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No.: ICC-01/12-01/18

Date: 25 January 2022

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 “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)**

Source: Office of the Prosecutor

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

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I. Introduction

1. Trial Chamber X (“Chamber”) should dismiss the Defence request for leave to appeal¹ the Chamber’s Third Decision on notice of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court (“Third Decision”).²
2. Both of the two proposed issues either misread and mischaracterise the Third Decision, contest matters that did not arise from the Third Decision, or amount to a mere disagreement with the Third Decision, and are thus not appealable under article 82(1)(d) of the Rome Statute (“Statute”).³ Even *arguendo*, if the proposed issues did arise from the Third Decision, none of the proposed issues meets the rest of the cumulative criteria under article 82(1)(d) of the Statute. They do not significantly affect the fair and expeditious conduct of the proceedings and their immediate resolution by the Appeals Chamber would not materially advance the proceedings.

II. Confidentiality

3. Pursuant to regulation 23*bis*(2) of the Regulations of the Court (“Regulations”), this response is filed confidentially because the Request was filed with this classification. A public redacted version will be filed in due course.

¹ ICC-01/12-01/18-1923-Conf (“Request”).

² ICC-01/12-01/18-1897.

³ ICC-01/04-01/10-487, para. 32-33; ICC-01/05-01/13-1278, para. 9.

III. Submissions

A. The First Issue raised by the Defence does not arise from the Third Decision

i. The Defence mischaracterises the Third Decision

4. In relation to the First Issue of “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”,⁴ the Defence mischaracterises the Third Decision. Contrary to the Defence’s allegations, the Third Decision does not mean that the Chamber has already reached “factual determinations concerning her evidence”, or conclusions “as concerns the legal implications of [P-0547’s] testimony”.⁵
5. The Third Decision only provided notice as to the “possibility” that legal characterisation of the facts and circumstances set out in the charges related to P-0547 “may be” subject to change. The Chamber was acting in accordance with the Appeals Chamber’s judgement, which required that when the possibility of such modification appears to the trial chamber at any time during the trial, it shall give notice thereof to the participants in accordance with regulation 55(2) of the Regulations and with due regard to the rights of the accused person.⁶
6. Providing notice under regulation 55(2) of the Regulations is not an ultimate “judicial determination” on the facts, which will only be made at the end of trial when the Chamber will assess P-0547’s evidence together with other evidence, including what may be submitted by the Defence.

⁴ Request, para. 1.

⁵ Request, para. 29.

⁶ ICC-01/12-01/18-1562-Conf, para. 1, 48.

7. The Chamber was acting well within its discretion in providing notice of a possible legal re-characterisation of the facts on the basis of P-0547's testimony. P-0538's account made it clear that the act of rape was directly linked to the facts and circumstances related to her arrest and detention and that severe pain and suffering⁷ had been inflicted on her. During her testimony, P-0547 described in detail how she was arrested by three men wearing a turban, khaki coloured-clothes and short trousers speaking Arabic,⁸ who arrived in a car with a black flag with white writings.⁹ As she refused to go with them, she was hit with a whip on her back, which left her scars.¹⁰ She was then brought to the BMS where she was held in a small room, together with three other women,¹¹ where she had no access to the outside world, food or water.¹² [REDACTED]
- [REDACTED]
- [REDACTED],¹³ [REDACTED]
- [REDACTED].¹⁴ She also described the pain and suffering caused by the incident.¹⁵

ii. The Defence mischaracterises the impact of the Third Decision

8. The Defence further mischaracterises the impact of the Third Decision. None of the “particular developments” described by the Defence provides a basis for arguing that the Chamber abused its discretion or acted unreasonably by providing regulation 55 notice at this juncture. Indeed, the only issues described by the Defence are the question of whether or not [REDACTED] is, or is not, P-0547, and

⁷ See Element 1 of the Elements of Crimes in relation to the war crime of cruel treatment under article 8(2)(c)(i) of the Statute, referring to “severe physical or mental pain or suffering”, and Element 1 of the Elements of Crimes in relation to the crime against humanity of other inhumane acts under article 7(1)(k) of the Statute, referring to “great suffering, or serious injury to body or to mental or physical health”.

⁸ T-151-CONF-ENG ET, p. 23, l. 14 – p. 24, l. 2.

⁹ T-151-CONF-ENG ET, p. 22, l. 10 – 22.

¹⁰ T-151-CONF-ENG ET, p. 20, l. 5-6, p. 24, l. 10 – 13.

¹¹ T-151-CONF-ENG ET, p. 26, l. 25 – p. 27, l. 3.

¹² T-152-CONF-ENG ET, p. 5, l. 13 – p. 6, l. 3.

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ See e.g. T-152-CONF-ENG ET, [REDACTED], p. 30, l. 10 - 15.

whether the Defence was precluded from cross-examining P-0547 on this issue for reasons attributable to the Prosecution's conduct.¹⁶

9. The Defence misstates a number of facts in this regard.

10. First, there is information that was made available to the Defence prior to its cross-examination, related to [REDACTED], and P-0547, including information relevant to whether they are, or are not, the same person:

- There are several accounts related to [REDACTED], disclosed to the Defence, including: (i) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED],¹⁷ (ii) [REDACTED]
[REDACTED]
[REDACTED],¹⁸ (iii) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED],¹⁹ (iv) P-0547's witness statement, [REDACTED],²⁰ and (v) [REDACTED]
[REDACTED]
[REDACTED],²¹
- There exist a number of differences between the information related to [REDACTED], as disclosed to the Defence, [REDACTED]
[REDACTED] on the one hand, and the accounts of P-0547 in her statement [REDACTED]
[REDACTED] on the other hand. These differences relate not only

¹⁶ Request, para. 26.

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED].

to personal details such as their names, the identification documents,²² the names of their parents,²³ and the date/year of birth²⁴ but also the accounts relating to their victimisation, such as the timing of the incident,²⁵ the perpetrators,²⁶ and the person who intervened to secure their release;²⁷

- During the examination-in-chief, P-0547 gave additional details that distinguished her accounts from those of [REDACTED] P-0547 stated that the community leaders from the neighbourhood had come to beg for her release and provided their names.²⁸ [REDACTED]

[REDACTED]

[REDACTED]²⁹ [REDACTED]

[REDACTED]

[REDACTED]³⁰ [REDACTED] [REDACTED] [REDACTED]

[REDACTED]³¹ [REDACTED]

²² [REDACTED]
[REDACTED]

²³ [REDACTED]
[REDACTED]
[REDACTED]

²⁴ [REDACTED]
[REDACTED]

²⁵ [REDACTED]
[REDACTED]

²⁶ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

²⁷ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

²⁸ T-152-CONF-ENG ET, p. 15, l. 12- 21, p. 17, l. 3 [REDACTED].

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ [REDACTED].

11. Second, the Defence was able during cross-examination to explore with P-0547 whether she is the same person as [REDACTED] or not. [REDACTED]

[REDACTED]

[REDACTED].³²

12. In fact, the Defence could have posed more questions to ascertain if [REDACTED] was indeed P-0547, [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]. Certainly the defence was not precluded by the Chamber from doing so. It did not.

13. Third, regardless of whether P-0547 is [REDACTED] or not, the Chamber could have reached the same conclusion as to the potential legal characterisation of facts related to her incident. There is one key similarity between the accounts of [REDACTED] and that of P-0547, namely, [REDACTED]

[REDACTED]³³ [REDACTED]³⁴ [REDACTED]

[REDACTED].³⁵

14. Finally, contrary to what the Defence asserts, the Prosecution has acted at all times in good faith and simply provided to the Defence information related to P-0547 and [REDACTED] on the basis of what was in its possession, in advance of cross-examination. Based on information in the Prosecution's possession, there is likely to be a confusion or good faith mistake on the part of [REDACTED]

[REDACTED] and P-0547: [REDACTED]

[REDACTED] as being the same person as P-0547, but

³² [REDACTED].

³³ [REDACTED]

³⁴ [REDACTED]

[REDACTED].

³⁵ [REDACTED]

[REDACTED].

without being able to provide any identification documentation for [REDACTED] which would enable a proper assessment on this point. In this regard:

- The Prosecution never stated that P-0547 and [REDACTED] were the same person;
- Indeed, due to differences in the identifying information and accounts between [REDACTED] and P-0547 as described at paragraph 10 above,³⁶ when disclosing [REDACTED] [REDACTED] the Prosecution applied redactions to the identifying information of [REDACTED] [REDACTED] with no reference to P-0547 in the “Related to Witness” metadata field;³⁷
- The Prosecution never relied [REDACTED] [REDACTED] in support of P-0547’s incident;³⁸
- [REDACTED]³⁹ [REDACTED]
[REDACTED].⁴⁰
- [REDACTED]

³⁶ [REDACTED]
[REDACTED]
[REDACTED].

³⁷ On 17 February 2020, in Pre-Trial INCRIM package 52, [REDACTED] was disclosed as [REDACTED]. On 10 March 2020, in Pre-Trial INCRIM package 59, [REDACTED] was disclosed as [REDACTED].

³⁸ [REDACTED]
[REDACTED].

³⁹ Request, para. 23.

⁴⁰ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

██████████⁴¹ (i.e. identifying them as the same person). However, ██████████

[REDACTED] 42 [REDACTED]

[REDACTED],⁴³

.44

- In March and May 2020, the Prosecution disclosed two investigation notes,

related to information

_____ a number of victims, _____

[REDACTED] 45 [REDACTED]

██████████, 46 ██████████, 47

- On 29 September 2021, in view of the upcoming testimony of P-0547, the

Prosecution disclosed a lesser redaction version [REDACTED] [REDACTED], from which the

redactions to her identifying information, including her name, date of birth,

number of ID card, family situation, and place of residence, were lifted.⁴⁸

_____ as if it was the same

person as P-0547, the Prosecution considered it appropriate to alert the

Defence to the different details

██████████. In the disclosure list, it was clarified that these redactions

41 [REDACTED]

42

43 [REDACTED]

44

45

46 [REDACTED]

47

⁴⁸ Trial INCRIM package 149 disclosed on 29 September 2021.

were lifted because “it could potentially be relevant to P-0547”;

- On 26 October 2021, after receiving the list of material for the Defence, which included [REDACTED], the Prosecution communicated to the Defence via email the names [REDACTED] [REDACTED] in order to provide additional details that distinguished the two individuals.⁴⁹ At no point did the Prosecution disclose [REDACTED] as being related to P-0547;
- Following the *inter partes* communications after P-0547’s testimony, the Prosecution agreed, as a courtesy, to the Defence request [REDACTED] [REDACTED] to obtain a copy of identification document [REDACTED] in order to clarify the matter. It also contacted [REDACTED] [REDACTED]. However, both indicated that they did not have any identification document for [REDACTED].⁵⁰ Instead, [REDACTED] [REDACTED] a copy of an identification card belonging to [REDACTED] [REDACTED] (P-0547),⁵¹ [REDACTED] is the same as the person appearing in the identification card,⁵² and
- [REDACTED]
[REDACTED]⁵³ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] s.

⁴⁹ Email from the Prosecution to the Defence on 26 October 2021 at 23:09. Further lesser redacted versions of these documents were officially disclosed in Trial INCRIM package 153 on 27 October 2021.

⁵⁰ [REDACTED]

⁵¹ [REDACTED]

⁵² [REDACTED]

⁵³ [REDACTED]

B. The Second Issue raised by the Defence does not arise from the Third Decision

15. The Second Issue raised by the Defence is 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.⁵⁴ This proposed issue mischaracterises the facts and in any event represents a disagreement with the process in which the Third Decision was issued. It is thus not an appealable issue.

16. First, the Defence has misstated the facts. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁵⁵ [REDACTED]

[REDACTED]

[REDACTED]⁵⁶

17. Since the First Decision was issued on 17 December 2020,⁵⁷ the Defence was aware of the possibility that after P-0547's testimony, the Chamber may give regulation 55(2) notice by considering acts of rape committed during detention as part of count 2 (other inhumane acts) and count 4 (cruel treatment).

18. Second, the Defence has misstated the law. According to regulation 55(2) of the Regulations, "at any time during the trial", if it appears to the Chamber that the legal characterisation of facts may be subject to change, it shall give notice of such a possibility. While it also requires that the Chamber give the participants the opportunity to make oral or written submissions "at an appropriate stage of the proceedings", it does not require that such an opportunity be given *before* the issuance of such notice. In fact, the Appeals Chamber in *Katanga* clarified that: "the

⁵⁴ Request, para. 1.

⁵⁵ [REDACTED].

⁵⁶ [REDACTED].

⁵⁷ ICC-01/12-01/18-1211-Red, para. 74.

participants must be given an opportunity to make submissions at an appropriate stage of the proceedings, *following* notice of a possible recharacterisation, but this does not limit the Trial Chamber's power to give such notice 'at any time during the trial' (emphasis added)."⁵⁸

19. The Prosecution also notes that in the Second Decision on regulation 55(2) issued on 20 September 2020 ("Second Decision"), based on P-0570's statement introduced pursuant to rule 68(2)(c) of the Rules,⁵⁹ the Chamber issued notice pursuant to regulation 55(2) of the Regulations that the legal characterisation of the facts and circumstances underlying the incident relating to P-0570 may be considered under counts 2 and 4 of the charges.⁶⁰ In its leave to appeal the Second Decision, the Defence raised no issue regarding the lack of opportunity to be heard in relation to whether P-0570's statement could support such a re-classification.⁶¹

C. The Request fails to meet the remaining cumulative criteria under article 82(1)(d) of the Statute

20. Even assuming *arguendo*, that any of the above proposed questions identifies an appealable issue, the Request should still be denied because it does not show that the proposed issues affect the fair and expeditious conduct of the proceedings, or the outcome of the trial, or that an immediate resolution of these issues by the Appeals Chamber will materially advance the proceedings.

21. The Third Decision has no impact on the Defence's opportunity to clarify and investigate the issues related to [REDACTED] and P-0547, "with a view to determining whether P-0547 should be recalled to question her on such matters".⁶²

⁵⁸ ICC-01/04-01/07-3363, para. 18.

⁵⁹ ICC-01/12-01/18-1588-Conf.

⁶⁰ [REDACTED].

⁶¹ ICC-01/12-01/18-1773-Conf.

⁶² Request, para. 25.

22. As discussed above, the Third Decision only provided notice as to the “possibility” that legal characterisation of the facts and circumstances set out in the charges related to P-0547 “may be” subject to change. The Defence arguments as to the impact of the Decision on the “Chamber’s ability impartially to assess a future request to recall P-0547 or strike aspects of her testimony that were affected by the Prosecution’s conduct”⁶³ is unfounded.
23. As to alleged inconsistencies and potential testimonial contamination raised by the Defence,⁶⁴ these issues are only relevant to the Chamber’s ultimate assessment of P-0547’s testimony and her credibility as a witness. It is not determinative of the Chamber’s decision to issue notice of a potential re-characterisation of the facts in relation to the incident concerning P-0547. The Prosecution also notes, in passing, that the Defence has misstated the law: it is not required to prove that the Accused made a direct contribution to, or had specific knowledge of, the particular incident charged.⁶⁵
24. Furthermore, the facts related to P-0547’s incident, including acts of sexual violence, have already been part of the charges under count 13 (persecution), counts 12-13 (rape) as a result of the First Decision⁶⁶ and count 5 (outrages upon personal dignity) as a result of the Second Decision.⁶⁷ The possible legal re-characterisation in relation to count 2 (inhumane acts) and count 4 (cruel treatment) should not require any additional preparations on the part of the Defence.⁶⁸ In this regard, the Prosecution recalls the Appeals Chamber’s findings in its judgment on the First Decision:

“the relevant acts of rape allegedly occurred during the detention of P-

⁶³ Request, para. 29.

⁶⁴ Request, para. 36.

⁶⁵ See e.g. ICC-01/12-01/18-461-Conf-Corr, para. 950; ICC-01/04-01/07-3436-tENG, para. 1632-1635.

⁶⁶ ICC-01/12-01/18-1211-Red, para. 86.

⁶⁷ ICC-01/12-01/18-1739-Red, para. 19.

⁶⁸ *Contra*, Request, para. 32.

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, 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. In addition, the Impugned Decision provides sufficient notice of the Trial Chamber's intention to rely on the acts of rape for purposes of counts 1 to 5. There is no indication that the Trial Chamber disregarded Mr Al Hassan's rights referred to in regulation 55(3) of the Regulations: the right to time and facilities for the preparation of his defence or the right to examine again a previous witness or call a new witness. The Appeals Chamber notes in this respect that the Impugned Decision was rendered at an early stage of the trial, allowing the Defence to adapt its strategy as necessary in light of the possible modification to the charges."⁶⁹

25. An immediate appellate resolution of these issues is not required because the Trial Chamber will make ultimate factual and legal findings concerning P-0547 on the basis of all evidence submitted at trial, including by the Defence, as part of its article 74 decision. The Defence may raise any relevant issues as part of its final appeal. In any event, the issues raised by the Defence are ultimately matters for the Trial Chamber's factual determination, within its broad discretion: namely, whether or

⁶⁹ ICC-01/12-01/18-1562-Red, para. 67.

not [REDACTED] and P-0547 are the same person and whether any differences in their accounts are relevant to an assessment of P-0547's credibility, and an assessment of P-0547's testimony regarding her rape. These are not matters for an appellate intervention, particularly at this stage of the proceedings.

IV. Conclusion

26. For the reasons set out above, the Defence's Request should be denied.



Karim A. A. Khan QC, Prosecutor

Dated this 25th of January 2022

At The Hague, The Netherlands