



**Summary**

**Judgment of the Appeals Chamber**

*in*

*The Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*

*Read by*

**Judge Luz del Carmen Ibáñez Carranza**

**Presiding**

(19 February 2020)

1. Good morning. As requested by the Public Information and Outreach Section, the photographer can now take pictures for two minutes for the publicity of the hearing.  
Thank you [*Pictures – Photographer leaves.*]
2. Would the Court Officer please call the case? [*Court Officer calls the case.*]
3. I am Judge Luz del Carmen Ibáñez Carranza, presiding in this appeal arising from the case of the Prosecutor v. Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud. My fellow judges in this appeal are Judge Chile Eboe-Osuji, Judge Howard Morrison, Judge Piotr Hofmański and Judge Solomy Balungi Bossa.
4. May I ask the parties and participants to introduce themselves for the record please, **starting with the Defence?** [*Parties will place themselves on the record. It is expected that the following will be present:*]

- Defence (Ms Melinda Taylor, Ms Marie-Helene Proulx)
- Office of the Prosecutor (Ms Helen Brady)
- Legal Representatives of Victims (Mr Seydou Doumbia, Mr Mayombo Kassongo, Mr Fidel Nsita Luvengika)]
- State Representatives of the Republic of Mali

5. Thank you very much. For the record, I also note that Mr Al Hassan is present.

6. Today, the Appeals Chamber will deliver its judgment in the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I of 27 September 2019, entitled in French ‘*Décision relative à l’exception d’irrecevabilité pour insuffisance de gravité de l’affaire soulevée par la défense*’, and in English ‘*Decision on the Admissibility Challenge raised by the Defence for Insufficient Gravity of the Case*’.

7. For the reasons that follow, the Appeals Chamber unanimously rejects the appeal lodged by Mr Al Hassan and confirms the decision of the Pre-Trial Chamber. This is a non-authoritative summary of the Appeals Chamber's written judgment in the appeal. The latter will be notified to the parties and participants after this hearing.

8. I shall briefly outline the procedural history of this appeal. On the 27<sup>th</sup> of September 2019, the Pre-Trial Chamber rejected Mr. Al Hassan's challenge that the case brought against him was not of sufficient gravity to justify further action by the Court under Article 17(1)(d) of the Statute. It is this decision that is the object of Mr Al Hassan's appeal. The Pre-Trial Chamber subsequently confirmed the charges of war crimes and crimes against humanity brought against Mr Al Hassan.

9. Mr Al Hassan filed his appeal brief on 21 October 2019 and the Prosecutor filed her response on 12 November 2019. The Victims and the authorities of Mali filed their observations on issues arising in the appeal on 19 November 2019 and 23 December 2019 respectively.
10. Mr Al Hassan raises two grounds of appeal. Under the first ground of appeal, Mr Al Hassan argues that the Pre-Trial Chamber erred by adopting, for the purposes of admissibility, an overly broad and erroneous definition of the case that ‘artificially inflated the gravity of the case on the basis of irrelevant considerations’. Under the second ground of appeal, Mr Al Hassan challenges the Pre-Trial Chamber’s exercise of discretion in its assessment of the gravity of the case based on a purported failure to attribute sufficient weight to the nature of his individual conduct.

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

**GRAVITY REQUIREMENT IN ARTICLE 17(1)(d)  
OF THE STATUTE**

12. Prior to considering the specific arguments raised by Mr Al Hassan, the Appeals Chamber finds it appropriate to set out its interpretation of the gravity requirement stipulated in article 17(1)(d) of the Statute.

13. For the reasons set out in detail in the written judgment, the Appeals Chamber considers that the gravity requirement must be assessed on a case-by-case basis having regard to the specific facts of a given case. The purpose of this requirement is to exclude from the purview of the Court those rather unusual cases when

conduct that technically fulfils all the elements of a crime under the Court's jurisdiction is nevertheless of marginal gravity only.

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

### **FIRST GROUND OF APPEAL**

15. I now turn to the **first ground of appeal**. Mr Al Hassan submits that the Pre-Trial Chamber ignored the notion of a 'case' for the purposes of article 17 and relied on vague and broad allegations of criminality. He argues that the Pre-Trial Chamber erred by relying on the following factors: allegations of criminality included in the Document Containing the Charges to satisfy the contextual elements, which are not linked to Mr Al

Hassan's conduct; allegations of criminality that fail to satisfy the requirements of regulation 52 of the Regulations of the Court in relation to the crime of persecution; and unidentified allegations of criminality set out in undisclosed victim applications.

16. In relation to **factual allegations underpinning the contextual elements**, the Appeals Chamber finds, for reasons further elaborated in the written judgment, that the Pre-Trial Chamber did not err in taking into account these allegations in its gravity assessment as they are part of the 'case' to be considered. In the case at hand, it is clear that the circumstances of the alleged attack were not considered in the abstract, but in light of the crimes attributed to Mr Al Hassan and were thus incident-specific.

17. Moreover, the Appeals Chamber finds no merit in Mr Al Hassan's arguments pertaining to the Pre-Trial

Chamber's **alleged error in considering the charge of persecution** in its gravity assessment. The charge of persecution is to a large extent based on the facts underlying counts 1 to 12 which specify historical events, defined in time and place, and individual victims. In addition, the count of persecution is but one of the 13 charges brought against Mr Al Hassan.

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

19. In the view of the Appeals Chamber, both quantitative and qualitative criteria are relevant in

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

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

21. Turning to the specific arguments raised by Mr Al Hassan, the Appeals Chamber notes that the number of

victims, while relevant, was not determinative in the Pre-Trial Chamber's assessment of the gravity requirement under article 17(1)(d) of the Statute.

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

23. In light of the foregoing and given that the Pre-Trial Chamber does not seem to have attached significant

weight to the number of participating victims, it is clear that this consideration was not a determinative factor in the Pre-Trial Chamber's assessment. It was only one of several relevant quantitative and qualitative considerations. In particular, the Pre-Trial Chamber considered the nature and extent of the charged crimes; the repercussions of the alleged crimes on the direct victims and on the population of Timbuktu as a whole, in particular the victims of rape, sexual slavery and other inhumane acts in the form of forced marriages; the discriminatory motive of the crimes allegedly committed against the population of Timbuktu on religious and/or gender-based grounds; the vulnerability of certain victims; the allegation that the crimes at bar were committed as part of a widespread and systematic attack against the civilian population; the significant role that the Prosecutor attributes to Mr Al Hassan in the

execution of said crimes through his contribution to the Islamic Police; and Mr Al Hassan's degree of intent and degree of participation in these crimes. Accordingly, the Appeals Chamber does not find an error.

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

## **SECOND GROUND OF APPEAL**

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

26. Under this ground, Mr Al Hassan argues that in abusing its discretion, the Pre-Trial Chamber erred in its assessment of gravity by failing to attribute sufficient weight to the nature of his conduct. He also maintains that in its assessment the Pre-Trial Chamber placed undue weight on the number of counts with which he had been charged.

27. In relation to the **nature of Mr Al Hassan's individual conduct**, the Appeals Chamber does not find any error in the Pre-Trial Chamber's consideration, in its assessment of the gravity requirement, of 'the significant role that the Prosecutor attributes to Mr Al Hassan in the execution of said crimes'. Contrary to the arguments advanced by Mr Al Hassan, the Pre-Trial Chamber did not consider abstract notions and labels regarding the conduct and role of Mr Al Hassan. Rather, it considered the factual allegations presented by the Prosecutor in support of her submissions concerning the contribution of Mr Al Hassan to the alleged crimes.

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

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

30. This is because, first, since the Confirmation Decision was rendered three days after the issuance of the Impugned Decision, findings contained therein cannot be considered. Second, while the question of an essential contribution is, in accordance with the jurisprudence of this Court, relevant for liability under article 25(3)(a) of the Statute (perpetrator), this does not mean that, absent an essential contribution as perpetrator, the case is automatically not grave enough. The Statute recognises also other modes of criminal liability such as

complicity, inducement, etc (see articles 25(3)(b) to (d) of the Statute), which do not require this factor of an essential contribution. The Appeals Chamber recalls in this context that, depending on the circumstances, criminal liability pursuant to articles 25(3)(b), (c) and/or (d) of the Statute could be equally or more grave than liability under article 25(3)(a).

31. Turning to Mr Al Hassan's submission that the Pre-Trial Chamber erred by placing **undue weight on the number of counts** with which he had been charged, his main argument is that the Pre-Trial Chamber failed to consider the degree of overlap in relation to the underlying conduct relied upon to establish the different charges.

32. In this regard, the Appeals Chamber finds no error in the Pre-Trial Chamber's consideration, in its gravity

assessment, of ‘the nature and scale of the charged crimes’.

33. It is clear from the Impugned Decision that the focus of the Pre-Trial Chamber’s assessment was the ‘nature and scale of the charged crimes’, rather than the number of counts or charges. Both factors are relevant criteria to the assessment of the gravity requirement under article 17(1)(d) of the Statute. Indeed, in this case, the alleged crimes resulted in the violation of several fundamental human rights, including the physical and mental integrity of the victims and their human dignity, such as the human right to a fair trial, the right to liberty and security of person, the human right of all persons deprived of their liberty to be treated with humanity and with respect for their inherent dignity, the right to freedom of thought, conscience and religion and the

prohibition on discriminating on the grounds of religion or belief.

34. Furthermore, for reasons fully set out in the written judgment, the Appeals Chamber considers that the fact that the same underlying acts violated several provisions of the Rome Statute is a relevant consideration for the purposes of assessing the gravity requirement under article 17(1)(d) of the Statute.

35. In light of the foregoing considerations, the Appeals Chamber rejects the second ground of appeal.

36. Finally, in an appeal pursuant to article 82(1)(a) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed. In the present case, given that the Appeals Chamber has rejected all grounds of appeal as the Pre-Trial Chamber did not err in its determination that the case brought against Mr Al Hassan meets the gravity requirement within the meaning of

article 17(1)(d) of the Statute and its conclusions were not unreasonable and did not amount to an abuse of discretion, it is appropriate to confirm the impugned decision.

37. This brings us to the end of the summary of the Appeals Chamber's Judgment.

38. I would like to thank the Court Reports, Interpreters and other Registry Staff for their valuable assistance today in holding this hearing.

39. The hearing is adjourned.