



Original: English

**No. ICC-01/12-01/18
Date: 8 November 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

**Third 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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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 Regulation 55 of the Regulations of the Court (the ‘Regulations’), issues the following ‘Third 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 23 April 2020, PTC I issued a decision, *inter alia*, amending the confirmed charges against Mr Al Hassan (the ‘Amending Decision’).²
3. 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’).³
4. On 8 July 2020, the Defence filed its response to the Notice Application (the ‘Response’).⁴
5. 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’).⁵ On this occasion, the

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 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).

³ 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).

⁴ 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.

⁵ ICC-01/12-01/18-1211-Conf (a public redacted version thereof was filed on 25 June 2021).

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 without prejudice to providing further notice in the future.

6. On 1 July 2021, the Appeals Chamber issued its judgment confirming the First Decision (the ‘Appeals Judgment’).⁶
7. 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 ‘Second Decision’).⁷

II. Analysis

8. For the purpose of the present decision, the Chamber incorporates by reference the applicable legal framework set out in the First Decision.⁸
9. In relation to witness P-0547, the Prosecution suggested in its Notice Application that the alleged rapes in detention of P-0547, together with the other facts already retained under count 5 (outrage upon personal dignity), be subject to notice of recharacterisation 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.⁹
10. 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.¹⁰ The Chamber nonetheless declined to provide notice as regards counts 2 and 4 for these individuals finding that ‘it

⁶ 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 date.)

⁷ ICC-01/12-01/18-1739-Conf (a public redacted version was filed on the same date).

⁸ First Decision, ICC-01/12-01/18-1211-Red, paras 9-14.

⁹ First Decision, ICC-01/12-01/18-1211-Red, paras 64-67.

¹⁰ First Decision, ICC-01/12-01/18-1211-Red, para. 73.

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.¹¹ The Chamber subsequently heard the testimony of P-0547 who testified in court between 26 and 28 October 2021¹² and considers it appropriate to re-assess the possibility of providing notice on this basis.

11. Having had due regard to the evidence before it, most notably the testimony of P-0547, 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, including acts of a sexual nature allegedly committed against P-0547, which are set out in paragraphs 337 and 678 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-0547.
12. In reaching the above conclusion, the Chamber has been mindful of the fact that, in its view, ‘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.’¹³
13. 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

¹¹ First Decision, ICC-01/12-01/18-1211-Red, para. 74.

¹² ICC-01/12-01/18-T-151-CONF-ENG; ICC-01/12-01/18-T-152-CONF-ENG; ICC-01/12-01/18-T-153-CONF-ENG.

¹³ First Decision, ICC-01/12-01/18-1211-Red, para. 61 *citing* Amending Decision, ICC-01/12-01/18-767-Conf, para. 102. The Chamber has also given due regard to the findings of the Appeals Chamber as cited in the Second Decision. See Second Decision, ICC-01/12-01/18-1739-Red, para. 23.

described in the charges. This assessment is made without making any determination as to the legal interpretation of the relevant legal elements.¹⁴

14. 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. First the Chamber deemed it necessary to hear the relevant evidence before making its definitive assessment on the Regulation 55 notice. Second, the Chamber notes that the Defence is informed in detail of the facts and circumstances relied upon for the proposed re-characterisations. Third, the Chamber 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,¹⁵ as well as the First Decision which indicated that a further assessment would be conducted upon hearing the testimony of the witness.¹⁶
15. 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-0547 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.

¹⁴ First Decision, ICC-01/12-01/18-1211-Red para. 13 *citing* Appeals Chamber, *The Prosecutor v. Germain Katanga*, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons", 27 March 2013, ICC-01/04-01/07-3363, paras 53, 56.

¹⁵ Amending Decision, ICC-01/12-01/18-767-Conf-Corr, para. 97; Confirmation Decision, ICC-01/12-01/18-461-Conf, para. 682.

¹⁶ First Decision, ICC-01/12-01/18-1211-Red, para. 74.

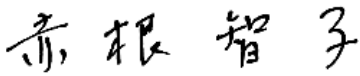
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

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-0547 may be subject to change, as described in paragraph 15 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, 8 November 2021

At The Hague, The Netherlands