



Summary

Judgment of the Appeals Chamber

in

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

(1 July 2021)

1. Today, the Appeals Chamber will deliver its judgment in the appeal of Mr Al Hassan against the decision of Trial Chamber X of 17 December 2020 entitled ‘Decision on application for notice of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court’.
2. This is a non-authoritative summary of the Appeals Chamber’s written judgment in the appeal. The latter will be notified after this hearing.
3. I will first briefly outline the procedural history of this appeal.
4. 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 that the legal characterisation of some facts, included in the confirmed charges, might change. It is this decision - which I shall refer to as the ‘Impugned Decision’ - that is the object of Mr Al Hassan’s appeal.
5. In the Impugned Decision the Trial Chamber considered, *inter alia*, acts of sexual violence committed against four victims: P-0574, P-0542, P-0570 and P-0547. Those acts had been included in the confirmed charge of persecution. 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, which were charged under counts 1 to 5. In the Impugned Decision the Trial Chamber found it unnecessary to do so, as similar acts against the same victims were already included in other confirmed charges. The Prosecutor’s request also concerned police reports allegedly drafted or signed by Mr Al Hassan and relied upon by the Islamic Tribunal to pass sentences. The Trial Chamber gave notice of a possible re-

characterisation with respect to seven of these reports so that they could be considered under article 25(3)(c) of the Statute.

6. Having been granted leave to appeal the Impugned Decision with respect to two issues, the Defence filed the appeal brief on 12 March 2021, and the Prosecutor filed the response on 25 March 2021.
7. The Defence challenges the rulings of the Trial Chamber which I just mentioned. 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’. This is the first ground of appeal. 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. This is the second ground of appeal.
8. I will address these grounds of appeal in turn.
9. 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. 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.

10. In the present case, 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. 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. 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.
11. Furthermore, if the acts of rape 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 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.
12. 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.
13. This is because, although the Trial Chamber did not formally apply regulation 55(2) of the Regulations, it ensured that the rights of the accused person in the process of legal re-characterisation of facts would be preserved, consistent with the goal of this regulation.

14. In particular, the Appeals Chamber notes 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. Given the close link between these acts of rape and the crimes charged in relation to the detention of these victims, 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. Furthermore, the acts of rape that allegedly occurred during the same detention and against the same victims are charged under count 13. 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 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.
15. Therefore, the Appeals Chamber is not satisfied that the Impugned Decision would have been substantially different if the Trial Chamber had not committed the error.
16. Regarding the **second ground** of appeal, the Appeals Chamber observes that, in general, the decision of a 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.

17. 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. 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.
18. Here, the Appeals Chamber observes that although the Confirmation Decision does not specifically address the seven police 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.
19. 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 included in the Document Containing the Charges 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 this decision as a whole and the manner in which the Pre-Trial Chamber set out to make findings of fact.
20. 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.

21. To conclude, the Appeals Chamber recalls that, 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 rejecting the second ground of appeal, the Appeals Chamber unanimously finds that it is appropriate to confirm the Impugned Decision.