

1 International Criminal Court
2 Appeals Chamber
3 Situation: Republic of Mali
4 In the case of The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag
5 Mahmoud - ICC-01/12-01/18
6 Single Judge Luz del Ibáñez Carranza
7 Delivery of Judgment - Courtroom 1
8 Wednesday, 19 February 2020
9 (The hearing starts in open session at 10.03 a.m.)
10 THE COURT USHER: [10:03:39] All rise.
11 The International Criminal Court is now in session.
12 Judge Ibáñez Carranza presiding.
13 Please be seated.
14 JUDGE IBÁÑEZ CARRANZA: [10:04:15] Good morning, everybody.
15 First, as requested by the Outreach section, the photographer can now take pictures
16 for two minutes for the publicity of the hearing. Is he here? No. Okay, please, we
17 can invite him to enter for the publicity of the hearing. Thank you.
18 You have two minutes, please. Thank you.
19 (Pause in proceedings)
20 JUDGE IBÁÑEZ CARRANZA: [10:05:37] Thank you very much.
21 Court officer, please could you call the case.
22 THE COURT OFFICER: [10:05:46] Good morning, Madam President.
23 The situation in the Republic of Mali, in the case of The Prosecutor versus Al Hassan
24 Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, case reference ICC-01/12-01/18.
25 And for the record, we are in open session.

1 JUDGE IBÁÑEZ CARRANZA: [10:06:08] I am Judge Luz del Carmen
2 Ibáñez Carranza, presiding in this appeal arising from the case
3 of the Prosecutor v Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud.
4 My fellow judges in this appeal are Judge Chile Eboe-Osuji, Judge Howard Morrison,
5 Judge Piotr Hofmański and Judge Solomy Balungi Bossa.
6 May I ask the parties and participants to introduce themselves for the record, please,
7 starting with the Defence.
8 MS TAYLOR: [10:06:53] Good morning, Madam President. Good morning to my
9 colleagues in the courtroom.
10 My name is Melinda Taylor. I'm appearing on behalf of Mr Al Hassan today with
11 my co-counsel Sarah Bafadhel and Marie-Hélène Proulx, and we are assisted by
12 Gyo Suzuki, Mohamed Youssef, Sarah Marinier-Doucet, Waleed Mahmoud and Dolly
13 Chahla. And Mr Al Hassan is appearing today as well.
14 Thank you.
15 JUDGE IBÁÑEZ CARRANZA: [10:07:24] Thank you.
16 Office of the Prosecutor, please.
17 MS BRADY: [10:07:27] Yes, good morning, your Honour. My name is Helen Brady,
18 I'm the senior appeals counsel, and I'm appearing today with Mr George Mugwanya,
19 an appeals counsel. Thank you.
20 JUDGE IBÁÑEZ CARRANZA: [10:07:38] Thank you.
21 Legal Representative of Victims, please.
22 MR LUVENGIKA: [10:07:52](Interpretation) Good morning, your Honour. The
23 LRV team is made up of Mr Mayombo Kassongo, Ms Biyéké, and Madam Laplace,
24 the case manager, and myself Mr Nsita. Thank you.
25 JUDGE IBÁÑEZ CARRANZA: [10:08:09] Well, I see that the legal representative of

1 Mali is not here yet, but he will be arriving.

2 Thank you very much.

3 For the record, I also note that Mr Al Hassan is present in the hearing.

4 Today, the Appeals Chamber will deliver its judgment in the appeal of Mr Al Hassan

5 against the decision of Pre-Trial Chamber I of 27 September 2019, entitled, in French,

6 "*Décision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée*

7 *par la défense*", and in English, "Decision on the Admissibility Challenge raised by

8 the Defence for Insufficient Gravity of the Case".

9 For the reasons that follow, the Appeals Chamber unanimously rejects the appeal

10 lodged by Mr Al Hassan and confirms the decision of the Pre-Trial Chamber. This is

11 a non-authoritative summary of the Appeals Chamber's written judgment in the

12 appeal. The latter will be notified to the parties and participants after this hearing.

13 I shall briefly outline the procedural history of this appeal. On 27 September 2019,

14 the Pre-Trial Chamber rejected Mr Al Hassan's challenge that the case brought against

15 him was not of sufficient gravity to justify the further action by the Court under

16 Article 17(1)(d) of the Statute. It is this decision that is the object of Mr Al Hassan's

17 appeal.

18 The Pre-Trial Chamber subsequently confirmed the charges of war crimes and crimes

19 against humanity brought against Mr Al Hassan.

20 Mr Al Hassan filed his appeal brief on 21 October 2019 and the Prosecutor filed her

21 response on 12 November 2019. The victims and the authorities of Mali filed their

22 observations on issues arising in the appeal on 19 November 2019 and

23 23 December 2019 respectively.

24 Mr Al Hassan raises two grounds of appeal. Under the first ground of appeal,

25 Mr Al Hassan argues that the Pre-Trial Chamber erred by adopting, for the purposes

1 of admissibility, an overly broad and erroneous definition of the case that artificially
2 inflated the gravity of the case on the basis of irrelevant considerations.

3 Under the second ground of appeal, Mr Al Hassan challenges the Pre-Trial Chamber's
4 exercise of discretion in its assessment of the gravity of the case based on a purported
5 failure to attribute sufficient weight to the nature of his individual conduct.

6 Mr Al Hassan requests the Appeals Chamber to reverse the Impugned Decision and
7 determine that the case is inadmissible due to reasons of insufficient gravity.

8 The gravity requirement in Article 17(1)(d) of the Statute.

9 Prior to considering the specific arguments raised by Mr Al Hassan, the

10 Appeals Chamber finds it appropriate to set out its interpretation of the gravity
11 requirement stipulated in Article 17(1)(d) of the Statute.

12 For the reasons set out in detail in the written judgment, the Appeals Chamber
13 considers that the gravity requirement must be assessed on a case-by-case basis
14 having regard to the specific facts of a given case. The purpose of this requirement is
15 to exclude from the purview of the Court those rather unusual cases when a conduct
16 that technically fulfils all the elements of a crime under the Court's jurisdiction is
17 nevertheless of marginal gravity.

18 In reviewing the findings of the Pre-Trial Chamber challenged by Mr Al Hassan, the
19 Appeals Chamber is guided by the above interpretation of Article 17(1)(d)
20 of the Statute.

21 I have been noticed, for the record, that the representative of the State of Mali is
22 present now in the gallery, is it? Okay. Thank you. Thank you very much.
23 First ground of appeal.

24 I now turn to the first ground of appeal. Mr Al Hassan submits that the
25 Pre-Trial Chamber ignored the notion of a case for the purposes of Article 17 and

1 relied on vague and broad allegations of criminality. He argues that the
2 Pre-Trial Chamber erred by relying on the following factors: Allegations of
3 criminality included in the Document Containing the Charges to satisfy the
4 contextual elements, which are not linked to Mr Al Hassan's conduct; allegations of
5 criminality that fail to satisfy the requirements of Regulation 52 of the Regulations of
6 the Court in relation to the crime of persecution; and unidentified allegations of
7 criminality set out in undisclosed victims' applications.

8 In relation to factual allegations underpinning the contextual elements, the
9 Appeals Chamber finds, for reasons further elaborated in the written judgment, that
10 the Pre-Trial Chamber did not err in taking into account these allegations in its
11 gravity assessment as they are part of the case to be considered. In the case at hand,
12 it is clear that the circumstances of the alleged attack were not considered in abstract,
13 but in light of the crimes attributed to Mr Al Hassan and were thus incident specific.
14 Moreover, the Appeals Chamber finds no merit in Mr Al Hassan's arguments
15 pertaining to the Pre-Trial Chamber's alleged error in considering the charge of
16 persecution in its gravity assessment. The charge of persecution is to a large extent
17 based on the facts underlying counts 1 to 12 which specify historical events, defined
18 in time and place, and individual victims. In addition, the count of persecution is
19 but one of the 13 charges brought against Mr Al Hassan.

20 In relation to Mr Al Hassan's contention that the Pre-Trial Chamber's reliance on the
21 number of participating victims was erroneous, I will first address the
22 Appeals Chamber's approach as to the relevant criteria for the assessment of gravity
23 requirement under Article 17(1)(d) of the Statute. I will then summarise the
24 Appeals Chamber's determination of the matter.

25 In the view of the Appeals Chamber, both quantitative and qualitative criteria are

1 relevant in assessing gravity. The gravity assessment involves a holistic evaluation
2 of all relevant quantitative and qualitative criteria, including to some extent factors
3 pertinent to the determination of the sentence of a convicted person. These may
4 provide some useful guidance in the assessment of gravity. Quantitative criteria
5 alone, including the number of victims, while relevant, are not determinative of the
6 gravity of a given case.

7 In determining the number of victims, the number of participating victims may
8 provide some indication of the scope of victimhood within the context of a case. The
9 relevance of the number of participating victims to a gravity assessment pursuant to
10 Article 17(1)(d) must be assessed on a case-by-case basis.

11 Turning to the specific arguments raised by Mr Al Hassan, the Appeals Chamber
12 notes that the number of victims, while relevant, was not determinative in the
13 Pre-Trial Chamber's assessment of the gravity requirement under Article 17(1)(d)
14 of the Statute.

15 It remains undisputed that the facts underlying the alleged crimes in the present case,
16 as presented by the Prosecutor in the Document Containing the Charges, involve 10
17 direct victims of forced marriage, sexual slavery and rape, 22 victims, direct victims of
18 torture and other ill-treatment, 60 direct victims of the passing of sentences without
19 due process, and the destruction of 10 protected buildings. Furthermore, according
20 to the Prosecutor, according to the Prosecutor, the crime against humanity of
21 persecution affected the entire population of Timbuktu and its region. This
22 population potentially includes several indirect victims unaccounted by
23 Mr Al Hassan.

24 In light of the foregoing and given that the Pre-Trial Chamber does not seem to have
25 attached significant weight to the number of participating victims, it is clear that this

1 consideration was not a determinative factor in the Pre-Trial Chamber's assessment.

2 It was only one of the several relevant quantitative and qualitative considerations.

3 In particular, the Pre-Trial Chamber considered the nature and extent of the charged

4 crimes, the repercussions of the alleged crimes on the direct victims and the

5 population of Timbuktu as a whole, in particular the victims of rape, sexual slavery

6 and other inhumane acts in the form of forced marriages; the discriminatory motive

7 of the crimes allegedly committed against the population of Timbuktu on religious

8 and on gender-based grounds; the vulnerability of certain victims; the allegations that

9 the crimes at bar were committed as a part of a widespread and systematic attack

10 against the civilian population; the significant role that the Prosecutor attributes to

11 Mr Al Hassan in the execution of the said crimes through his contribution to Islamic

12 police; and Mr Al Hassan's degree of intent and degree of participation in these

13 crimes. Accordingly, the Appeals Chamber does not find an error.

14 The Appeals Chamber therefore rejects the first ground of appeal.

15 Second ground of appeal.

16 I shall now turn to the second ground of appeal.

17 Under this ground, Mr Al Hassan argues that in abusing its discretion, the

18 Pre-Trial Chamber erred in its assessment of gravity by failing to attribute sufficient

19 weight to the nature of his conduct. He also maintains that in its assessment the

20 Pre-Trial Chamber placed undue weight on the number of counts with which he had

21 been charged.

22 In relation to the nature of Mr Al Hassan's individual conduct, the Appeals Chamber

23 does not find any error in the Pre-Trial Chamber's consideration, in its assessment of

24 the gravity requirement, of the significant role that the Prosecutor attributes to

25 Mr Al Hassan in the execution of the said crimes. Contrary to the arguments

1 advanced by Mr Al Hassan, the Pre-Trial Chamber did not consider abstract notions
2 and labels regarding the conduct and role of Mr Al Hassan. Rather, it considered the
3 factual allegations presented by Prosecutor in support of her submissions concerning
4 the contribution of Mr Al Hassan to the alleged crimes.

5 Moreover, contrary to Mr Al Hassan's argument, the conduct set out in the Document
6 Containing the Charges does not indicate that his contribution to the crime was
7 minimal.

8 Furthermore, for reasons fully set out in the written judgment, the Appeals Chamber
9 finds that although Mr Al Hassan is correct that, in the Confirmation Decision, the
10 Pre-Trial Chamber considered that Mr Al Hassan had not made essential
11 contributions to the crimes, this consideration is irrelevant to the disposition of this
12 appeal.

13 This is because, first, since the confirmation decision was rendered three days after
14 the issuance of the Impugned Decision, findings contained therein cannot be
15 considered. Second, while the question of an essential contribution is in accordance
16 with the jurisprudence of the Court, relevant for liability under Article 25(3)(a) of
17 the Statute, as perpetrator, this does not mean that, absent an essential contribution as
18 perpetrator, the case is automatically not grave enough. The Statute recognises also
19 other modes of criminal liability such as complicity, inducement, et cetera, which do
20 not require this factor of essential contribution. The Appeals Chamber recalls in this
21 context that, depending on the circumstances, criminal liability pursuant to
22 Articles 25(3)(b), (c) and/or (d) of the Statute could be equally or more grave than
23 liability under Article 25(3)(a).

24 Turning to Mr Al Hassan's submissions that the Pre-Trial Chamber erred by placing
25 undue weight on the number of counts with which he had been charged, his main

1 argument is that the Pre-Trial Chamber failed to consider the degree of overlap in
2 relation to the underlying conduct relied upon to establish the different charges.
3 In this regard, the Appeals Chamber finds no error in the Pre-Trial Chamber's
4 consideration, in its gravity assessment, of the nature and scale of the charged crimes.
5 It is clear from the Impugned Decision that the focus of the Pre-Trial Chamber's
6 assessment was the nature and scale of the charged crimes, rather than the number of
7 counts or charges. Both factors are relevant criteria to the assessment of the gravity
8 requirement under Article 17(1)(d) of the Statute. Indeed, in this case, the alleged
9 crimes resulted in the violation of several fundamental human rights, including the
10 physical and mental integrity of the victims and their human dignity, such as the
11 human right to a fair trial, the right to liberty and security of person, the human right
12 of all persons deprived of their liberty to be treated with humanity and with respect
13 for their inherent dignity, the right to freedom of thought, conscience and religion and
14 the prohibition on discriminating on the grounds of religion or belief.
15 Furthermore, for reasons fully set out in the written judgment, the Appeals Chamber
16 considers that the fact that the same underlying acts violated several provisions of the
17 Rome Statute is a relevant consideration for the purposes of assessing the gravity
18 requirement under Article 17(1)(d) of the Statute.
19 In light of the foregoing considerations, the Appeals Chamber rejects the second
20 ground of appeal.
21 Finally, in an appeal pursuant to Article 82(1)(a) of the Statute, the Appeals Chamber
22 may confirm, reverse or amend the decision appealed. In the present case, given
23 that the Appeals Chamber has rejected all grounds of appeal as the Pre-Trial Chamber
24 did not err in its determination that the case brought against Mr Al Hassan meets the
25 gravity requirement within the meaning of Article 17(1)(d) of the Statute and its

- 1 conclusions were not unreasonable and did not amount to an abuse of discretion, it is
- 2 appropriate to confirm the Impugned Decision.
- 3 This brings us to the end of the summary of the Appeals Chamber's judgment.
- 4 I would like now to thank the court reporters, interpreters, and other Registry staff for
- 5 their valuable assistance today in holding this hearing.
- 6 The hearing is adjourned.
- 7 THE COURT USHER: [10:30:19] All rise.
- 8 (The hearing ends in open session at 10.30 a.m.)