021, ICC-01/12-01/18-1773-Conf

Source: Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Karim Khan QC
James Stewart
Gilles Dutertre

Counsel for the Defence

Melinda Taylor
Kirsty Sutherland

Legal Representatives of the Victims

Seydou Doumbia
Mayombo Kassongo
Fidel Luvengika Nsita

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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

I. Introduction

1. On 30 September 2019, Pre-Trial Chamber I confirmed charges against Mr Al Hassan ('Confirmation Decision').¹
2. On 31 January 2020, the Office of the Prosecutor ('Prosecution') filed a request for corrections and amendments of the Confirmation Decision ('Prosecution Request to Amend the Charges').²
3. On 21 February 2020, Pre-Trial Chamber I issued a decision in which it *inter alia* rejected Parts I and II of the Prosecution Request to Amend the Charges.³
4. On 23 April 2020, following submissions from the Prosecution⁴ and the Defence,⁵ Pre-Trial Chamber I issued a decision amending the confirmed charges against Mr Al Hassan ('Amendment Decision').⁶
5. On 23 June 2020, the Prosecution filed before Trial Chamber X an application for notice to be given pursuant to Regulation 55(2) of the Regulations of the Court ('Notice Application').⁷
6. On 8 July 2020, the Defence filed its response to the Notice Application ('Notice Response').⁸
7. On 14 July 2020, the trial against Mr Al Hassan opened.
8. On 8 September 2020, testimony in the trial against Mr Al Hassan commenced with the first witness for the Prosecution, Witness P-0007. At the date of filing, [REDACTED] witnesses for the Prosecution have testified and [REDACTED] currently remain.

¹ ICC-01/12-01/18-461-Conf-Corr; [ICC-01/12-01/18-461-Corr-Red](#).

² ICC-01/12-01/18-568-Conf; [ICC-01/12-01/18-568-Red](#).

³ ICC-01/12-01/18-608-Conf-tENG; [ICC-01/12-01/18-608-Red-tENG](#).

⁴ ICC-01/12-01/18-625-Conf-Exp; [ICC-01/12-01/18-625-Red2](#).

⁵ ICC-01/12-01/18-664-Conf; [ICC-01/12-01/18-664-Red](#).

⁶ ICC-01/12-01/18-767-Conf-Corr; [ICC-01/12-01/18-767-Corr-Red](#).

⁷ ICC-01/12-01/18-894-Conf-Corr.

⁸ ICC-01/12-01/18-941-Conf.

9. On 17 December 2020, Trial Chamber X 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’ (‘First Decision’).⁹
10. On 17 May 2021, Trial Chamber X issued its ‘Decision on request related to the submission into evidence of Mr Al Hassan’s statements’ (‘Article 69(7) Decision’).¹⁰
11. On 1 July 2021, the Appeals Chamber issued its judgment concerning the Defence’s appeal of the First Decision (‘Appeals Judgment’).¹¹ The Appeals Chamber found, *inter alia*, that while Trial Chamber X 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 of the Court.¹²
12. On 13 July 2021, following a request by the Prosecution¹³ and a response from the Defence opposing introduction,¹⁴ Trial Chamber X issued its ‘Decision on the introduction into evidence of P-0570’s prior recorded testimony pursuant to Rule 68(2)(c) of the Rules’ (‘P-0570 Decision’)¹⁵ authorising introduction of P-0570’s prior recorded testimony pursuant to Rule 68(2)(c).
13. On 20 September 2021, Trial Chamber X issued its ‘Second Decision on notice of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court’ (‘Second Decision’).¹⁶
14. By the Second Decision, Trial Chamber X, *inter alia*, notified the parties and participants of the possibility that the legal characterisation concerning [REDACTED] may be subject to change to include Mr Al Hassan’s responsibility as direct perpetrator pursuant to Article 25(3)(a) of the Statute under counts 1 and 3 (torture), 2

⁹ ICC-01/12-01/18-1211-Conf.

¹⁰ ICC-01/12-01/18-1475-Conf.

¹¹ ICC-01/12-01/18-1562-Conf.

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

¹³ ICC-01/12-01/18-1408-Conf.

¹⁴ ICC-01/12-01/18-1547-Conf.

¹⁵ ICC-01/12-01/18-1588-Conf.

¹⁶ ICC-01/12-01/18-1739-Conf.

(other inhuman acts), 4 (cruel treatment) and 5 (outrages upon personal dignity).¹⁷ According to the Prosecution, this mode of liability would be alternative to Mr Al Hassan's responsibility under Articles 25(3)(c) and Article 25(3)(d) of the Statute as confirmed by Pre-Trial Chamber I in relation to this victim for these counts.¹⁸

15. The Defence respectfully requests leave to appeal the Decision on the Issue identified below.

II. Confidentiality

16. Pursuant to Regulation 23*bis*(2) of the Regulations of Court, this request has been filed confidentially as it refers to confidential evidence and [REDACTED], a matter the subject of confidentiality orders by Trial Chamber X.¹⁹ A public redacted version will be filed forthwith.

III. Submissions

17. Pursuant to Article 82(1)(d) of the Statute, the Defence may appeal:

A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the [...] Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

18. There is an issue which arises from the Second Decision, and which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings, being:

Whether Trial Chamber X erred in law by exceeding the facts and circumstances confirmed by Pre-Trial Chamber I when issuing notice of possible re-characterisation of Mr Al Hassan's responsibility as a direct perpetrator for the

¹⁷ Second Decision, ICC-01/12-01/18-1739-Conf, para 41.

¹⁸ Second Decision, ICC-01/12-01/18-1739-Conf, para 27.

¹⁹ [REDACTED].

charged incident involving [REDACTED] pursuant to Article 25(3)(a) of the Statute ('Issue').²⁰

The Issue arises from the Second Decision

19. As Trial Chamber X states in the Second Decision,²¹ a Trial Chamber can re-characterise facts and circumstances pursuant to Regulation 55 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*.²² This power exists within the framework of Regulation 55, which permits the Trial Chamber to modify the legal characterisation of facts, but not the facts themselves.

20. As explained by the Appeals Chamber in *Lubanga*,²³ which was relied upon in the Appeals Judgment:²⁴

The distinction between facts and their legal characterisation should be respected for the interpretation of Regulation 55 as well. The text of Regulation 55 only refers to a change in the legal characterisation of the facts, but not to a change in the statement of the facts. This indicates that only the legal characterisation (regulation 52 (c) of the Regulations of the Court) could be subject to change, but not the statement of the facts (regulation 52 (b) of the Regulations of the Court).

21. In *Katanga and Ngudjolo*, which was relied upon by both Trial Chamber X in the Second Decision,²⁵ and Pre-Trial Chamber I in its February 2020 decision,²⁶ Trial Chamber II stated:²⁷

²⁰ Second Decision, ICC-01/12-01/18-1739-Conf, paras 29-38.

²¹ Second Decision, ICC-01/12-01/18-1739-Conf, para 29.

²² First Decision, ICC-01/12-01/18-1211-Conf, para 90 citing *Gbagbo and Blé Goudé*, [ICC-02/11-01/15-369](#), para 32 ('[T]here is no legal impediment to a Trial Chamber recharacterising 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 recharacterised were confirmed by that Pre-Trial Chamber. Therefore, the Appeals Chamber rejects Mr Gbagbo's argument in this regard.')

²³ [ICC-01/04-01/06-2205](#), para. 97.

²⁴ Appeals Judgment, ICC-01/12-01/18-1562-Conf, para 39 (*emphasis added*).

²⁵ Second Decision, ICC-01/12-01/18-1739-Conf, para 30.

²⁶ [ICC-01/12-01/18-608-Red-tENG](#), paras 46-47.

²⁷ *Katanga and Ngudjolo*, [ICC-01/04-01/07-1547-tENG](#), para 25. See also para 21 (*emphasis added*): "The Chamber recalls that, under article 74(2) of the Statute, the Trial Chamber is bound by the "facts and

In the Chamber's view, while the facts can no longer be amended once the Pre-Trial Chamber has rendered its decision on the confirmation of the charges, the evidence presented during the pre-trial phase can, by contrast, be amended or added to in the course of the trial. This distinction between the facts and the evidence is essential, for it enables the Prosecutor, at the confirmation hearing, to select at this stage only such evidence as appears to him to be "sufficient" to give the Pre-Trial Chamber substantial grounds to believe that an accused committed the crimes with which he is charged. It should be recalled that, under article 66 of the Statute, the evidentiary standard applicable in order for the Court to reach a guilty verdict requires that the judges be convinced beyond all reasonable doubt, as a result of which the Prosecutor may be impelled to produce in the course of the trial, subject to time limits fixed by the Trial Chamber, the new evidence which he considers decisive.

22. As Trial Chamber V in *Yekatom* explained, where the Pre-Trial Chamber expressly considered the proposed modes of liability, and excluded them due to the Prosecution's failure to substantiate the necessary factual elements of these forms of liability, the Trial Chamber improperly transforms the Regulation 55 procedure into a *de facto* form of review or appeal by reintroducing them through re-characterisation.²⁸

Indeed, a critical distinction is made between the scenario in which a Pre-Trial

circumstances described in the charges" and cannot modify them. Thus it may only evaluate them differently or give them a different legal characterisation in accordance with regulation 55 of the Regulations of the Court. Under the terms of article 61 of the Statute, it is the Pre-Trial Chamber, and it alone, which is competent, if so requested, to authorise the Prosecutor to modify the charges, and hence the facts and circumstances which they describe. Article 61(9) provides for the possibility of such amendment being effected during the period between the confirmation of the charges and the commencement of the trial, although the Chamber considers it necessary to recall that, within the meaning of that article, the concept of "commencement of the trial" has yet to be precisely defined. Regarding the period after the commencement of the trial, the article provides only for the situation where the Prosecutor seeks to withdraw the charges, subject to leave of the Trial Chamber. However, that same article makes no provision for any amendment or addition of new facts after the commencement of the trial. It would appear to the Chamber, however, that such a possibility, if compatible with the texts currently in force, would mean that the Prosecutor would have to institute new proceedings against the suspect before the Pre-Trial Chamber."

²⁸ *Yekatom*, [ICC-01/14-01/18-542](#), para 14: 'In the present case however, and at this point, it does not appear to the Chamber that the legal characterisation in this case might be subject to change, as prescribed by Regulation 55(2) of the Regulations. Notably, the Chamber recalls that the Prosecution requests that notice be given for modes of liability which have been assessed and adjudicated by PTC II twice. First, these modes of liability – which formed part of the Prosecution's document containing the charges – 41 were rejected by PTC II in its Confirmation Decision. Second, PTC II rejected the same modes of liability in its Decision on Reconsideration and Leave to Appeal. Noting that the Court's statutory framework does not provide for the possibility of a review of confirmation decisions by trial chambers and the distinct powers afforded to pre-trial chambers to determine the factual scope of the charges, the Chamber will defer to the PTC II's findings.'

Chamber declines to confirm a mode of liability due to the fact that it was not charged or its position that another mode of liability was more apt, and the scenario in which, as here, the Pre-Trial Chamber makes an explicit determination that the evidence adduced during the confirmation hearing fails to satisfy the evidential threshold for confirming a specific charge or mode of liability. In the latter case, the Pre-Trial Chamber's finding must become final unless the Prosecution appeals or avails itself of the procedure under Article 61(9). As the Trial Chamber in *Yekatom* has further noted, deference to the findings of the Pre-Trial Chamber is appropriate as 'the Court's statutory framework does not provide for the possibility of a review of confirmation decisions by trial chambers' as pre-trial chambers have 'distinct powers . . . to determine the factual scope of the charges'.²⁹

23. Moreover, as the Appeals Chamber has explained in its Appeals Judgment in regards to Regulation 55 in this case, while the Trial Chamber is entitled to read a confirmation decision 'holistically,' taking the 'confirmation decision together with the document containing the charges and subsequent amendments,' it may do so '[w]here the confirmation decision *does not directly address certain factual allegations* advanced by the Prosecutor'.³⁰ Where the Trial Chamber instead directly contradicts those directly addressed facts, it falls afoul of principles of international human rights law, including the accused's fundamental right to notice as enshrined in Article 67(1)(a) and (b). Similarly, in *Gbagbo*, the Appeals Chamber held:³¹

There is no legal impediment to a Trial Chamber recharacterising 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 recharacterised were confirmed by that Pre-Trial Chamber.

24. Thus, while the Appeals Chamber found that facts could be resurrected for the purpose of recharacterising a previously considered mode of liability, it expressly emphasised that the Trial Chamber cannot exceed the confirmed facts. It is therefore

²⁹ *Yekatom*, [ICC-01/14-01/18-542](#), para 15.

³⁰ [ICC-01/12-01/18-1562-Red](#), paras. 5, 94.

³¹ [ICC-02/11-01/15-369](#), para 2.

clear that any such determination by the Trial Chamber must rest on confirmed facts and circumstances.

25. The Issue arises from the Decision as to whether Trial Chamber X erred in exceeding the facts and circumstances confirmed in the charges.

26. The factual findings of Pre-Trial Chamber I were that:

- a) contrary to the Prosecution's submissions, the Chamber did not consider that [REDACTED];³²
- b) it was not established to the requisite standard that Mr Al Hassan had himself administered the flogging of [REDACTED];³³
- c) the persons who executed the sentences on [REDACTED] 2012 were from Ansar Dine/AQMI, but there was no specific finding that they were members of the Islamic Police;³⁴ and
- d) Mr Al Hassan's role, along with other members of the Islamic Police, centred around providing "practical assistance" as a security cordon.³⁵

³² Confirmation Decision, ICC-01/12-01/18-461-Conf-Corr, para 789: "Après avoir examiné les faits établis au paragraphe 270 de cette décision, la Chambre ne considère pas que, comme l'avance le Procureur, [REDACTED]. La Chambre relève que [REDACTED]."

³³ Confirmation Decision, ICC-01/12-01/18-461-Conf-Corr, para 790: "Par conséquent, la Chambre estime qu'il n'est pas établi au standard requis que M. Al Hassan ait lui-même administré la flagellation subie par [REDACTED]. La Chambre ne retient donc pas la responsabilité pénale individuelle de M. Al Hassan en tant qu'auteur direct au regard de l'article 25-3-a du Statut. Elle examinera cependant la responsabilité pénale individuelle de M. Al Hassan pour ce fait criminel au regard des autres formes de responsabilité prévues aux dispositions c et d de l'article 25-3 du Statut."

³⁴ Confirmation Decision, ICC-01/12-01/18-461-Conf-Corr, para 912: "Se fondant sur les faits établis aux paragraphes 307 à 308 de cette décision, la Chambre considère qu'il n'est pas nécessaire dans ce cas particulier de démontrer que les crimes ont été commis par des membres de la Police islamique, car, d'une part, il est établi au standard requis, au vu des circonstances, que les auteurs physiques du crime et les personnes présentes pour assurer son exécution étaient des membres d'Ansar Dine/AQMI, parmi lesquels des membres de la Police islamique."

³⁵ Confirmation Decision, ICC-01/12-01/18-461-Conf-Corr, para 912 (*emphasis added*): "D'autre part, la Chambre ne retient la responsabilité de M. Al Hassan en se fondant sur l'autorité qu'il aurait pu exercer sur les membres de la Police islamique. En revanche, la Chambre se fonde sur le fait que M. Al Hassan était présent lors de la flagellation [REDACTED], dans le cadre d'une de ses fonctions au sein de la Police islamique, à savoir celle d'assurer la sécurité lors de l'exécution publique de sanctions ordonnées par le Tribunal islamique. La Chambre considère qu'il est raisonnable de conclure au vu des circonstances qu'il a également tenu ce rôle pendant la flagellation des deux autres couples le [REDACTED] 2012. La Chambre considère ainsi que, de par son rôle qui consistait à assurer avec d'autres membres de la Police islamique, dont Abou Dhar et Abdallah Burkini, un « cordon de sécurité » entre les personnes qui étaient flagellées et le public, M. Al Hassan a apporté

27. In contrast, the Trial Chamber's Regulation 55 determination goes beyond these facts and circumstances by relying on an alleged fact (that Mr Al Hassan personally flogged [REDACTED]³⁶) that was rejected by the Pre-Trial Chamber at paragraphs 789 and 790 of the Confirmation Decision:³⁷

Après avoir examiné les faits établis au paragraphe 270 de cette décision, la Chamber ne considère pas que, comme l'avance le Procureur, [REDACTED]. La Chamber relève que [REDACTED].

Par conséquent, la Chambre estime qu'il n'est pas établi au standard requis que M. Al Hassan ait lui-même administré la flagellation subie par [REDACTED]. [...]

28. Personal participation as a physical perpetrator in a particular incident is a material fact:³⁸ the *ad hoc* tribunals have confirmed that material facts which concern the personal actions of the accused have to be clearly and specifically pleaded in the indictment.³⁹ Indeed, it is clear from the decision that the alleged fact concerning Mr Al Hassan's physical participation in the flogging was germane to the Chamber's decision that the elements of Article 25(3)(a) might be met. The Trial Chamber's decision therefore rests on a material fact that was not pleaded in the indictment. This is impermissible.

29. The Issue therefore arises from the Decision as to whether Trial Chamber X erred in law by exceeding the facts and circumstances confirmed by Pre-Trial Chamber I when issuing notice of possible re-characterisation of Mr Al Hassan's responsibility as a direct perpetrator for the charged incident [REDACTED] pursuant to Article 25(3)(a) of the Statute.

une « assistance pratique » qui a eu un effet sur la commission de l'infraction et qu'il a apporté son assistance « [e]n vue de faciliter » la commission des flagellations concernant [...] [REDACTED]. »

³⁶ Second Decision, ICC-01/12-01/18-1739-Conf, para 35.

³⁷ *Supra*, fns 31 and 32.

³⁸ ICTR, *Seromba*, [Appeals Judgment](#), para 27: "Criminal acts that were physically committed personally by the accused must be specifically set forth in the indictment".

³⁹ See [Kupreškić et al. Appeal Judgment](#), para 89; [Krnojelac Appeal Judgment](#), para 32; [Niyitegeka Appeal Judgment](#), para 193; [Ntakirutimana Appeal Judgment](#), para 32; [Kvočka et al. Appeal Judgment](#), para 28; [Naletilić & Martinović Appeal Judgment](#), para 24; [Cyangugu Appeal Judgment](#), para 23; [Sylvestre Gacumbitsi Judgment](#), para 49.

The Issue will significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trials, and an immediate resolution by the Appeals Chamber may materially advance the proceedings

30. The Issue significantly affects the fairness of the proceedings.
31. *First*, previous Chambers of this Court have emphasised the relationship between Regulation 55 and fundamental human rights, including the right to fair trial⁴⁰ (and the Chamber’s corollary duty⁴¹) and the right to adequate time and facilities.⁴²
32. As explained by the Appeals Chamber in *Lubanga*:⁴³
- human rights law demands that the modification of the legal characterisation of facts in the course of the trial must not render that trial unfair. The Appeals Chamber notes in this context that article 67(1)(b) of the Statute provides for the right of the accused person to “have adequate time and facilities for the preparation of the defence”. It is to avoid violations of this right that Regulation 55(2) and (3) set out several stringent safeguards for the protection of the rights of the accused.
33. *Second*, the Second Decision was delivered on 20 September 2021, some 14 months after the opening of trial and after [REDACTED] *viva voce* witnesses have testified. Contrary to Trial Chamber X’s statement in the Second Decision,⁴⁴ the Defence does not have ‘adequate time to prepare its defence and adapt its strategy as necessary’.
34. The Defence has not had an opportunity to investigate this incident with the benefit of knowledge of the change of mode of liability. The proposed re-characterisation would necessarily require re-prioritisation of investigative resources in order for the Defence to be able to question future Prosecution witnesses. This will impact expeditiousness by placing unforeseen additional strain on Defence resources at this late stage of the Prosecution’s case.

⁴⁰ Rome Statute, Article 67(1).

⁴¹ Rome Statute, Article 64(2).

⁴² Rome Statute, Article 67(1)(b).

⁴³ [ICC-01/04-01/06-2205](#), para 85.

⁴⁴ Second Decision, ICC-01/12-01/18-1739-Conf, para 40.

35. Three witnesses with knowledge of the charged incident have already testified: [REDACTED]. [REDACTED] was questioned briefly about this incident by both the Prosecution⁴⁵ and the Defence.⁴⁶ [REDACTED] was also questioned briefly about this incident by the Defence.⁴⁷ [REDACTED] was not questioned by the Defence concerning this incident. The decision taken by Counsel not to question more extensively these witnesses concerning this incident was made on the basis of the mode of liability charged. The Second Decision thus raises the possibility that these witnesses would have to be recalled for further questioning, which would necessarily prolong the proceedings.

36. Maintenance of the Second Decision would therefore impact the expeditiousness of these proceedings. Responsibility for any prolongation to these proceedings occasioned by necessary adjournment and/or additional questioning of witnesses cannot be laid at the feet of the Defence.

37. An immediate resolution by the Appeals Chamber on this issue would materially advance the proceedings, as clarity concerning the charges applicable in a case now 14 months into trial is necessary and witnesses are currently being heard which could enliven a need for Defence questioning on the charged incident.

IV. Relief sought

38. The Defence respectfully requests that Trial Chamber X **GRANT LEAVE TO APPEAL** the Second Decision on the Issue identified herein.



Melinda Taylor
Counsel for Mr Al Hassan

Dated this 27th Day of September 2021
At The Hague, The Netherlands

⁴⁵ [REDACTED].

⁴⁶ [REDACTED].

⁴⁷ [REDACTED].