



**Original: English**

**No. ICC-01/12-01/18 OA3**

**Date: 1 July 2021**

**THE APPEALS CHAMBER**

**Before:**

**Judge Luz del Carmen Ibáñez Carranza, Presiding  
Judge Piotr Hofmański  
Judge Solomy Balungi Bossa  
Judge Rosario Salvatore Aitala  
Judge Gocha Lordkipanidze**

**SITUATION IN THE REPUBLIC OF MALI**

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

**Public redacted version of  
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’**

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

**The Office of the Prosecutor**

Mr Karim A. A. Khan, Prosecutor  
Ms Helen Brady

**Counsel for the Defence**

Ms Melinda Taylor  
Ms Kirsty Sutherland

**Legal Representatives of Victims**

Mr Seydou Doumbia  
Mr Mayombo Kassongo  
Mr Fidel Nsita Luvengika

**REGISTRY**

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**Registrar**

Mr Peter Lewis

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud 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’ of 17 December 2020 (ICC-01/12-01/18-1211-Conf; public version registered on 25 June 2021 (ICC-01/12-01/18-1211-Red)),

After deliberation,

Unanimously,

*Delivers* the following

## JUDGMENT

The ‘Decision on application for notice of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court’ is confirmed.

## REASONS

### I. KEY FINDINGS

1. While article 74(2) of the Statute binds the trial chamber to the facts and circumstances described in the charges, the trial chamber has a power to modify the legal characterisation given to those facts by the pre-trial chamber. However, 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 of the Court and with due regard to the rights of the accused person.
2. When a possible change to the legal characterisation may affect the gravity of the crimes charged and, eventually, the sentence of the person, it is of particular significance that the accused person receives notice under regulation 55 of the Regulations of the Court.
3. The protection of the rights of the accused person in the process of legal re-characterisation of facts is among the main goals of regulation 55 of the Regulations of the Court. It ensures that the accused person’s right to have adequate time and facilities

for the effective preparation of his or her defence, enshrined in article 67(1)(b) of the Statute, is respected.

4. The decision of the pre-trial chamber under article 61(7) of the Statute is a limited judicial intervention, the objective of which is to ensure that there is a case worthy of trial and to define the parameters of the subject matter of that trial. The pre-trial chamber must calibrate its review of the factual allegations carefully according to its role as ‘gatekeeper’, taking into account the need to proceed expeditiously so as not to cause undue delay to the proceedings as a whole.

5. Where the confirmation decision does not directly address certain factual allegations advanced by the Prosecutor, a trial chamber may find it necessary to read the confirmation decision together with the document containing the charges and subsequent amendments to see whether those allegations are within the scope of the case.

## II. INTRODUCTION

6. On 17 December 2020, Trial Chamber X (the ‘Trial Chamber’) issued a decision with respect to the Prosecutor’s application for notice under regulation 55(2) of the Regulations of the Court (the ‘Regulations’) that the legal characterisation of some facts, included in the confirmed charges, might change (the ‘Impugned Decision’).<sup>1</sup> The Trial Chamber considered, *inter alia*, acts of sexual violence committed against four victims: P-0574, P-0542, P-0570 and P-0547.<sup>2</sup> Those acts had been included in the confirmed charge of persecution.<sup>3</sup> The Prosecutor sought notice of a possible re-characterisation so that these acts could also be considered as torture, cruel treatment and other crimes related to the detention of those four victims.<sup>4</sup> In the Impugned Decision the Trial Chamber found it unnecessary to do so, as similar acts against the

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<sup>1</sup> [Decision on application for notice of possibility of variation of legal characterisation pursuant to Regulation 55\(2\) of the Regulations of the Court](#), 25 June 2021, ICC-01/12-01/18-1211-Red (confidential version was filed on 17 December 2020 (ICC-01/12-01/18-1211-Conf)).

<sup>2</sup> [Impugned Decision](#), paras 57-75.

<sup>3</sup> [Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud](#), 13 November 2019, ICC-01/12-01/18-461-Red-Corr (original confidential version filed on 30 September 2019; corrigendum of confidential version filed on 8 November 2019 (ICC-01/12-01/18-461-Conf-Corr)) (the ‘Confirmation Decision’), paras 677-682, 707.

<sup>4</sup> Corrigendum to “Prosecution’s application for notice to be given pursuant to regulation 55(2) of the Regulations of the Court”, 19 February 2021, ICC-01/12-01/18-894-Conf-Corr (original confidential version filed on 22 June 2020 (ICC-01/12-01/18-894-Conf)) (the ‘Regulation 55 Application’), para. 77.

same victims were already included in other confirmed charges.<sup>5</sup> The Prosecutor's request also concerned police reports allegedly drafted or signed by Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud ('Mr Al Hassan') and relied upon by the Islamic Tribunal to illegally pass sentences in seven cases.<sup>6</sup> The Trial Chamber gave notice of a possible re-characterisation with respect to those seven cases so that they could be considered under article 25(3)(c) of the Statute.<sup>7</sup>

7. The Defence challenges the above rulings of the Trial Chamber.<sup>8</sup> Regarding the acts of sexual violence, the Defence argues that the Chamber has no power, outside the scopes of article 61(9) of the Statute or regulation 55 of the Regulations, 'to include additional acts in existing charges or to make substantive changes to the manner in which the confirmed charges are pleaded' (first ground of appeal).<sup>9</sup> With respect to the seven police reports, the Defence submits that the Trial Chamber's finding concerning Mr Al Hassan's authorship or signature of those reports falls outside of the scope of the confirmed facts (second ground of appeal).<sup>10</sup>

8. Regarding the first ground of appeal, the Appeals Chamber recalls that, while article 74(2) of the Statute binds the trial chamber to the facts and circumstances described in the charges, the trial chamber has a power to modify the legal characterisation given to those facts by the pre-trial chamber. However, when the possibility of such modification appears to the trial chamber during the trial, it shall give notice thereof to the participants in accordance with regulation 55(2) of the Regulations. The Appeals Chamber therefore finds an error in so far as the Trial Chamber considered that it needed not apply regulation 55(2) of the Regulations. However, the Appeals Chamber is not satisfied that this error materially affected the Impugned Decision.

9. Regarding the second ground of appeal, the Appeals Chamber observes that although the Confirmation Decision does not specifically address the seven police

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<sup>5</sup> [Impugned Decision](#), paras 60, 68.

<sup>6</sup> Regulation 55 Application, para. 66.

<sup>7</sup> [Impugned Decision](#), paras 137-141.

<sup>8</sup> Defence Appeal of 'Decision on Application for Notice of Possibility of Variation of Legal Characterisation Pursuant to Regulation 55(2) of the Regulations of the Court' (ICC-01/12-01/18-1211-Conf), 12 March 2021, ICC-01/12-01/18-1369-Conf (OA3) (the 'Appeal Brief').

<sup>9</sup> Appeal Brief, para. 9. *See also* paras 5-27.

<sup>10</sup> Appeal Brief, p. 14 (heading). *See also* paras 28-45.

reports referred to in the Prosecutor’s application in the section of the Confirmation Decision discussing Mr Al Hassan’s responsibility under article 25(3)(c) of the Statute, this does not necessarily mean that the Trial Chamber may not consider the allegation that these reports were drafted and signed by Mr Al Hassan. As the pre-trial chamber’s task is to determine the parameters of the charges, it remains for the trial chamber to assess the individual factual allegations within the scope of the charges. Therefore, the Appeals Chamber finds that the Trial Chamber did not exceed the ‘facts and circumstances’ described in the charges in giving notice under regulation 55(2) of the Regulations.

### III. PROCEDURAL HISTORY

#### A. Proceedings before the Trial Chamber

10. On 17 December 2020, the Trial Chamber issued the Impugned Decision.<sup>11</sup>

11. On 18 January 2021, the Defence requested leave to appeal the Impugned Decision in respect of five issues.<sup>12</sup> The Trial Chamber granted leave in respect of the following two issues:

(i) Whether the Trial Chamber’s finding that it may take into consideration allegations of sexual violence committed against P-0574, P-0542, P-0570 and P-0547 in its assessment and analysis of counts 1 to 5 violates Mr Al Hassan’s right to detailed and timely notice of the nature, cause and content of counts 1 to 5.

(ii) Whether the Trial Chamber’s reliance on unconfirmed facts to give notice of a potential requalification of Mr Al Hassan’s individual liability exceeded the scope of regulation 55 of the Regulations, and constituted a *de facto* amendment of the charges.<sup>13</sup>

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<sup>11</sup> [Impugned Decision](#).

<sup>12</sup> Defence request for leave to appeal ‘Decision on application for notice of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court’, ICC-01/12-01/18-1251-Conf.

<sup>13</sup> [Decision on Defence request for leave to appeal the ‘Decision on application for notice of possibility of variation of legal characterisation pursuant to Regulation 55\(2\) of the Regulations of the Court’](#), 24 February 2021, ICC-01/12-01/18-1319 (reclassified as ‘public’ on 5 March 2021), pp. 9, 12, 15.

## B. Proceedings before the Appeals Chamber

12. Following the request of the Defence,<sup>14</sup> the Appeals Chamber extended the deadline for the Defence's appeal brief.<sup>15</sup> The Appeal Brief was filed on 12 March 2021,<sup>16</sup> and the Prosecutor's response was filed on 25 March 2021 (the 'Prosecutor's Response').<sup>17</sup>

13. On 19 April 2021, the Appeals Chamber rejected the Defence's request for suspensive effect in relation to two aspects of the Impugned Decision.<sup>18</sup>

14. On 12 May 2021, the Prosecutor informed the Appeals Chamber that although she no longer intends to rely on [REDACTED] (relevant to the first ground of appeal) for her case against Mr Al Hassan, her legal submissions in response to the Appeal Brief remain unchanged.<sup>19</sup>

## IV. STANDARD OF REVIEW

15. In the present appeal, the Defence alleges errors of law and, in relation to the first ground of appeal, abuse of discretion.

16. Regarding errors of law, the Appeals Chamber has previously held that it

will not defer to the relevant Chamber's legal interpretation of the law, but will arrive at its own conclusions as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law.<sup>20</sup>

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<sup>14</sup> Defence Request for Extension of Time to File Appeal of 'Decision on Application for Notice of Possibility of Variation of Legal Characterisation Pursuant to Regulation 55(2) of the Regulations of the Court', 1 March 2021, ICC-01/12-01/18-1324-Conf.

<sup>15</sup> Decision on the request for extension of time, 4 March 2021, ICC-01/12-01/18-1339-Conf.

<sup>16</sup> Appeal Brief.

<sup>17</sup> Prosecution response to Defence Appeal of 'Decision on Application for Notice of Possibility of Variation of Legal Characterisation Pursuant to Regulation 55(2) of the Regulations of the Court', ICC-01/12-01/18-1399-Conf (OA3).

<sup>18</sup> Decision on suspensive effect, ICC-01/12-01/18-1417-Conf (OA3). *See also* Appeal Brief, para. 4.

<sup>19</sup> Prosecution's provision of further information regarding the Defence Appeal of 'Decision on Application for Notice of Possibility of Variation of Legal Characterisation Pursuant to Regulation 55(2) of the Regulations of the Court', ICC-01/12-01/18-1472-Conf (OA3) (the 'Prosecutor's Notice Regarding [REDACTED]'), para. 3.

<sup>20</sup> Appeals Chamber, *The Prosecutor v. Uhuru Muigai Kenyatta*, [Judgment on the Prosecutor's appeal against Trial Chamber V\(B\)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87\(7\) of the Statute"](#), 19 August 2015, ICC-01/09-02/11-1032 (OA5) (the 'Kenyatta OA5 Judgment'), para. 23; Appeals Chamber, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V\(A\) of 19 August 2015 entitled "Decision on Prosecution Request for Admission of Prior Recorded Testimony"](#), 12 February 2016, ICC-01/09-01/11-2024 (OA10), para. 20; Appeals

17. The Appeals Chamber further held:

If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.<sup>21</sup>

18. A decision is ‘materially affected by an error of law’ if the Trial Chamber ‘would have rendered a [decision] that is substantially different from the decision that was affected by the error, if it had not made the error’.<sup>22</sup>

19. Regarding errors in a trial chamber’s exercise of its discretion, the Appeals Chamber has stated that

[A]n abuse of discretion occurs when the impugned decision is so unfair or unreasonable as to “force the conclusion that the Chamber failed to exercise its discretion judiciously”. The Appeals Chamber will also consider whether the first instance Chamber gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion.<sup>23</sup>

20. The analysis and determination of the issues arising from the two grounds of appeal will be guided by the standard of review set out above.

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Chamber, *The Prosecutor v. Bosco Ntaganda*, [Judgment on the appeal of Mr Bosco Ntaganda against the “Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9”](#), 22 March 2016, ICC-01/04-02/06-1225 (OA2), para. 33. *See also* Appeals Chamber, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Mohamed Ag Mahmoud*, [Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled ‘Décision relative à l’exception d’irrecevabilité pour insuffisance de gravité de l’affaire soulevée par la défense’](#), 19 February 2020, ICC-01/12-01/18-601-Red (OA) (confidential version notified on the same day, ICC-01/12-01/18-601-Conf (OA)) (the ‘*Al Hassan OA Judgment*’), para. 38.

<sup>21</sup> [Al Hassan OA Judgment](#), para. 38; Appeals Chamber, *The Prosecutor v. Simone Gbagbo*, [Judgment on the appeal of Côte d’Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled “Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo”](#), 27 May 2015, ICC-02/11-01/12-75-Red (OA) (confidential version filed on the same day (ICC-02/11-01/12-75-Conf (OA)) (the ‘*Simone Gbagbo OA Judgment*’), para. 40.

<sup>22</sup> [Al Hassan OA Judgment](#), para. 38; [Simone Gbagbo OA Judgment](#), para. 41.

<sup>23</sup> [Kenyatta OA5 Judgment](#), para. 25 (footnotes omitted), *quoting* ICTY, Appeals Chamber, *Solobodan Milošević v. Prosecutor*, [Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel](#), 1 November 2004, IT-02-54-AR73.7, para. 10; Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled “Decision giving notice pursuant to Regulation 55\(2\) of the Regulations of the Court”](#), 18 December 2015, ICC-02/11-01/15-369 (OA7), para. 64.



## V. MERITS

### A. First ground of appeal - acts of rape of P-0574, P-0542, P-0570 and P-0547

21. Under the first ground of appeal, the Defence challenges the Trial Chamber's finding that it may consider, without a legal re-characterisation, acts of rape of P-0574, P-0542, P-0570 and P-0547 under the counts of torture and cruel treatment, despite these acts having been confirmed by Pre-Trial Chamber I (the 'Pre-Trial Chamber') under a different count – persecution.

#### *1. Background and relevant part of the Impugned Decision*

22. In the Document Containing the Charges ('DCC'), the Prosecutor alleged that P-0574, P-0542, P-0570 and P-0547 were abducted and detained in harsh conditions and/or subjected to flogging.<sup>24</sup> These criminal acts were charged under: count 1 (torture as a crime against humanity), count 2 (other inhumane acts as a crime against humanity), count 3 (torture as a war crime), count 4 (cruel treatment as a war crime), and count 5 (outrages upon personal dignity as a war crime).<sup>25</sup>

23. The Prosecutor also included in the DCC allegations of sexual violence against these four victims, committed during their detention.<sup>26</sup> These allegations were charged as criminal acts underlying the crime of persecution (count 13).<sup>27</sup> They were not charged as rape, although the DCC contains two counts of rape relating to other victims (counts 11 and 12).<sup>28</sup>

24. In the Confirmation Decision, the Pre-Trial Chamber confirmed in part the above-mentioned charges in relation to crimes committed against P-0574, P-0542, P-0570 and P-0547.<sup>29</sup> The Pre-Trial Chamber found that there were substantial grounds to believe that the crime against humanity of torture was committed with respect to P-0574;<sup>30</sup> the

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<sup>24</sup> [Version amendée et corrigée du Document contenant les charges contre M. AL HASSAN Ag ABDOUL AZIZ Ag Mohamed Ag Mahmoud](#), 2 July 2019, ICC-01/12-01/18-335-Corr-Red (original confidential corrected version filed on 11 May 2019 (ICC-01/12-01/18-335-Conf-Corr)), paras 470-473, 970.

<sup>25</sup> [DCC](#), para. 1058.

<sup>26</sup> [DCC](#), para. 970.

<sup>27</sup> [DCC](#), para. 1058.

<sup>28</sup> [DCC](#), para. 1058.

<sup>29</sup> [Confirmation Decision](#), paras 282-283, 331, 334, 337.

<sup>30</sup> [Confirmation Decision](#), paras 284, 350.

crime against humanity of other inhumane acts against P-0574;<sup>31</sup> the war crime of cruel treatment against P-0574;<sup>32</sup> the war crime of outrages upon personal dignity against P-0574, P-0542, P-0570 and P-0547.<sup>33</sup> The Pre-Trial Chamber found that the Prosecutor did not establish that there are substantial grounds to believe that the acts concerning P-0570 and P-0547 could be characterised as a crime against humanity of other inhumane acts.<sup>34</sup>

25. The Pre-Trial Chamber also confirmed acts of sexual violence against these four victims, but only under count 13 (persecution).<sup>35</sup> In doing so, the Pre-Trial Chamber noted that, although these acts of sexual violence could support elements of other crimes, it only confirmed them under count 13 as that was where the acts appeared in the DCC. It also drew '[TRANSLATION] the attention of the Trial Chamber to this point so that the facts thus characterised can be examined and, should the Trial Chamber think it appropriate, undergo legal re-characterisation pursuant to regulation 55 of the Regulations of the Court'.<sup>36</sup>

26. In the proceedings before the Trial Chamber, the Prosecutor sought notice, pursuant to regulation 55(2) of the Regulations, of a possible legal re-characterisation of the above-mentioned acts of sexual violence against P-0574, P-0542, P-0570 and P-0547, such that those acts could also be considered (i) under counts 11 and 12, as well as (ii) under counts 1 to 5.<sup>37</sup> The Prosecutor argued that the Pre-Trial Chamber had 'recognised the possible need for the [Trial Chamber] to re-characterise victims or incidents recognised in the [Pre-Trial Chamber]'s findings as falling under further or different crimes under the Statute'.<sup>38</sup>

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<sup>31</sup> [Confirmation Decision](#), paras 284, 352.

<sup>32</sup> [Confirmation Decision](#), paras 284, 354.

<sup>33</sup> [Confirmation Decision](#), paras 284, 332, 335, 338, 355.

<sup>34</sup> [Confirmation Decision](#), paras 335, 338, 353.

<sup>35</sup> [Confirmation Decision](#), paras 677-682, 707.

<sup>36</sup> [Confirmation Decision](#), para. 682. See also [Rectificatif de la Décision portant modification des charges confirmées le 30 septembre 2019 à l'encontre d'Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud](#), 8 May 2020, ICC-01/12-01/18-767-Corr-Red (original confidential version filed on 23 April 2020; corrigendum of confidential version filed on 1 May 2020 (ICC-01/12-01/18-767-Conf-Corr)) ('Second Amendment Decision'), paras 96-97.

<sup>37</sup> Regulation 55 Application, para. 77.

<sup>38</sup> Regulation 55 Application, para. 75.

27. Regarding counts 1 to 5, the Prosecutor submitted that the Pre-Trial Chamber's 'factual findings relating to these rapes also show the possibility of re-characterising them, as appropriate, under Counts 1-5'.<sup>39</sup> In particular, the Prosecutor argued that:

80. The findings relating to P-0574's rapes in detention justify including them in Counts 1 to 5.

81. The findings relating to the rapes in detention of P-0570, P-0542 and P-0547 justify: (a) including them in Count 5 for P-0570, P-0542 and P-0547; (b) re-characterising them together with this other conduct as other inhumane acts [...] (Count 2) and cruel treatment (Count 4), because these findings show these crimes' material and mental elements (infliction of great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act of similar nature and gravity as a crime against humanity with awareness of the factual circumstances establishing such nature and gravity; infliction of severe physical or mental pain or suffering; intent and knowledge).<sup>40</sup>

28. In the Impugned Decision, the Trial Chamber granted the Prosecutor's request in relation to counts 11 to 12. It gave notice under regulation 55(2) of the Regulations that the legal characterisation of these acts of sexual violence might change to rape as a crime against humanity and as a war crime.<sup>41</sup>

29. Regarding counts 1 to 5, the Trial Chamber made several findings. First, it granted the Prosecutor's request and issued a notice of possible re-characterisation with respect to some of these acts of sexual violence.<sup>42</sup> Second, for some other acts, the Trial Chamber decided that 'it 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'.<sup>43</sup> Third, for the remaining acts, the Trial Chamber declined to give notice of a possible re-characterisation, finding that it was 'unnecessary to resort to Regulation 55 in this context'.<sup>44</sup>

30. In respect of this third finding, the Trial Chamber noted:

This submission [of the Prosecutor] presents unique issues in terms of the application of Regulation 55 of the Regulations. Allegations of acts of violence and other forms of ill-treatment committed against P-0574 are already included

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<sup>39</sup> Regulation 55 Application, para. 79.

<sup>40</sup> Regulation 55 Application, paras 80-81.

<sup>41</sup> [Impugned Decision](#), paras 51-53.

<sup>42</sup> [Impugned Decision](#), paras 70-71, 86.

<sup>43</sup> [Impugned Decision](#), paras 72-75.

<sup>44</sup> [Impugned Decision](#), paras 59-63, 68-69.

under counts 1 to 5. Unlike the instances above, the Prosecution does not seek notice of possible re-characterisation such that facts and circumstances in relation to a particular victim, standing alone, could be found to have a different legal characterisation. Rather, the Prosecution's concern is that in its Confirmation Decision, PTC I did not reference its findings on the alleged acts of a sexual nature committed against P-0574 while in detention in confirming the charges under counts 1 to 5. At this point, the Prosecution seeks, by way of Regulation 55, to have those facts included under these counts, already confirmed by PTC I.<sup>45</sup>

31. The Trial Chamber further held that:

A trial chamber may consider all relevant facts and circumstances, confirmed by the pre-trial chamber, in assessing each count. Moreover, even given the structure and the specification of the charges in this particular case, there is no issue of lack of notice or prejudice to the Defence in that the relevant incident with reference to the particular victim was already included in counts 1 to 5.<sup>46</sup>

32. The Trial Chamber was of the view that evidence of rapes will be 'highly relevant to the assessment of whether alleged acts of violence and other forms of mistreatment were committed against P-0574 under counts 1 to 5'.<sup>47</sup> It pointed out that 'it was the same victim, the same person, who experienced those events at the same time or within a very short space of time'.<sup>48</sup> For these reasons, the Trial Chamber declined to provide notice of a possible legal re-characterisation under regulation 55(2) of the Regulations, as it was unnecessary.<sup>49</sup> The Pre-Trial Chamber made a similar finding with respect to P-0542, P-0570 and P-0547 under count 5.<sup>50</sup>

## 2. *Submissions of the Defence*

33. The Defence submits that while the Court's legal framework sets out two courses of action for modifications to the charges, namely those provided in articles 61(8)-(9) of the Statute and in regulation 55 of the Regulations, '[n]either approach was followed in this instance'.<sup>51</sup> The Defence argues that 'the Trial Chamber committed an error of law, in finding that it possessed the power to add additional underlying acts to existing counts', and that the Trial Chamber also 'abused its discretion, and acted in a manner

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<sup>45</sup> [Impugned Decision](#), para. 59.

<sup>46</sup> [Impugned Decision](#), para. 60.

<sup>47</sup> [Impugned Decision](#), para. 61.

<sup>48</sup> [Impugned Decision](#), para. 61, *quoting* [Second Amendment Decision](#), para. 102.

<sup>49</sup> [Impugned Decision](#), paras 62-63.

<sup>50</sup> [Impugned Decision](#), paras 68-69.

<sup>51</sup> Appeal Brief, para. 5.

that contravened Mr Al Hassan's fair trial rights, by first, incorrectly concluding that this approach raised no issues of notice and second, failing to consider the specific prejudice generated in this particular case'.<sup>52</sup>

### 3. *Submissions of the Prosecutor*

34. The Prosecutor submits that the Defence fails to establish either that the Trial Chamber erred in law, or in its exercise of discretion.<sup>53</sup> She argues that the Defence 'impermissibly restricts the Trial Chamber's considerable ability under the Statute to assess and evaluate the confirmed facts and circumstances'.<sup>54</sup> The Prosecutor avers that a trial chamber is not prevented 'from relying on *other confirmed facts* in the Confirmation Decision (and its amendments) in assessing individual counts'.<sup>55</sup> The Prosecutor argues that, while the ill-treatment of the four witnesses is described under counts 2, 4 and 5, referring to 'acts of violence' and 'ill-treatment' against them in detention (without noting that they included sexual acts), sexual violence should not be treated differently from other violent acts and ill-treatment.<sup>56</sup> The Prosecutor further argues that the Defence has not demonstrated that it faced concrete prejudice as a result of the Trial Chamber's approach to counts 1 to 5.<sup>57</sup>

35. Finally, the Prosecutor requests that, in the event the Appeals Chamber finds any error in the Trial Chamber's approach, the Appeals Chamber should 'consider providing the appropriate notice under regulation 55(2) of the Regulations to re-characterise the allegations of sexual violence for [witnesses] P-0574, P-0542, P-0570 and P-0547 under Counts 1-5, or to remand the matter back to the Trial Chamber to do so'.<sup>58</sup>

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<sup>52</sup> Appeal Brief, para. 8.

<sup>53</sup> Prosecutor's Response, paras 6-20.

<sup>54</sup> Prosecutor's Response, para. 10.

<sup>55</sup> Prosecutor's Response, para. 11.

<sup>56</sup> Prosecutor's Response, para. 13.

<sup>57</sup> Prosecutor's Response, para. 18.

<sup>58</sup> Prosecutor's Response, para. 20.

4. *Determination by the Appeals Chamber*

(a) **Whether the Trial Chamber may rely on the acts of rape when examining crimes charged under counts 1 to 5**

36. The Defence argues that the impugned finding of the Trial Chamber ‘constituted a change to the factual matrix concerning the acts and conduct underpinning [the relevant] counts’.<sup>59</sup> The Defence disputes that the Trial Chamber has any power or discretion, outside the scope of article 61(9) of the Statute or regulation 55 of the Regulations ‘to include additional acts in existing charges or to make substantive changes to the manner in which the confirmed charges are pleaded’.<sup>60</sup> Referring to article 74(2) of the Statute and rule 142(2) of the Rules of Procedure and Evidence (the ‘Rules’), the Defence argues that ‘the defendant is not prosecuted in connection with a loose connection of facts and circumstances, but a set of clearly defined charges, that can be heard and resolved independently if necessary’.<sup>61</sup> The Defence argues that whereas for the count of persecution it would focus on persecutory intent, ‘if the acts of rape are added to Counts 1 and 5, the Defence must now address these acts in addition to existing material facts concerning arrest and detention’.<sup>62</sup> According to the Prosecutor, the Trial Chamber was legally correct and fully entitled to rely on the alleged acts of a sexual nature for counts 1 to 5 and properly exercised its discretion.<sup>63</sup>

37. Regulation 55 of the Regulations reads:

1. In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.

2. If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change.

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<sup>59</sup> Appeal Brief, para. 15.

<sup>60</sup> Appeal Brief, para. 9.

<sup>61</sup> Appeal Brief, para. 12.

<sup>62</sup> Appeal Brief, para. 26.

<sup>63</sup> Prosecutor’s Response, paras 7-8.

3. For the purposes of sub-regulation 2, the Chamber shall, in particular, ensure that the accused shall:

(a) Have adequate time and facilities for the effective preparation of his or her defence in accordance with article 67, paragraph 1 (b); and

(b) If necessary, be given the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence admissible under the Statute in accordance with article 67, paragraph 1 (e).

38. The Appeals Chamber has previously stated that regulation 55(2) and (3) of the Regulations ‘may not be used to exceed the facts and circumstances described in the charges or any amendment thereto’.<sup>64</sup>

39. The Appeals Chamber held the following in relation to regulation 52<sup>65</sup> of the Regulations:

Regulation 52 of the Regulations of the Court [...] stipulates that the document containing the charges shall contain three distinct elements: information identifying the accused person, a statement of the facts, and the legal characterisation of these facts. 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).<sup>66</sup>

40. The Appeals Chamber also held that:

article 74 (2) of the Statute confines the scope of Regulation 55 to the facts and circumstances described in the charges and any amendment thereto. If applied

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<sup>64</sup> Appeals Chamber, [Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55\(2\) of the Regulations of the Court”](#), 8 December 2009, ICC-01/04-01/06-2205 (OA15 OA16) (the ‘Lubanga OA15 OA16 Judgment’), para. 91. The Appeals Chamber has found that ‘article 74(2) of the Statute confines the scope of Regulation 55 to the facts and circumstances described in the charges and any amendment thereto’. See [Lubanga OA15 OA16 Judgment](#), para. 93.

<sup>65</sup> Regulation 52 of the Regulations provides:

The document containing the charges referred to in article 61 shall include:

(a) The full name of the person and any other relevant identifying information;

(b) A statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court;

(c) A legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28.

<sup>66</sup> [Lubanga OA 15 OA 16 Judgment](#), para. 97.

with such limitation, Regulation 55 is consistent with article 74 (2) of the Statute. This latter provision binds the Trial Chamber only to the facts and circumstances described in the charges or any amendment thereto, but does not make reference to the legal characterisation of these facts and circumstances. It follows *a contrario* that article 74 (2) of the Statute does not rule out a modification of the legal characterisation of the facts and circumstances.<sup>67</sup>

41. In light of the foregoing, the Appeals Chamber considers that, while article 74(2) of the Statute binds the trial chamber to the facts and circumstances described in the charges, the trial chamber has a power to modify the legal characterisation given to those facts by the pre-trial chamber. However, 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.

42. In the case at hand, the Pre-Trial Chamber confirmed the crimes under counts 1 to 5 with respect to a number of facts and circumstances. Regarding P-0574, the Pre-Trial Chamber considered the evidence of her arrest and detention, during which she and others were ‘[TRANSLATION] torture[d] or ill-treat[ed]’, including by receiving [REDACTED] lashes.<sup>68</sup> Based on these findings, the Pre-Trial Chamber concluded that ‘[TRANSLATION] the “severe” degree of suffering is met’ and it confirmed the crimes against P-0574 under counts 1 to 5.<sup>69</sup>

43. Under count 5, the Pre-Trial Chamber also considered similar facts regarding a three-day detention of P-0542, without food and ‘[TRANSLATION] in a particularly filthy room’,<sup>70</sup> and concluded that those ‘[TRANSLATION] acts, taken together, and in particular the conditions of the victim’s detention, constitute degradation of such severity as to be generally recognised as an outrage against personal dignity’.<sup>71</sup> The Pre-Trial Chamber further considered the detention of P-0570,<sup>72</sup> as well as the detention of P-0547 and the conditions thereof.<sup>73</sup> In both cases, the Pre-Trial Chamber was

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<sup>67</sup> [Lubanga OA 15 OA 16 Judgment](#), para. 93.

<sup>68</sup> [Confirmation Decision](#), para. 282.

<sup>69</sup> [Confirmation Decision](#), para. 283.

<sup>70</sup> [Confirmation Decision](#), para. 331.

<sup>71</sup> [Confirmation Decision](#), para. 332.

<sup>72</sup> [Confirmation Decision](#), para. 334.

<sup>73</sup> [Confirmation Decision](#), para. 337.



satisfied that these facts constitute the crime of outrages upon personal dignity as a war crime.<sup>74</sup>

44. The facts upon which the Pre-Trial Chamber relied to confirm the crimes under counts 1 to 5 in relation to P-0574, and the crimes under count 5 in relation to all four victims in question, did not expressly include the acts of sexual violence of which these women allegedly fell victim. As indicated above, the Pre-Trial Chamber relied on the alleged acts of sexual violence against P-0574, P-0542, P-0570 and P-0547 to confirm the crime charged under count 13 – persecution.<sup>75</sup> It follows that, if the Trial Chamber eventually were to convict Mr Al Hassan under counts 1 to 5 on the basis of the ‘facts and circumstances’ relevant to this ground of appeal, it would change their legal characterisation. Accordingly, notice under regulation 55(2) of the Regulations is required.

45. Furthermore, the crimes charged under counts 1 to 5 involve the infliction of ‘severe physical or mental pain or suffering upon one or more persons’<sup>76</sup> or a violation of the person’s dignity.<sup>77</sup> If the acts of rape<sup>78</sup> are considered in addition to the facts and circumstances initially charged under counts 1 to 5, the gravity of the crimes charged under these counts may increase. In particular, the severity of ‘physical or mental pain or suffering’ or of a violation of the victim’s dignity may increase, given that the current

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<sup>74</sup> [Confirmation Decision](#), paras 335, 338.

<sup>75</sup> [Confirmation Decision](#), paras 677-682, 707.

<sup>76</sup> According to the Elements of Crimes, the relevant elements of the crimes in question are as follows: ‘[t]he perpetrator inflicted severe physical or mental pain or suffering upon one or more persons’ (count 1 – crime against humanity of torture (article 7(1)(f) of the Statute)); ‘[t]he perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act’ (count 2 – crime against humanity of other inhumane acts (article 7(1)(k) of the Statute)); ‘[t]he perpetrator inflicted severe physical or mental pain or suffering upon one or more persons’ (count 3 – war crime of torture (article 8(2)(c)(i) of the Statute)); ‘[t]he perpetrator inflicted severe physical or mental pain or suffering upon one or more persons’ (count 4 – war time of cruel treatment (article 8(2)(c)(i) of the Statute)).

<sup>77</sup> According to the Elements of Crimes, the relevant element of the war crime of outrages upon personal dignity (article 8(2)(c)(ii) of the Statute) charged under count 5 is that ‘[t]he perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons’.

<sup>78</sup> According to the Elements of Crimes, the relevant elements of the crime of rape, charged under counts 11 and 12, are:

‘1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.’

charges under these counts only concern the detention of the four victims, its conditions and infliction of lashes. This could have an impact on the sentence of Mr Al Hassan, if he is convicted. When a possible change to the legal characterisation may affect the gravity of the crimes charged and, eventually, the sentence of the person, it is of particular significance that the accused person receives notice under regulation 55 of the Regulations.

46. The Appeals Chamber therefore considers that the possibility of reliance on these acts of rape to prove the crimes charged under counts 1 to 5 is a significant change. It may in principle require additional preparations on the part of the Defence. It is thus important that the Defence receives sufficient notice that a re-characterisation of this kind is contemplated.

47. The Appeals Chamber therefore finds that it was correct for the Prosecutor to seek notice of a possible legal re-characterisation under regulation 55 of the Regulations with respect to these acts of rape. However, the Trial Chamber declined to give such notice.

48. Having regard to the foregoing, the Appeals Chamber is of the view that, when it appeared to the Trial Chamber, at any time during the trial, that it might consider the acts of rape under counts 1 to 5, the Trial Chamber ought to have followed the procedure set out in regulation 55(2) of the Regulations, with due regard to the rights of the accused person.

49. The Appeals Chamber therefore finds that the Trial Chamber committed an error of law. It will examine the effect of that error after first considering the remaining arguments of the Defence under this ground, which mainly concern the actual prejudice, if any, to the rights of Mr Al Hassan.

#### **(b) Whether Mr Al Hassan's rights have been violated**

50. Noting that the 'change to the factual matrix' was notified several months after the start of the trial, and after repeated communications from the Prosecutor and the Pre-Trial Chamber that these allegations fell outside the scope of these counts, the Defence avers that it 'violated Mr Al Hassan's right to timely notice as concerns the nature of the charges that he would face at trial, and his related right to adequate time

as concerns investigations and case preparation pertaining to such charges’.<sup>79</sup> The Prosecutor argues that, considering the Confirmation Decision as a whole, the Defence had already been notified of the relevant incidents in detention in relation to the four witnesses under counts 1-5.<sup>80</sup>

51. The Appeals Chamber recalls that article 67 of the Statute enshrines the rights of the accused to a fair trial. In particular, under articles 67(1)(a) and (b) of the Statute, the accused is entitled to ‘be informed promptly and in detail of the nature, cause and content of the charge [...]’ and to ‘have adequate time and facilities for the preparation of the defence [...]’. The Appeals Chamber further recalls that these rights of the accused reflect internationally recognised human rights and, pursuant to article 21(3) of the Statute, the application and interpretation of the law of the Court ‘must be consistent with internationally recognized human rights’.<sup>81</sup>

52. With regard to the Defence’s argument on the timely notice of the nature of the charges, the Appeals Chamber recalls that the Impugned Decision was rendered on 17 December 2020, approximately five months after the commencement of the trial, during the presentation of the Prosecutor’s case. It is of note in this regard that, pursuant to regulation 55(2) of the Regulations, notice of a possible re-characterisation of facts may be given ‘at any time during the trial’. This is also relevant to the present context. Therefore, the Appeals Chamber considers that, rendering the Impugned Decision after the start of the presentation of the Prosecutor’s case does not, merely due to its timing, amount to a violation of Mr Al Hassan’s right to be informed promptly of the charges under article 67(1)(a) of the Statute.

53. The Appeals Chamber further recalls that whether sufficient notice of the charges is given to the accused person depends upon ‘the particular circumstances of the case’.<sup>82</sup>

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<sup>79</sup> Appeal Brief, para. 15.

<sup>80</sup> Prosecutor’s Response, para. 16.

<sup>81</sup> [Lubanga OA15 OA16 Judgment](#), para. 83. See also 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 (OA13), para. 86.

<sup>82</sup> Appeals Chamber, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïsona*, [Judgment on the appeal of Mr Alfred Yekatom against the decision of Trial Chamber V of 29 October 2020 entitled “Decision on motions on the Scope of the Charges and the Scope of Evidence at Trial”](#), 5 February 2021, ICC-01/14-01/18-874 (OA2), para. 54.

In the present case, the alleged acts of rape were confirmed by the Pre-Trial Chamber under the count of persecution (count 13), which was based on the underlying crimes, including those listed in counts 1 to 5 as concerns the same victims and their detention. Furthermore, the Trial Chamber indicated in the Impugned Decision that it may take into consideration these rapes in its assessment of counts 1 to 5, noting that ‘there is no issue of lack of notice or prejudice to the Defence’ as the relevant incidents in relation to the four victims were already included in these counts.<sup>83</sup>

54. In light of the above, the Appeals Chamber considers that although the Trial Chamber did not find regulation 55 of the Regulations to be applicable, the Defence was already on notice that the alleged acts of rape will be considered. Although these rapes were confirmed under count 13, they concern the same victims and they occurred during the detention of these victims, which underlies the crimes charged under counts 1 to 5.

55. The Defence further argues, by reference to decisions of the International Criminal Tribunal for Rwanda (ICTR), that specific facts pleaded in support of specific counts could not be understood as being cross-cutting *vis-à-vis* the different counts.<sup>84</sup> According to the Defence, as in the ICTR *Karera* case, the Prosecutor in this case ‘contributed to the defendant’s lack of timely notice’ and the ‘accusatory instruments in this case uniformly conveyed the position that [the acts of rape] did not form part of Counts 1 to 5’.<sup>85</sup> The Prosecutor argues that the ICTR precedents relied upon by the Defence are ‘inapposite’ as their ‘indictments and procedural history differ significantly from this case’.<sup>86</sup>

56. The Appeals Chamber is not persuaded that the ICTR precedents referred to by the Defence lend support to its argument.<sup>87</sup> The Appeals Chamber notes that the Defence, in advancing this argument, relies on the following finding made in the ICTR Appeal Judgment in the *Muvunyi* case: ‘the Prosecution’s failure to expressly state that a paragraph in the Indictment supports a particular count in the Indictment is indicative

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<sup>83</sup> [Impugned Decision](#), para. 60. *See also* paras 62, 68.

<sup>84</sup> Appeal Brief, para. 20.

<sup>85</sup> Appeal Brief, para. 23.

<sup>86</sup> Prosecutor’s Response, para. 17.

<sup>87</sup> Appeal Brief, para. 20.

that the allegation is not charged as a crime’.<sup>88</sup> The Defence also refers to the ICTR Appeal Judgment in the *Karera* case and argues that the Trial Chamber’s approach ‘falls within the four corners of these ICTR precedents’.<sup>89</sup>

57. However, there are material differences between those cases and the case at hand. The ICTR Appeals Chamber in *Muvunyi* reversed the ICTR Trial Chamber’s decision to enter a conviction on count 5 (other inhumane acts) for the reason that it relied on a paragraph of the indictment setting out factual allegations which did not support any count.<sup>90</sup> In the present case, the alleged acts of rape are confirmed under count 13. Therefore, unlike in the *Muvunyi* case, these factual allegations support a count included in the DCC.

58. Furthermore, in the *Karera* case, the ICTR Appeals Chamber quashed the ICTR Trial Chamber’s decision to rely on a fact underlying count 4 (murder) in entering convictions under counts 1 (genocide) and 3 (extermination).<sup>91</sup> In reaching this conclusion, it noted, *inter alia*, that ‘by reading the Amended Indictment alone, the [accused] would not have understood that he was also charged for the same fact under Counts 1 and 3’, and that the Prosecutor’s decision not to refer to the fact in question under these counts in the context of indictment amendment process ‘may have given the message that [the fact] related only to Count 4 of the Indictment’.<sup>92</sup> However, in the present case, although the alleged acts of rape were not listed under counts 1 to 5, the Prosecutor expressly indicated in her request for notice under regulation 55 of the Regulations that she intended to rely on them under these counts. Importantly, the Prosecutor filed the Regulation 55 Application prior to the start of the trial and the Trial Chamber clarified in the Impugned Decision that it may take into consideration the acts

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<sup>88</sup> Appeal Brief, para. 20, *quoting* ICTR Appeals Chamber, *Tharcisse Muvunyi v. The Prosecutor*, [Judgement](#), 29 August 2008, ICTR-00-55A-A (the ‘*Muvunyi* Appeal Judgment’), para. 156.

<sup>89</sup> Appeal Brief, paras 21-22.

<sup>90</sup> [Muvunyi Appeal Judgment](#), para. 156.

<sup>91</sup> ICTR Appeals Chamber, *François Karera v. The Prosecutor*, [Judgement](#), 2 February 2009, ICTR-01-74-A (the ‘*Karera* Appeal Judgment’), paras 360-370

<sup>92</sup> [Karera Appeal Judgment](#), paras 365-367, fn. 835. In that case, the Prosecution filed a request for leave to amend the indictment, seeking an authorisation to present counts 3 and 4 cumulatively instead of alternatively. The ICTR Trial Chamber granted this request in part, allowing the cumulative pleading of counts 3 and 4, and also instructed the Prosecution, *inter alia*, to clarify the facts which were intended to support the charge of murder (count 4), as opposed to extermination (count 3). Thereafter, the Prosecution filed the amended indictment; however, the concise statement of facts supporting counts 3 and 4 was severed and the fact in question was only pleaded under count 4.

of rape in its assessment of counts 1 to 5. In the circumstances of this case, the Appeals Chamber considers that, contrary to the Defence's arguments and differently from the *Karera* case, neither the Prosecutor nor the accusatory instruments have led to the Defence's lack of timely notice of the charges.

59. The Defence further argues that this change affects the 'rights to adequate time and resource to implement [its] strategy', as, in addition to persecutory intent, it 'must now address [the acts of rape] in addition to existing material facts concerning arrest and detention'.<sup>93</sup> It submits that the impact on the Defence must be viewed in connection with 'the cumulative degree of prejudice caused by the multiple changes made to the charges in this case'.<sup>94</sup> The Defence also refers to 'restraints stemming from the Covid-19 pandemic, and the security situation in the North of Mali'.<sup>95</sup> In the Prosecutor's view, even assuming that the Defence only knew of the alleged rapes against the four victims via the decision for counts 1-5, it fails to show how it would have prepared differently for counts 1-5 and count 13.<sup>96</sup> The Prosecutor further argues that the Defence has not demonstrated that it faced concrete prejudice as a result of the Trial Chamber's approach to counts 1 to 5.<sup>97</sup> She notes that the four victims in question have not yet testified.<sup>98</sup>

60. The Appeals Chamber observes that, contrary to the Defence's assertion, there does not appear to be any 'concrete prejudice' to the Defence at this stage of the proceedings. In particular, the Appeals Chamber notes that the Prosecutor's case regarding the alleged acts of rape is based on the evidence of the four victims,<sup>99</sup> and that none of them have yet been heard at this point,<sup>100</sup> allowing the Defence to address all relevant issues under the counts in question in future. The Defence submits that it 'cross-examined the first 19 witnesses, on the understanding that counts 1 to 5 would

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<sup>93</sup> Appeal Brief, para. 26.

<sup>94</sup> Appeal Brief, para. 27 (emphasis in original). In the Defence's view, the multiple changes include 'the Pre-Trial Chamber's confirmation of a series of new, and more serious amendments, less than three months before the start of the trial, and the scope of the Decision itself, which in addition to the two issues, encompasses a series of additional notices concerning other witnesses and charges'.

<sup>95</sup> Appeal Brief, para. 26.

<sup>96</sup> Prosecutor's Response, para. 16.

<sup>97</sup> Prosecutor's Response, para. 18.

<sup>98</sup> Prosecutor's Response, para. 18.

<sup>99</sup> See e.g. [Confirmation Decision](#), paras 677-680.

<sup>100</sup> See also Prosecutor's Notice Regarding [REDACTED], para. 3.

not encompass acts of a sexual nature as concerns [the four victims]’.<sup>101</sup> However, the Appeals Chamber is unable to assess whether this may have any impact on Mr Al Hassan’s defence, as the Defence has not explained how its cross-examination would have been different, had it known about the intention to rely on the acts of rape for counts 1 to 5.

61. Furthermore, the Appeals Chamber does not find merit in the arguments that the multiple changes made to the charges and their timing caused ‘the cumulative degree of prejudice’ to the Defence, as it was notified of the changes and the Trial Chamber acknowledged that it has ‘the affirmative obligation [...] to ensure that any eventual re-characterisation does not render a trial unfair’.<sup>102</sup> The Trial Chamber noted that ‘the Defence is informed in detail of the facts and circumstances relied upon for the proposed re-characterisations’ and ‘the witnesses who are expected to testify about [the relevant] incidents will appear before the Chamber at an advanced stage of the trial’.<sup>103</sup> The Appeals Chamber also considers that the Defence’s argument concerning the necessity of additional investigations and their restraints stemming from the current situation is unsubstantiated, given, *inter alia*, that the alleged acts of rape need to be addressed also in relation to counts 11, 12 and 13.

62. For the foregoing reasons, the Appeals Chamber finds that the Defence has not demonstrated that the Trial Chamber’s finding regarding the acts of rape violated Mr Al Hassan’s right to timely notice of the charges to adequate time for case preparation.

**(c) Whether the error committed by the Trial Chamber materially affected the Impugned Decision**

63. The Appeals Chamber now turns to the assessment of effect of the error identified above. In particular, it will consider whether the Impugned Decision would have been substantially different if the Trial Chamber had not committed that error, namely if it had followed the procedure set out in regulation 55 of the Regulations.

64. The Appeals Chamber notes that regulation 55 of the Regulations sets out a number of procedural guarantees. In addition to requiring the trial chamber to give notice of the possibility of a legal re-characterisation, regulation 55(2) of the

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<sup>101</sup> Appeal Brief, para. 22.

<sup>102</sup> [Impugned Decision](#), para. 83.

<sup>103</sup> [Impugned Decision](#), paras 84-85.

Regulations empowers that chamber to suspend the hearing to ensure effective preparation by the participants or to order a hearing to consider relevant matters. Furthermore, pursuant to regulation 55(3) of the Regulations, the trial chamber shall ensure that the accused ‘[h]ave adequate time and facilities for the effective preparation of his or her defence in accordance with article 67, paragraph 1 (b)’. The trial chamber shall also, ‘[i]f necessary, [give the accused] the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence admissible under the Statute in accordance with article 67, paragraph 1 (e)’. The Appeals Chamber has previously held that

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.<sup>104</sup>

65. The protection of the rights of the accused person in the process of legal re-characterisation of facts is thus among the main goals of regulation 55 of the Regulations. It ensures that the accused person’s right to have adequate time and facilities for the effective preparation of his or her defence, enshrined in article 67(1)(b) of the Statute, is respected. Therefore, in order to assess whether the Impugned Decision would have been substantially different if the Trial Chamber had not committed the error identified above, the Appeals Chamber will consider whether the Trial Chamber effectively preserved the procedural guarantees set out in regulation 55 of the Regulations notwithstanding that it did not specifically apply that provision.

66. The Appeals Chamber notes in this respect that the relevant acts of rape allegedly occurred during the detention of P-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

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<sup>104</sup> [Lubanga OA15 OA16 Judgment](#), para. 85.



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.

67. The Appeals Chamber is therefore not satisfied that the Impugned Decision would have been substantially different if the Trial Chamber had not committed the above-mentioned error. Indeed, although it did not formally apply regulation 55(2) of the Regulations, the Trial Chamber ensured that the rights of the accused person in the process of legal re-characterisation of facts would be preserved, consistent with the above-mentioned goal of this regulation.

#### **(d) Conclusion**

68. Having rejected all arguments of the Defence, the Appeals Chamber rejects this ground of appeal.

### **B. Second ground of appeal – Islamic Police reports**

69. In the second ground of appeal, the Defence argues that the Trial Chamber erred in its reliance on unconfirmed facts to give notice of a potential re-characterisation from article 25(3)(d) to article 25(3)(c) of the Statute in respect of Mr Al Hassan's involvement in seven alleged cases under count 6 (passing sentence without prior judgment pronounced by a regularly constituted court).

#### *1. Background and relevant part of the Impugned Decision*

##### **(a) Proceedings at the pre-trial stage**

70. In the DCC, the Prosecutor alleges that Mr Al Hassan acted as *de facto* Commissioner of the Islamic Police in Timbuktu and in this role he received complaints, conducted investigations, interrogated suspects, prepared police reports,

and sent cases to the Islamic Tribunal.<sup>105</sup> She further alleges that, from April 2012 to January 2013, the Islamic Tribunal of Timbuktu put in place by the armed groups, Ansar Dine/Al-Qaida in Islamic Maghreb ('AQIM'), issued judgments without providing for the necessary guarantees of judicial independence and impartiality contrary to article 8(2)(c)(iv) of the Statute.<sup>106</sup> She alleges that Mr Al Hassan participated in the commission of these crimes in count 6 of the DCC, under various modes of responsibility in article 25(3)(a)-(d) of the Statute.<sup>107</sup> Specifically, the Prosecutor alleges that Mr Al Hassan is responsible as a co-perpetrator under article 25(3)(a) of the Statute for summoning individuals, leading investigations and for making decisions about how to proceed, including whether to transfer cases to the attention of the Islamic Tribunal.<sup>108</sup> The Prosecutor alleges that the documentary evidence demonstrates that Mr Al Hassan drafted and signed multiple police reports carrying the official seal of the Islamic Police.<sup>109</sup> In support of this allegation, the Prosecutor refers to dozens of such reports in the DCC, [REDACTED].<sup>110</sup> She further alleges that Mr Al Hassan identified his own signature and handwriting in the reports presented to him [REDACTED], [REDACTED].<sup>111</sup> Finally, the Prosecutor alleges that a handwriting expert confirmed the authenticity of Mr Al Hassan's signature in a number of [REDACTED] police documents.<sup>112</sup>

71. The Prosecutor also alleges that Mr Al Hassan lent his assistance to the commission of the count 6 crimes under article 25(3)(c) of the Statute. In particular, she alleges that Mr Al Hassan, as *de facto* Commissioner of the Islamic Police, contributed under article 25(3)(c) of the Statute by leading investigations and drafting police reports that were sent to the Islamic Tribunal.<sup>113</sup> The Prosecutor refers to a number of such reports as examples, [REDACTED].<sup>114</sup>

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<sup>105</sup> [DCC](#), paras 152-153, 155-157, 286.

<sup>106</sup> [DCC](#), paras 98, 421, 502, 1059-1066.

<sup>107</sup> [DCC](#), para. 502.

<sup>108</sup> [DCC](#), paras 286, 299, 506.

<sup>109</sup> [DCC](#), para. 300. *See also* para. 292.

<sup>110</sup> [DCC](#), fn. 714.

<sup>111</sup> [DCC](#), para. 301, fn. 716.

<sup>112</sup> [DCC](#), para. 302.

<sup>113</sup> [DCC](#), paras 409, 517.

<sup>114</sup> [DCC](#), fn. 987, *referring to* Islamic Police Report of [REDACTED], [REDACTED].

72. In respect of Mr Al Hassan's participation under article 25(3)(d) of the Statute, the Prosecutor alleges that Mr Al Hassan contributed 'in any other way' to the commission of the crimes enumerated in count 6 of the DCC. For instance, she alleges that Mr Al Hassan actively participated and led investigations of suspects, as evidenced by the various police reports that Mr Al Hassan drafted and signed and by the cases he transmitted to the Islamic Tribunals.<sup>115</sup> The Prosecutor refers to a number of Islamic Police reports as examples, [REDACTED].<sup>116</sup>

73. In the Confirmation Decision, the Pre-Trial Chamber determined that the system of sentences passed by the Islamic Tribunal of Timbuktu put in place by the armed groups, Ansar Dine/AQIM, between 1 April 2012 and 28 January 2013, did not provide guarantees of independence and impartiality, and was not regularly constituted within the meaning of article 8(2)(c)(iv) of the Statute.<sup>117</sup> The Pre-Trial Chamber reviewed the evidence in respect of the sentences passed in 36 cases during this period, including the seven cases relevant in this appeal, and found that it was established to the requisite standard that those seven judgments were in fact issued as alleged.<sup>118</sup>

74. In the section of the Confirmation Decision devoted to individual criminal responsibility, the Pre-Trial Chamber set out its findings about Mr Al Hassan's role in the Islamic Police. The Pre-Trial Chamber noted some of the documents and witness statements in evidence, and found that they demonstrate that Mr Al Hassan wrote and completed documents for the Islamic Police.<sup>119</sup> In making this finding, the Pre-Trial Chamber referred to two Islamic Police reports from 3 December 2012, corresponding to two of the seven cases at issue in this appeal.<sup>120</sup>

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<sup>115</sup> [DCC](#), paras 419, 526.

<sup>116</sup> [DCC](#), fns. 1021, 1022, *referring to* Islamic Police Report of [REDACTED], [REDACTED]; Islamic Police Report of [REDACTED], [REDACTED]; Islamic Police Report of [REDACTED], [REDACTED].

<sup>117</sup> [Confirmation Decision](#), para. 428. *See also* [Confirmation Decision](#), para. 483.

<sup>118</sup> [Confirmation Decision](#), paras 436, 474, 515 ([REDACTED]); paras 448, 474, 515 ([REDACTED]); paras 457-458, 474, 515 ([REDACTED]); paras 462, 474, 515 ([REDACTED]); paras 467, 474, 515 ([REDACTED]); paras 469, 474, 515 ([REDACTED]); paras 472, 474, 515 ([REDACTED]).

<sup>119</sup> [Confirmation Decision](#), para. 718.

<sup>120</sup> [Confirmation Decision](#), fn. 1956, *referring to* Islamic Police Report of 3 December 2012, MLI-OTP-0001-7538 (corresponding to [REDACTED]); Islamic Police Report of 3 December 2012, MLI-OTP-0001-7542 (corresponding to [REDACTED]).

75. Generally, the Pre-Trial Chamber found that Mr Al Hassan made written records of his investigations, which were included in the police reports created for cases in Timbuktu and in the region.<sup>121</sup> He affixed his own signature to the reports and, in the absence of the Emir of the Islamic Police, he received people and wrote and signed reports. The Pre-Trial Chamber noted that Mr Al Hassan's signature was '[TRANSLATION] sufficient'.<sup>122</sup> The Pre-Trial Chamber referred specifically to one of the police reports corresponding to one of the seven relevant cases when finding that Mr Al Hassan made a written record of the facts reported, and signed documents which he compiled as an investigator.<sup>123</sup>

76. The Pre-Trial Chamber determined that, [REDACTED].<sup>124</sup> In this regard, the Pre-Trial Chamber noted [REDACTED] that several specific reports and cases were sent to the Islamic Tribunal.<sup>125</sup> The Pre-Trial Chamber also noted some of the images in evidence and found that they showed that some Islamic Police reports were transferred to the Islamic Tribunal.<sup>126</sup> Finally, the Pre-Trial Chamber also determined that Mr Al Hassan's signature appeared '[TRANSLATION] invariably' on the police reports, and he had the authorisation to act independently to resolve some complaints or to refer cases to the Islamic Tribunal '[TRANSLATION] on some occasions' in the absence of the Emir of the Islamic Police.<sup>127</sup>

77. In its subsequent analysis, the Pre-Trial Chamber found substantial grounds to believe that Mr Al Hassan had personally drafted and signed five reports of the Islamic Police relating to irregular sentences passed in five cases,<sup>128</sup> and that he aided, abetted or otherwise assisted (article 25(3)(c) of the Statute) in the commission of the passing of sentences without previous judgment rendered according to due process of law, upon individuals in these five cases.<sup>129</sup> The Pre-Trial Chamber stated that, in writing and signing the five Islamic Police reports in these cases and, where applicable, transmitting

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<sup>121</sup> [Confirmation Decision](#), paras 733-734, 740.

<sup>122</sup> [Confirmation Decision](#), paras 735, 843.

<sup>123</sup> [Confirmation Decision](#), para. 740, fn. 2015, *referring to* Islamic Police Report of 23 May 2012, MLI-OTP-0001-7527 (corresponding to [REDACTED]).

<sup>124</sup> [Confirmation Decision](#), para. 754.

<sup>125</sup> [Confirmation Decision](#), fn. 2041.

<sup>126</sup> [Confirmation Decision](#), fn. 2041.

<sup>127</sup> [Confirmation Decision](#), paras 757-758.

<sup>128</sup> [Confirmation Decision](#), paras 877-886, 928, 970.

<sup>129</sup> [Confirmation Decision](#), para. 928.

them to the Islamic Tribunal, Mr Al Hassan gave practical assistance which had an effect on the commission of the offending acts.<sup>130</sup>

78. Referring back to the cases it reviewed earlier in the Confirmation Decision, the Pre-Trial Chamber determined that Mr Al Hassan's contribution to other cases of sentences passed without due process was only 'general' in nature. He participated by virtue of the '[TRANSLATION] important role he performed in the Islamic Police, in particular in all of his activities connected to the writing of Islamic Police reports'.<sup>131</sup> In this regard, the Pre-Trial Chamber determined as follows:

[TRANSLATION] In the Chamber's view [...], the Prosecutor has not established that this general contribution constitutes "aid[ing], abet[ting] or otherwise assist[ing]", within the meaning of article 25(3)(c) of the Statute, which had an effect on the commission of the acts, and that he engaged in the conduct "[f]or the purpose of facilitating" the commission of the crime at article 8(2)(c)(iv) of the Statute. Accordingly, the Chamber does not find that Mr Al Hassan bears individual criminal responsibility within the meaning of article 25(3)(c) of the Statute for the commission of those criminal acts. Mr Al Hassan's individual criminal responsibility will nonetheless be subsequently considered in terms of article 25(3)(d) of the Statute.<sup>132</sup>

79. Nevertheless, in its subsequent analysis, the Pre-Trial Chamber did not explain which cases Mr Al Hassan contributed to 'in any other way' within the meaning of article 25(3)(d) of the Statute. Rather, it recalled the involvement of the Islamic Police in investigations and that the resulting case reports, '[TRANSLATION] which were prepared by Mr Al Hassan, for the Islamic Police, and by the Hisbah, were then sent to the Islamic Court'.<sup>133</sup> The Pre-Trial Chamber again recalled its findings about the five specific cases for which it previously determined that Mr Al Hassan wrote and signed the corresponding police reports,<sup>134</sup> and about Mr Al Hassan's '[TRANSLATION] important role within the Islamic Police'.<sup>135</sup> The Pre-Trial Chamber concluded that there was sufficient evidence to establish substantial grounds to believe that Mr Al

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<sup>130</sup> [Confirmation Decision](#), para. 928.

<sup>131</sup> [Confirmation Decision](#), para. 931.

<sup>132</sup> [Confirmation Decision](#), para. 931.

<sup>133</sup> [Confirmation Decision](#), para. 969.

<sup>134</sup> [Confirmation Decision](#), para. 970.

<sup>135</sup> [Confirmation Decision](#), para. 972.

Hassan contributed ‘in any other way’ within the meaning of article 25(3)(d) of the Statute to the commission of the crimes charged in count 6.<sup>136</sup>

80. Subsequent to the Confirmation Decision, the Prosecutor submitted a request to the Pre-Trial Chamber under article 61(9) of the Statute in respect of seven cases that the Pre-Trial Chamber confirmed under count 6 but only with respect to Mr Al Hassan’s potential participation under article 25(3)(d) of the Statute. The Prosecutor submitted that these seven cases should also be considered under the form of participation in article 25(3)(c) of the Statute, as there were corresponding police reports written and signed by Mr Al Hassan for those seven additional cases.<sup>137</sup> The Prosecutor explained that these seven cases were not included in the section of the Confirmation Decision relating to liability under article 25(3)(c) of the Statute either due to the Pre-Trial Chamber’s or the Prosecutor’s inadvertence. The Pre-Trial Chamber rejected this request, finding that the procedure under article 61(9) of the Statute

[...] must be used only for the amendment, at the Prosecutor’s instigation, of charges already confirmed, in particular as concerns their factual scope, so as to delineate with the utmost accuracy the charges to which the Defence will have to respond at trial, and not be used to make corrections to the confirmation decision. Accordingly, the Chamber does not consider that article 61(9) of the Statute gives it the task of revisiting the facts as found or the assessment of evidence previously presented and included in its Confirmation Decision and of making “corrections” thereto, and it matters not that such corrections concern errors attributable to the Prosecutor (Part I of the Request) or to the Chamber (Part II of the Request). In this instance, the Chamber considers that the corrections requested by the Prosecutor in Parts I and II of her Request do not concern an amendment of the factual scope of the charges already confirmed within the meaning of article 61(9) of the Statute. The Chamber has already confirmed the facts with respect to [REDACTED].<sup>138</sup>

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<sup>136</sup> [Confirmation Decision](#), para. 975.

<sup>137</sup> [Prosecutor’s Request for corrections and amendments concerning the Confirmation Decision](#), 30 January 2020, ICC-01/12-01/18-568-Red (confidential version filed on the same day (ICC-01/12-01/18-568-Conf)), paras 10-12, 20-23.

<sup>138</sup> [Décision sur la procédure applicable suite au dépôt par le Procureur de sa requête pour corrections et modifications de la Décision de confirmation des charges](#), 21 February 2020, ICC-01/12-01/18-608-Red (confidential version filed on the same day (ICC-01/12-01/18-608-Conf); English translation filed on 15 April 2020 (ICC-01/12-01/18-608-Red-t-ENG)) (the ‘First Amendment Decision’), para. 44.

The Pre-Trial Chamber also suggested that the Trial Chamber could consider using regulation 55 of the Regulations to make a modification to the legal characterisation of the facts relating to the seven cases.<sup>139</sup>

**(b) Proceedings at the trial stage**

81. Once the case was transferred to the current Trial Chamber, the Prosecutor filed an application for notice to be given pursuant to regulation 55(2) of the Regulations, in which she requested that the Trial Chamber re-characterise Mr Al Hassan's form of criminal responsibility for seven incidents included in count 6 under article 25 of the Statute, subparagraph (3)(c) as an alternative to subparagraph (3)(d).<sup>140</sup> The Prosecutor sought notice of possible re-characterisation of these seven cases under count 6, which correspond to the police reports now subject to the Defence appeal, for the reasons submitted in her prior application before the Pre-Trial Chamber under article 61(9) of the Statute.<sup>141</sup>

82. The Trial Chamber noted the findings in the Confirmation Decision about Mr Al Hassan's involvement in the Islamic Police<sup>142</sup> and, specifically, found that Mr Al Hassan's 'role with regard to the drafting of Islamic Police reports and their transmission to the Islamic Tribunal forms an integral part of PTC I's factual findings and narrative'.<sup>143</sup> The Trial Chamber further found that, having regard to the elements required under article 25(3)(c) of the Statute, the facts and circumstances of the charges,<sup>144</sup> and evidence received, 'the Prosecution has demonstrated that the legal elements of Article 25(3)(c) of the Statute in relation to the seven cases under count 6 may be derived from the facts and circumstances confirmed by PTC I'.<sup>145</sup>

83. The Trial Chamber considered that '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

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<sup>139</sup> [First Amendment Decision](#), para. 47.

<sup>140</sup> Regulation 55 Application, paras 17-21.

<sup>141</sup> Regulation 55 Application, paras 17-21.

<sup>142</sup> [Impugned Decision](#), paras 107-109.

<sup>143</sup> [Impugned Decision](#), para. 109.

<sup>144</sup> See [Confirmation Decision](#), paras 436, 448, 457-458, 462, 466-467, 469, 472, 733-735, 740-743, 754-758.

<sup>145</sup> [Impugned Decision](#), para. 110.

would not exceed the facts and circumstances described in the charges. This assessment [was] made without making any determination as to the legal interpretation of the relevant legal elements'.<sup>146</sup>

84. The Trial Chamber also found that:

Issuing notice of the possible re-characterisation of Mr Al Hassan's responsibility pursuant to Article 25(3)(c) of the Statute in respect of the seven cases under count 6 does not cause unfairness to the accused at this stage of the proceedings. Indeed, the Chamber notes that the Defence is informed in detail of the facts and circumstances relied upon for the proposed re-characterisations. Further, as mentioned above, the Chamber has received a body of evidence related to the seven cases and considers that waiting for the presentation of additional evidence relevant to the above incidents would be more prejudicial for the accused. In addition, the notice comes at an early point in the trial proceedings, allowing the Defence to have an adequate opportunity to adapt its strategy as necessary.<sup>147</sup>

On the basis of the above considerations, the Trial Chamber found that 'giving Regulation 55(2) notice now for the relevant charged incidents will avoid any undue prejudice to the accused, and the fairness and expeditiousness of the proceedings'.<sup>148</sup>

## 2. *Submissions of the Defence*

85. The Defence first submits that '[t]he Trial Chamber's findings concerning Mr. Al Hassan's authorship or signature of the seven Islamic Police Reports falls outside the scope of the confirmed facts'.<sup>149</sup> The Defence argues that the Pre-Trial Chamber confirmed the charges by finding that 'in some cases, the Prosecution has established that Mr. Al Hassan had facilitated the commission of the crime through his conduct in signing and drafting Islamic Police Reports that appeared to have a nexus to the Islamic Judgment in question, whereas in the other cases, the Pre-Trial Chamber found that such a nexus or contribution had not been established'.<sup>150</sup> It notes that the fact that the Pre-Trial Chamber did not refer to the seven Islamic Police Reports at issue in this appeal was 'not an inadvertent omission' but 'a reflection of both an absence of pleadings and a lack of evidence on this point'.<sup>151</sup> The Defence contends that the Pre-

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<sup>146</sup> [Impugned Decision](#), para. 111.

<sup>147</sup> [Impugned Decision](#), para. 112.

<sup>148</sup> [Impugned Decision](#), para. 113.

<sup>149</sup> Appeal Brief, p. 14, heading before para. 30.

<sup>150</sup> Appeal Brief, para. 32 (footnote omitted).

<sup>151</sup> Appeal Brief, para. 33 (emphasis in original).



Trial Chamber's findings 'were not [...] of a legal nature that could be subject to a legal requalification', and therefore the Trial Chamber expanded and exceeded the factual matrix of the confirmed charges.<sup>152</sup>

86. The Defence further argues that '[t]he Trial Chamber's approach constitutes a *de facto* amendment of the charges as it is predicated on new material facts that were not confirmed by the Pre-Trial Chamber'.<sup>153</sup> According to the Defence, the Trial Chamber was bound by the Pre-Trial Chamber's findings on the nature and number of contributions that had been established by the conclusion of the confirmation stage, and thus it cannot rely on material facts that are not confirmed in the charges.<sup>154</sup> The Defence notes that the Pre-Trial Chamber 'considered the issue as to whether Mr. Al Hassan signed or authored particular Islamic Police Report to be "facts" that were material to the degree and nature of his contribution to specific incidents'.<sup>155</sup> It argues that the Trial Chamber relied on the evidence 'for the purpose of making its own appreciation and extrapolation as concerns the facts and circumstances of the case' and its conclusion rested on a disagreement with the Pre-Trial Chamber as concerns the underlying existence of facts.<sup>156</sup>

87. The Defence also argues that '[t]he Trial Chamber's approach is inconsistent with Mr. Al Hassan's right to fair and impartial proceedings'.<sup>157</sup> The Defence avers, by reference to the Appeals Chamber's findings in the *Mbarushimana* case, that the Prosecutor 'was required to present and substantiate [her] case concerning the seven Islamic Court cases at the confirmation hearing', and her failure to do so 'should not operate to the detriment of the Defence'.<sup>158</sup> The Defence further submits that '[t]he right to an impartial Trial Chamber demands a clear separation between the role of the Pre-Trial Chamber in confirming charges, as compared to the role of the Trial Chamber in determining whether the evidence satisfies the confirmed charges'.<sup>159</sup> In the Defence's view, '[i]f the Trial Chamber adopts an overly active and broad approach in interpreting

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<sup>152</sup> Appeal Brief, paras 34-35 (emphasis in original).

<sup>153</sup> Appeal Brief, p. 16, heading before para. 36.

<sup>154</sup> Appeal Brief, paras 36-39.

<sup>155</sup> Appeal Brief, para. 40.

<sup>156</sup> Appeal Brief, para. 40.

<sup>157</sup> Appeal Brief, p. 20, heading before para. 41.

<sup>158</sup> Appeal Brief, paras 41-43.

<sup>159</sup> Appeal Brief, para. 44.

the facts (or extrapolating new facts), so as to allow for a range of additional and more serious charges’, this would amount to a ‘violation of Article 39(4) of the Statute and internationally recognized human rights law’.<sup>160</sup> Finally, the Defence avers that the possible modification of the legal characterisation in question caused prejudice to Mr Al Hassan as it had an impact on the preparation of his defence and that re-calling Prosecution witnesses ‘would also unfairly and unnecessarily prolong the case’.<sup>161</sup>

### 3. *Submissions of the Prosecutor*

88. The Prosecutor submits that the Trial Chamber acted within the legal framework of regulation 55 of the Regulations when giving notice of the possible re-characterisation of Mr Al Hassan’s liability for the seven cases.<sup>162</sup> To support her view, the Prosecutor argues, *inter alia*, that: (i) the Trial Chamber’s decision was ‘based on findings which fell squarely within the facts and circumstances charged’;<sup>163</sup> (ii) ‘the Trial Chamber was entitled to find that evidence of Mr Al Hassan’s specific contributions to the seven cases [...] fell within the scope of the confirmed facts regarding his general contributions and warranted a possible re-characterisation of his liability for those cases to article 25(3)(c)’ of the Statute;<sup>164</sup> (iii) both the Pre-Trial and Trial Chambers considered that the re-characterisation in question could fall within the scope of the facts and circumstances of the charges;<sup>165</sup> and (iv) the Defence mischaracterises the Confirmation Decision and several aspects of the Prosecutor’s submissions and materials in the present case.<sup>166</sup>

89. The Prosecutor further submits that the Trial Chamber ‘did not exceed the scope of regulation 55 of the Regulations, nor did its notice of potential re-characterisation amount to a *de facto* amendment of the charges’.<sup>167</sup> In her view, the Trial Chamber ‘relied upon the confirmed facts and circumstances in this case in giving notice of the

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<sup>160</sup> Appeal Brief, para. 44 (footnote omitted).

<sup>161</sup> Appeal Brief, para. 45.

<sup>162</sup> Prosecutor’s Response, para. 22.

<sup>163</sup> Prosecutor’s Response, para. 23.

<sup>164</sup> Prosecutor’s Response, para. 25.

<sup>165</sup> Prosecutor’s Response, paras 26-27.

<sup>166</sup> Prosecutor’s Response, paras 28-30.

<sup>167</sup> Prosecutor’s Response, para. 31.

possible re-characterisation’ and thus ‘[i]ts actions were squarely within the scope of regulation 55’ of the Regulations.<sup>168</sup>

90. Finally, the Prosecutor argues that Mr Al Hassan suffers no prejudice.<sup>169</sup> She avers that: (i) Mr Al Hassan was given ‘sufficient information to assist him in understanding the nature, cause and content of the charge concerning the seven cases’ from, *inter alia*, the DCC, the Confirmation Decision and the Impugned Decision;<sup>170</sup> (ii) the Defence ‘was well-positioned to anticipate the possibility of a re-characterisation of Mr Al Hassan’s liability for the seven cases’ by the time of the Regulation 55 Application;<sup>171</sup> (iii) ‘Mr Al Hassan’s right to examine the evidence against him has not been infringed’;<sup>172</sup> and (iv) ‘the Trial Chamber provided prompt and timely notice of the possible re-characterisation’.<sup>173</sup> The Prosecutor also argues that the Defence’s argument about the Trial Chamber’s alleged lack of impartiality ‘should be dismissed *in limine*’.<sup>174</sup>

#### 4. Determination by the Appeals Chamber

##### (a) The ‘facts and circumstances’ described in the charges

91. The Appeals Chamber observes that the ultimate question to be decided arising from the second ground of appeal is whether the Trial Chamber exceeded the ‘facts and circumstances’ described in the charges by giving notice of the possible modification of the legal characterisation given to facts relating to Mr Al Hassan’s role in the count 6 crimes. This question is case-specific, turning on the correctness of the Trial Chamber’s interpretation of the relevant findings in the Confirmation Decision. However, in support of this ground of appeal, the Defence makes a number of principled arguments about the role of the trial chamber *vis-à-vis* the pre-trial chamber under the Statute with a view to limiting the scope of the factual allegations against Mr Al Hassan.<sup>175</sup> Thus, before turning to the Impugned Decision, the Appeals Chamber

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<sup>168</sup> Prosecutor’s Response, para. 31.

<sup>169</sup> Prosecutor’s Response, para. 33.

<sup>170</sup> Prosecutor’s Response, para. 34.

<sup>171</sup> Prosecutor’s Response, para. 35.

<sup>172</sup> Prosecutor’s Response, para. 36 (footnote omitted).

<sup>173</sup> Prosecutor’s Response, para. 37.

<sup>174</sup> Prosecutor’s Response, para. 38.

<sup>175</sup> For instance, the Defence argues that there is ‘no hybrid procedure’ that allows the Trial Chamber to amend the charges and to perform a legal re-characterisation of those facts at the same time (Appeal Brief, para. 29). The Defence also submits that the Trial Chamber impermissibly ‘stepped into the shoes

finds it necessary to first contextualise the question raised under the second ground of appeal by explaining the nature of the confirmation proceedings under the Statute and the concept of the ‘facts and circumstances’ described in the charges.

92. The Appeals Chamber recalls that, under the Statute, one of the principal functions of the pre-trial chamber is to decide whether to confirm the charges upon which a person is committed to trial. This is a limited judicial intervention, the objective of which is to ensure that there is a case worthy of trial and to define the parameters of the subject matter of that trial.<sup>176</sup> In some cases, those parameters may be defined broadly by the pre-trial chamber.<sup>177</sup> But even in those cases where each criminal act is specified in the Prosecutor’s charging document, the pre-trial chamber need not make findings exhaustively on each individual criminal act underlying the crimes charged. Given the early stage of the case, the pre-trial chamber will assess the charges at the macro-level to move forward only with those charges that are sufficiently well-grounded in evidence.<sup>178</sup> Compared with the fact-finding role of the trial chamber, this

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of the Pre-Trial Chamber’ by exceeding ‘the factual matrix of the confirmed charges’ (Appeal Brief, para. 35). Finally, the Defence suggests that ‘[t]he prerogative for defining the factual elements of the charges [...] rests solely with the Pre-Trial Chamber: subsequent “updates” risk promoting uncertainty, and undermining the authoritative nature of the charges’ (Appeal Brief, para. 44).

<sup>176</sup> Appeals Chamber, *The Prosecutor v. Callixte Mbarushimana*, [Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled “Decision on the confirmation of charges”](#), 30 May 2012, ICC-01/04-01/10-514 (OA4) (the ‘*Mbarushimana* OA4 Judgment’), para. 47; Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction](#), 1 December 2014, ICC-01/04-01/06-3121-Red (A5) (confidential version filed on the same day (ICC-01/04-01/06-3121-Conf (A5))) (the ‘*Lubanga* A5 Judgment’), para. 124.

<sup>177</sup> E.g. Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, [Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled “Judgment”](#), 30 March 2021, ICC-01/04-02/06-2666-Red (A A2) (confidential version filed on the same day (ICC-01/04-02/06-2666-Conf (A A2))) (the ‘*Ntaganda* Appeal Judgment’), para. 327; Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeal of Jean-Pierre Bemba Gombo against Trial Chamber III’s ‘Judgment pursuant to article 74(2) of the Statute’, 8 June 2018, ICC-01/05-01/08-3636-Anx1-Red (confidential version filed on the same day (ICC-01/05-01/08-3636-Conf-Anx1)), [Dissenting opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański](#) (the ‘*Bemba* A Dissenting Opinion’), para. 20: ‘In our view, article 74 (2) of the Statute is aimed at ensuring a separation between the prosecutorial function of determining the scope of a case and the judicial function of fact-finding within the scope of the case brought by the Prosecutor. Given its purpose, which we will discuss in more detail later in this opinion, article 74 (2) of the Statute is generally not concerned with the level of detail of the charges. We consider that it is for the Prosecutor to define the factual scope of a case and that the identification of the broad parameters of a case may suffice to serve article 74 (2)’s purpose of delineating the jurisdiction of the trial chamber’.

<sup>178</sup> See [Mbarushimana OA4 Judgment](#), para. 39: ‘[Article 61] serves to ensure the efficiency of judicial proceedings and to protect the rights of persons by ensuring that cases and charges go to trial only when justified by sufficient evidence’. See also W. A. Schabas *et al.*, ‘Article 61’ in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (2016, 3<sup>rd</sup> ed.), p. 1487: ‘By implication, the article 61 mechanism “is designed to protect the

is a light review. The pre-trial chamber must calibrate its review of the factual allegations carefully according to its role as ‘gatekeeper’,<sup>179</sup> taking into account the need to proceed expeditiously so as not to cause undue delay to the proceedings as a whole.<sup>180</sup>

93. Appropriately, the decision under article 61(7) of the Statute may not contain an analysis of every factual allegation brought by the Prosecutor. It remains the Prosecutor’s primary responsibility to formulate the charges, initially in the charging documents and then by way of any amendments thereto.<sup>181</sup> Indeed, in the past, in addition to the confirmation decision, trial chambers have looked to the document containing the charges submitted by the Prosecutor to fully ascertain the ‘facts and circumstances described in the charges’.<sup>182</sup>

94. Therefore, the Appeals Chamber finds that the constraints that the Defence seeks to place upon a trial chamber’s interpretation of the scope of the charges would run contrary to the applicable legal framework and established practice. In principle, a trial chamber may view the confirmation decision holistically in its interpretation of how the pre-trial chamber set out to delimit the scope of the ‘facts and circumstances’ at

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rights of the Defence against wrongful and wholly unfounded charges”. Distinguishing the cases that should go to trial from those that should not also ensures judicial economy insofar as it saves the Court’s limited resources for those cases which deserve to be discussed at trial’.

<sup>179</sup> See [Mbarushimana OA4 Judgment](#), paras 47-48, explaining that at the confirmation stage the Prosecutor ‘need not submit more evidence than is necessary to meet the threshold of substantial grounds to believe’, and that, as a result, the determinations of the pre-trial chamber on witnesses’ credibility may be ‘presumptive’.

<sup>180</sup> In this regard, there are statutory time limits unique to pre-trial filings that provide further support for the importance of expeditiousness at that stage. For instance, rule 121 (3) of the Rules requires that the Prosecutor provide to the Pre-Trial Chamber and the person a description of the charges and a list of evidence ‘no later than 30 days before the date of the confirmation hearing’. Furthermore, pursuant to regulation 53 of the Regulations, ‘[t]he written decision of the Pre-Trial Chamber setting out its findings on each of the charges shall be delivered within 60 days from the date the confirmation hearing ends’ ([Bemba A Dissenting Opinion](#), para. 34). See also H. Friman *et al.*, ‘Charges’ in G. Sluiter *et al.* (eds.) *International Criminal Procedure: Principles and Rules* (2013), p. 470: ‘the [confirmation] procedure is a means to an end – to ensure that charges are properly grounded on sufficient evidence to justify trial proceedings. International criminal trials should be reserved for serious cases solidly based on the evidence. An effective confirmation process can “weed out” weak cases and streamline charges for trial. There is little point in sending an accused to trial if the evidence cannot meet a basic threshold. However the process should not itself become either overly complicated or overly time-consuming so as to encroach upon an accused’s right to an expeditious trial’.

<sup>181</sup> See [Bemba A Dissenting Opinion](#), para. 26; [Lubanga A5 Judgment](#), para. 124.

<sup>182</sup> Trial Chamber V, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Decision on the content of the updated document containing the charges](#), 28 December 2012, ICC-01/09-01/11-522, paras 14-19; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, [Decision on the updated document containing the charges](#), 6 February 2015, ICC-01/04-02/06-450, para. 39.

issue for trial. Relevant to this consideration is whether the pre-trial chamber performed a thorough analysis of all of the factual allegations underpinning a charge, or whether it analysed only a sample of those allegations before concluding that the charge in question, as a whole, had been established to the requisite degree.<sup>183</sup> Moreover, where the confirmation decision does not directly address certain factual allegations advanced by the Prosecutor, a trial chamber may find it necessary to read the confirmation decision together with the document containing the charges and subsequent amendments to see whether those allegations are within the scope of the case.<sup>184</sup>

95. Turning to this case, the Appeals Chamber notes that the Trial Chamber concluded, following its review of the Confirmation Decision, that ‘Mr Al Hassan’s role with regard to the drafting of Islamic Police reports and their transmission to the Islamic Tribunal forms an integral part of PTC I’s factual findings and narrative’.<sup>185</sup> Indeed, the Appeals Chamber observes that in the Confirmation Decision the Pre-Trial Chamber found that there was sufficient evidence that Mr Al Hassan wrote and completed reports as *de facto* Commissioner of the Islamic Police, and that he subsequently sent these reports to the Islamic Tribunal to support the cases listed under count 6.<sup>186</sup> The Pre-Trial Chamber found that Mr Al Hassan signed the reports ‘[TRANSLATION] invariably’,<sup>187</sup> and that [REDACTED], as regards his authority to transmit cases, his signature was ‘[TRANSLATION] sufficient’.<sup>188</sup> The Appeals Chamber observes that these facts appear as findings of the Pre-Trial Chamber in the section of the Confirmation Decision devoted to Mr Al Hassan’s individual criminal responsibility. Therefore, the Appeals Chamber considers that the Pre-Trial Chamber was of the view that there were substantial grounds to believe that Mr Al Hassan carried out these activities and that these activities contributed to the crimes in count 6.

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<sup>183</sup> See [Ntaganda Appeal Judgment](#), para. 336 (‘The Appeals Chamber finds that there is no indication that the Pre-Trial Chamber intended to confirm the relevant charges only in part and to decline to confirm the remaining parts. Rather, the Pre-Trial Chamber considered evidence of some aspects of the crimes charged and, based on that evidence, confirmed the crimes charged in their entirety’).

<sup>184</sup> See [Ntaganda Appeal Judgment](#), para. 335 (‘The Appeals Chamber also agrees with the following observation by the Trial Chamber: “As a general principle, [...] where the Pre-Trial Chamber was silent on a particular allegation in the DCC, it cannot be presumed to have been rejected, and such silence need not automatically result in its removal from the Updated DCC.”’).

<sup>185</sup> [Impugned Decision](#), para. 109.

<sup>186</sup> [Confirmation Decision](#), paras 718, 735, 754-757, 843.

<sup>187</sup> [Confirmation Decision](#), paras 757-758.

<sup>188</sup> [Confirmation Decision](#), paras 735, 843.

96. The issue arises in this appeal as to whether the Confirmation Decision could also be interpreted to say that the evidence established only that Mr Al Hassan prepared and signed certain specific police reports – none of which correspond to the seven cases at issue on appeal.<sup>189</sup> Indeed, after its general discussion about Mr Al Hassan’s role in preparing police reports, the Pre-Trial Chamber referred only to five reports in its analysis under articles 25(3)(b),<sup>190</sup> 25(3)(c),<sup>191</sup> and 25(3)(d)<sup>192</sup> of the Statute. Moreover, the Pre-Trial Chamber appears to have made a distinction based upon those reports that Mr Al Hassan drafted and signed and those that he did not. It explained that the evidence established that Mr Al Hassan was criminally responsible under article 25(3)(c) of the Statute in respect of five cases corresponding to those five reports,<sup>193</sup> and that it would then consider Mr Al Hassan’s responsibility in respect of ‘the other cases [listed under count 6]’ only under article 25(3)(d) of the Statute.<sup>194</sup>

97. However, bearing in mind the way in which the factual allegations are formulated in the DCC and the manner in which the Pre-Trial Chamber made general findings about Mr Al Hassan’s contribution to the crimes in the DCC, the Appeals Chamber, for several reasons, rejects the interpretation advanced by the Defence. First, the Appeals Chamber finds that the Defence’s interpretation places too much emphasis on only one section of the Confirmation Decision and it is directly contradicted by the Pre-Trial Chamber’s findings under the general section of the Confirmation Decision entitled ‘[TRANSLATION] Responsibility; Findings of fact’.<sup>195</sup> There, in finding that the evidence established to the standard required that Mr Al Hassan wrote and completed documents for the Islamic Police, the Pre-Trial Chamber referred to dozens of police reports not among those referred to by the Defence.<sup>196</sup>

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<sup>189</sup> See Appeal Brief, paras 30-35.

<sup>190</sup> [Confirmation Decision](#), paras 877-886.

<sup>191</sup> [Confirmation Decision](#), para. 928.

<sup>192</sup> [Confirmation Decision](#), para. 970.

<sup>193</sup> [Confirmation Decision](#), para. 928.

<sup>194</sup> [Confirmation Decision](#), para. 931.

<sup>195</sup> [Confirmation Decision](#), paras 710 *et seq.*

<sup>196</sup> [Confirmation Decision](#), paras 718-719. See also [Confirmation Decision](#), fn. 2041, where the Pre-Trial Chamber noted [REDACTED] certain police reports that Mr Al Hassan drafted and that were sent to the Islamic Tribunal, none of which are among the five police reports referred to in the Pre-Trial Chamber’s subsequent findings under article 25(3)(c) of the Statute. See also [Confirmation Decision](#), para. 755.

98. Second, the language used by the Pre-Trial Chamber when making findings about Mr Al Hassan's responsibility for preparing police reports tends to show that the Pre-Trial Chamber was concerned only with defining the broad parameters of his involvement in this area of the relevant investigations. The Pre-Trial Chamber found that, generally, Mr Al Hassan's signature appeared '[TRANSLATION] invariably' on the Islamic Police reports it considered.<sup>197</sup> The Pre-Trial Chamber found that the number of reports for each case that arose in the Timbuktu region '[TRANSLATION] could vary from none to five or ten'.<sup>198</sup> For cases arising outside the Timbuktu region, Mr Al Hassan wrote '[TRANSLATION] some reports'.<sup>199</sup> Finally, the Pre-Trial Chamber's analysis of images in evidence led it to the conclusion that '[TRANSLATION] some Islamic Police reports were transferred to the Islamic Court'.<sup>200</sup> The Appeals Chamber considers that this language suggests that the precise number of police reports that the Pre-Trial Chamber found to have been prepared by Mr Al Hassan was not central to its analysis, but in any event it was likely more than five.

99. Third, the Appeals Chamber observes that the Prosecutor formulated count 6 of the DCC broadly in relation to Mr Al Hassan's contribution to the enumerated judgments of the Islamic Tribunal. Common to all alleged forms of participation is the allegation that Mr Al Hassan is criminally responsible because of his senior position in the Islamic Police, his participation in investigations of suspects, and his responsibility for drafting and signing police reports that were transmitted to the Islamic Tribunal.<sup>201</sup> The Prosecutor referred to many such reports in the DCC, [REDACTED].<sup>202</sup> These reports are explicitly included as 'examples' supporting the allegation that Mr Al Hassan drafted and signed reports in his role as *de facto* Commissioner of the police. The Appeals Chamber considers that the Prosecutor cited these examples in support of the allegation that drafting and signing police reports was within Mr Al Hassan's role during the relevant time. That is, those examples were cited as evidence in support of

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<sup>197</sup> [Confirmation Decision](#), para. 757.

<sup>198</sup> [Confirmation Decision](#), para. 733.

<sup>199</sup> [Confirmation Decision](#), para. 734.

<sup>200</sup> [Confirmation Decision](#), fn. 2041.

<sup>201</sup> See [DCC](#), paras 409, 419, 517, 526.

<sup>202</sup> E.g. [DCC](#), fns 714, 716, 987, 988, 991, 1021, 1022, 1283, 1297, 1298; Prosecutor's Response, para. 30.



an allegation, not as an exhaustive list of all of the reports Mr Al Hassan was alleged to have drafted and signed.<sup>203</sup>

100. It follows that the Pre-Trial Chamber could not have, on the basis of the allegations in the DCC, set out to make exhaustive findings about the reports that Mr Al Hassan drafted and signed for the purposes of limiting the scope of the trial. The Appeals Chamber finds that such an interpretation would misconstrue the nature of this charge and it would be inconsistent with the role of a pre-trial chamber at this stage of the proceedings as described above. Rather, the Confirmation Decision defines the parameters of the ‘facts and circumstances’ in the charges. In this case, those parameters include the allegation that Mr Al Hassan contributed to the crimes in the DCC by serving an important role in his position during the relevant period, and that in this position he carried out certain functions as set out in the Confirmation Decision. The Appeals Chamber finds that this interpretation of the Confirmation Decision is consistent with the decision as a whole and the manner in which the Pre-Trial Chamber set out to make findings of fact.<sup>204</sup>

101. Therefore, the Appeals Chamber disagrees with the Defence’s argument that the Confirmation Decision limits the scope of the ‘facts and circumstances’ only to Mr Al Hassan’s authorship or signature of specific Islamic Police reports. The Appeals Chamber acknowledges that the sections of the Confirmation Decision referred to by the Defence do indeed give rise to a certain degree of ambiguity, if read in isolation. In this regard, the Appeals Chamber emphasises that a decision pursuant to article 61(7) of the Statute should, in principle, be clear about whether certain factual allegations are rejected and how this may reduce the scope of a case. The Appeals Chamber also observes that, in the Prosecutor’s request for amendment, the Pre-Trial Chamber was presented with similar issues to those raised in this appeal, and the Pre-Trial Chamber declined to rule on the issues raised.<sup>205</sup> But despite this ambiguity, and despite the fact that the Pre-Trial Chamber had the opportunity to resolve the ambiguity but opted not to, the Appeals Chamber finds that, for the purposes of this appeal, the Trial Chamber

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<sup>203</sup> See Prosecutor’s Response, para. 32, noting that ‘[...] the charges did not cite to all of the reports relating to the seven cases as these were matters of evidence’.

<sup>204</sup> Whether this provides sufficient specificity so as to comply with the requirement to give notice (article 67(1)(a) of the Statute) is not a question directly raised in this appeal, and the Appeals Chamber has not considered it.

<sup>205</sup> [First Amendment Decision](#), paras 44-46.

has correctly interpreted the ‘facts and circumstances’ confirmed by the Pre-Trial Chamber. Thus, the Defence’s challenge to the Trial Chamber’s finding in the Impugned Decision that the allegations concerning Mr Al Hassan’s authorship or signature of the seven Islamic Police reports fall within the scope of the confirmed facts is rejected.

102. It is for these reasons that the Appeals Chamber also rejects the Defence’s argument that Mr Al Hassan is unable to prepare his defence case due to issues of uncertainty or a need for clarity.<sup>206</sup> This is because the Defence bases this argument on the principle that the charges must not include a mere sample of facts with which the Prosecutor intends to charge an accused.<sup>207</sup> Indeed, this principle requires that a meaningful defence can only be prepared when the Prosecutor is not allowed to ‘mould her case to the evidence’ as the trial progresses. Nevertheless, this type of prejudice simply does not arise here. As stated above, one of the primary allegations in the Prosecutor’s case against Mr Al Hassan is that he contributed to the crimes enumerated in count 6 by drafting and signing police reports that were eventually transmitted to the Islamic Tribunal. In this sense, the DCC does not contain a ‘sample of the facts’, but a definite set of factual allegations, even if the DCC may have referred only to a sample of the evidence supporting it. There is no ambiguity or uncertainty as to whether this aspect of the ‘facts and circumstances’ of the charges was confirmed by the Pre-Trial Chamber. The Pre-Trial Chamber discusses these activities at length, referring to dozens of such reports in the Confirmation Decision.

103. A number of the Defence’s remaining arguments have as their premise that, by giving notice under regulation 55 of the Regulations of the possibility that Mr Al Hassan may have drafted and signed the seven police reports in question, the Trial

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<sup>206</sup> Appeal Brief, paras 36-37, 40.

<sup>207</sup> See Appeal Brief, para. 36, referring to Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Décision relative au dépôt d'un résumé des charges par le Procureur](#), 21 October 2009, ICC-01/04-01/07-1547 (English translation filed on 29 October 2009, [ICC-01/04-01/07-1547-ENG](#)), para. 22. See also Appeal Brief, para. 37, referring to ICTR Appeals Chamber, *Aloys Ntabakuze v. The Prosecutor*, [Judgement](#), 8 May 2012, ICTR-98-41A-A, para. 38 and fn. 88. The ICTR Appeals Chamber noted, in footnote 88, that ‘the indictment must plead the criminal conduct of the subordinates for whom the accused is alleged to be responsible’, and ‘this includes pleading the location and approximate date of the alleged criminal acts and the means by which committed when this information is in possession of the Prosecution’.

Chamber introduced ‘new facts’ that were not confirmed in the charges.<sup>208</sup> The Defence refers to the *Bemba* case, where it argues that Trial Chamber III found that certain additions to the charges in that case were not permitted after the confirmation hearing because they constituted ‘material facts concerning specific contributions’ that were not relied on in the confirmation decision.<sup>209</sup> The Defence also refers to the *Kanyarukiga* case from the ICTR illustrating, in the Defence’s view, an approach consistent with that taken in *Bemba*.<sup>210</sup> And finally, the Defence refers to the Appeals Chamber’s jurisprudence in the *Lubanga* case, which cautions that ‘[t]o give the Trial Chamber the power to extend *proprio motu* the scope of the trial to facts and circumstances not alleged by the Prosecutor [in the charges] would be contrary to the distribution of powers under the Statute’.<sup>211</sup>

104. Indeed, the Appeals Chamber notes that in the legal framework there is a clear distinction between the amendment procedure before the trial commences<sup>212</sup> and the modification of the legal characterisation of facts under regulation 55 of the Regulations.<sup>213</sup> Only the former procedure is appropriate where the Prosecutor seeks to modify the factual allegations. Nevertheless, for the reasons explained above, the Appeals Chamber finds that the factual allegations relating to Mr Al Hassan’s authorship or signature of Islamic Police reports are squarely within the scope of the ‘facts and circumstances’ in this case. In its final determination of Mr Al Hassan’s responsibility, the Trial Chamber may find that Mr Al Hassan prepared some of the reports in evidence or none at all. This is an evidentiary finding that is within the purview of the Trial Chamber, and it only tends to prove – but does not necessarily finally determine – whether there is a link between Mr Al Hassan and the crimes alleged under count 6 of the DCC. Therefore, the Appeals Chamber rejects the Defence’s argument that the Trial Chamber’s decision to give notice that it may consider Mr Al

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<sup>208</sup> Appeal Brief, paras 29, 36, 38-39.

<sup>209</sup> Appeal Brief, para. 39.

<sup>210</sup> Appeal Brief, para. 39.

<sup>211</sup> Appeal Brief, para. 44, referring to [Lubanga OA15 OA16 Judgment](#), para. 94. See also Appeal Brief, para. 44: ‘the notion that the Trial Chamber has the power to extrapolate new facts or to interpret the charged facts differently, with a view to reaching new factual conclusions, potentially opens a Pandora’s box of uncertainty and confusion as concerns the precise scope and content of the charges’.

<sup>212</sup> See article 61(9) of the Statute and rule 128 of the Rules.

<sup>213</sup> See [Lubanga OA15 OA16 Judgment](#), para. 94.

Hassan's authorship or signature of certain police reports constitutes a *de facto* amendment of the charges.

105. Finally, the Defence argues that '[t]he right to an impartial Trial Chamber demands a clear separation between the role of the Pre-Trial Chamber in confirming charges, as compared to the role of the Trial Chamber in determining whether the evidence satisfies the confirmed charges'.<sup>214</sup> It cautions that if a trial chamber adopts an

overly active and broad approach in interpreting the facts (or extrapolating new facts), so as to allow for a range of additional, and more serious charges, this will raise the question as to whether the Trial Chamber has in fact donned the mantle of an investigating/confirming judge, in violation of Article 39(4) of the Statute and internationally recognized human rights law.<sup>215</sup>

106. The Appeals Chamber finds that this argument stems from a misapprehension of the purpose of the confirmation process under the Statute. In its fact-intensive review, a trial chamber will sometimes assess allegations that were not specifically addressed by the pre-trial chamber given the latter's limited role as discussed above. This function of the trial chamber does not necessarily produce tension with that of the pre-trial chamber. In the view of the Appeals Chamber, the correct balance between the pre-trial and trial chamber is struck where, as described above, the trial chamber is capable of ascertaining the scope of a case once the trial for that case is set. If the opposite were true, a trial chamber would be unable to apply regulation 55(1) of the Regulations, which calls upon a trial chamber to ascertain the 'facts and circumstances' described in the charges.

107. In this case, the Pre-Trial Chamber has confirmed the factual allegation that Mr Al Hassan is criminally responsible for the crimes in count 6 in part for having drafted and signed reports of the Islamic Police. The Appeals Chamber finds that the Trial Chamber has correctly interpreted its power to evaluate all of the evidence supporting this allegation, including the seven reports at issue in this appeal.

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<sup>214</sup> Appeal Brief, para. 44.

<sup>215</sup> Appeal Brief, para. 44 (footnotes omitted).

**(b) Alleged prejudice to the Defence's case**

108. In the Impugned Decision, the Trial Chamber noted that the Defence had received disclosure of 'a body of evidence related to the seven cases'.<sup>216</sup> The Trial Chamber justified its decision to issue notice without hearing additional evidence due to the delay this may cause to the trial, which it determined 'would be more prejudicial for the accused'.<sup>217</sup> Thus, it concluded that 'issuing notice of the possible re-characterisation of Mr Al Hassan's responsibility pursuant to Article 25(3)(c) of the Statute in respect of the seven cases under count 6 does not cause unfairness to the accused at this stage of the proceedings'.<sup>218</sup> The Defence, for its part, notes that several witnesses have already testified about the authenticity of the Islamic Police reports, but it submits that re-calling the Prosecutor's witnesses would 'unfairly and unnecessarily prolong the case'.<sup>219</sup> Nevertheless, the Defence submits that the notice in and of itself causes undue prejudice due to the Defence's 'very limited opportunities for investigating and preparing its case'.<sup>220</sup>

109. The Appeals Chamber is not persuaded by the Defence's arguments that the possible modification of the legal characterisation in question caused prejudice to Mr Al Hassan.<sup>221</sup> In this regard, the Appeals Chamber notes the Prosecutor's submission that the Defence focused on issues regarding general methodology when putting questions to the relevant witnesses,<sup>222</sup> and the Defence has not explained how its cross-examination would have been different had it been given the notice prior to cross-examining these witnesses. Moreover, the Appeals Chamber notes in particular that the Defence is not claiming that it was denied the opportunity to re-examine relevant witnesses as a result of the notice under regulation 55 of the Regulations. To the contrary, the Defence submits that it does not seek any re-examination, nor has the Defence substantiated its claim that recalling prosecution witnesses 'would unfairly and unnecessarily prolong the case'. Therefore, the Appeals Chamber finds that the Trial

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<sup>216</sup> [Impugned Decision](#), para. 112.

<sup>217</sup> [Impugned Decision](#), para. 112.

<sup>218</sup> [Impugned Decision](#), para. 112.

<sup>219</sup> Appeal Brief, para. 45.

<sup>220</sup> Appeal Brief, para. 45.

<sup>221</sup> See Appeal Brief, para. 45.

<sup>222</sup> Prosecutor's Response, para. 36.

Chamber did not err in determining that no prejudice was caused at that particular stage of the proceedings as a result of the Impugned Decision.

**(c) Conclusion**

110. For the foregoing reasons, the Appeals Chamber rejects the Defence's second ground of appeal.

**VI. APPROPRIATE RELIEF**

111. In an appeal pursuant to article 82(1)(d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed. In the present case, in light of the Appeals Chamber's conclusion that the error found under the first ground of appeal did not materially affect the Impugned Decision, as well as its conclusion under the second ground of appeal, it is appropriate to confirm the Impugned Decision.

Done in both English and French, the English version being authoritative.



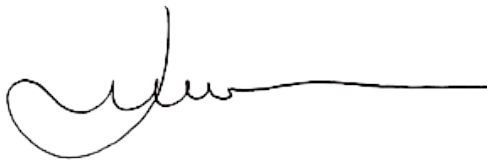
**Judge Luz del Carmen Ibáñez Carranza**  
**Presiding**



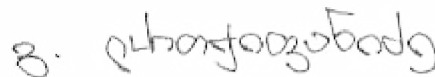
**Judge Piotr Hofmański**



**Judge Solomy Balungi Bossa**



**Judge Rosario Salvatore Aitala**



**Judge Gocha Lordkipanidze**

Dated this 1<sup>st</sup> day of July 2021

At The Hague, The Netherlands