



Original: English

**No. ICC-01/12-01/18
Date: 24 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

Decision on Defence Request for Leave to Appeal ‘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**

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 Article 82(1)(d) of the Rome Statute (the ‘Statute’), issues the following ‘Decision on Defence request for leave to appeal “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. Between 26 and 28 October 2021, Prosecution witness P-0547 testified before the Chamber.¹
2. On 8 November 2021, the Chamber issued its ‘Third Decision on notice of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court’, which related to witness P-0547 (the ‘Impugned Decision’).²
3. On 15 November 2021, the Defence filed a request seeking leave to appeal the Impugned Decision (the ‘Request’) with respect to the following two issues: (i) whether the Chamber abused its discretion, and acted unreasonably, by making judicial determinations based on the testimony of P-0547, given the particular developments that arose during her testimony (the ‘First Issue’); and (ii) whether the Chamber erred in procedure by failing to afford the Defence an opportunity to make oral or written submissions on this matter, before rendering the Third Decision (the ‘Second Issue’).³
4. On 19 November 2021, the Prosecution filed its response to the Request (the ‘Response’).⁴

¹ 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.

² ICC-01/12-01/18-1897.

³ Defence Request for Leave to Appeal ‘Third Decision on notice of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court’, ICC-01/12-01/18-1923-Conf (with four confidential *ex parte* annexes only available to the Prosecution and the Defence).

⁴ Prosecution response to Defence request for leave to appeal ‘Third Decision on notice of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court’, ICC-01/12-01/18-1958-Conf.

II. Analysis

5. 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.⁵
6. The core of the Defence's submissions under the First Issue related to a disclosure issue which was brought to the Chamber's attention on the last day of P-0547's testimony, which led the Defence to note at that stage there was a risk that the witness would have to be recalled.⁶ The Defence avers that the First Issue arises from the Impugned Decision as therein the Chamber 'conducted a factual evaluation [...] and reached a conclusion' regarding P-0547's testimony notwithstanding the fact that 'cross-examination could not be concluded'.⁷
7. The Chamber notes that while the Defence raises concerns relating to disclosure and consistency amongst the evidence, neither such concerns nor the hypothetical possibility that the Defence may seek to recall P-0547 in the future, means that the testimony of the witness cannot be considered as being concluded at the present time. Accordingly the First Issue does not constitute an 'appealable issue.' In any case, the Chamber recalls that the Chamber's decision to activate Regulation 55 of the Regulations is a discretionary one which depends on *whether and when it appears to the Chamber* that legal re-characterisation may be possible.⁸
8. Turning to the Second Issue, the Chamber notes that, as rightly pointed out by the Prosecution, the Defence has already provided submissions on the activation of Regulation 55 of the Regulations with respect to P-0547, including on counts 2 and 4, which were duly taken into account by the Chamber in issuing the

⁵ 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.

⁶ Request, ICC-01/12-01/18-1923-Conf, para. 20. *See also* ICC-01/12-01/18-T-153-CONF-ENG, p. 38 line 1 – p. 39 line 4.

⁷ Request, ICC-01/12-01/18-1923-Conf, para. 26.

⁸ Decision on application for notice of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court, 17 December 2020, ICC-01/12-01/18-1211-Conf (the 'First Decision'; public redacted version filed on 25 June 2021), paras 11-12.

Impugned Decision.⁹ The Chamber also recalls that the Impugned Decision is the first step of a three-stage process, which merely entails a *notice* that the legal characterisation of facts *may* be subject to change.¹⁰ In so far as the Defence appears to suggest that the Impugned Decision entails an actual ‘requalification’,¹¹ the Second Issue is based on a misunderstanding of the Impugned Decision and the applicable law. As clearly stated in the First Decision,¹² the parties will be given an opportunity to make oral or written submissions as to the appropriateness of the actual legal re-characterisation, before the Chamber decides whether to make the proposed re-characterisation for which notice was given. In this regard, the Chamber recalls the findings of the Appeals Chamber that pursuant to Regulation 55(2) of the Regulations, ‘the participants must be given an opportunity to make submissions at an appropriate stage of the proceedings, *following* notice of a possible recharacterisation’.¹³ For these reasons, the Second Issue does not constitute an appealable issue arising from the Impugned Decision.

9. For the aforementioned reasons, the Chamber finds that neither of the issues identified by the Defence are ‘appealable issues.’ Thus it is unnecessary to address the remainder of the cumulative requirements of Article 82(1)(d) of the Statute.

⁹ 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, paras 38-47; Response, ICC-01/12-01/18-1958-Conf, para. 16.

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

¹¹ Request, ICC-01/12-01/18-1923-Conf, paras 27-28.

¹² First Decision, ICC-01/12-01/18-1211-Red, para. 10(ii).

¹³ 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, para. 18 [emphasis added].

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request; and

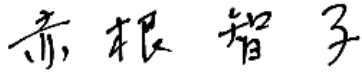
INSTRUCTS the parties to file public redacted versions of ICC-01/12-01/18-1923-Conf and ICC-01/12-01/18-1958-Conf by Tuesday, 25 January 2022.

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 Wednesday, 24 November 2021

At The Hague, The Netherlands