

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 19 April 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**

Confidential document

Decision on suspensive effect

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor

James Stewart

Counsel for the Defence

Melinda Taylor

Kirsty Sutherland

Legal Representatives of Victims

Seydou Doumbia

Mayombo Kassongo

Fidel Luvengika Nsita

REGISTRY

Registrar

Peter Lewis

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Al Hassan Ag About 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),

Having before it 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”’ of 12 March 2021 (ICC-01/12-01/18-1369-Conf), in which a request for suspensive effect is made,

After deliberation,

Renders the following

DECISION

The request for suspensive effect is rejected.

REASONS

1. On 17 December 2020, Trial Chamber X (the ‘Trial Chamber’) issued a decision on the application of the Prosecutor for notice to be given under regulation 55(2) of the Regulations of the Court (the ‘Impugned Decision’).¹
2. On 18 January 2021, Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (‘Mr Al Hassan’) requested leave to appeal the Impugned Decision in respect of five issues.² The Trial Chamber granted leave in respect of the following two issues:
 - a. 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

¹ 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.

² 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.

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.

- b. 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 of the Court, and constituted a *de facto* amendment of the charges.³
3. Following the request of counsel for Mr Al Hassan (the 'Defence'),⁴ the Appeals Chamber extended the deadline for the Defence's appeal brief.⁵ The appeal brief was filed on 12 March 2021 (the 'Appeal Brief'),⁶ and the Prosecutor's response was filed on 25 March 2021 (the 'Prosecutor's Response').⁷
4. In its Appeal Brief, the Defence refers to the two aspects of the Impugned Decision under appeal and requests that the Appeals Chamber order suspensive effect 'as concerns these two aspects of the Impugned Decision'.⁸ The Defence explains that:

[It] is not requesting that the proceedings as a whole be suspended, but that the operative parts of the Decision are suspended for the purposes of ascertaining whether the impugned modifications can be considered part of the existing charges in connection with upcoming witnesses. This partial suspension will preserve Mr. Al Hassan's rights, and ensure that the objective of the appeal is not undermined through intervening developments at the trial level. It will also neither delay the trial proceedings nor occasion prejudice to the other parties.⁹

³ [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 pursuant to the Trial Chamber's instruction), pp. 9, 12, 15.

⁴ 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.

⁵ Decision on the request for extension of time, 4 March 2021, ICC-01/12-01/18-1339-Conf.

⁶ 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-01/12-01/18-1369-Conf.

⁷ 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.

⁸ Appeal Brief, para. 4.

⁹ Appeal Brief, para. 4 (footnote omitted).

5. The Prosecutor opposes the request for suspensive effect, as the implementation of the Impugned Decision would not lead to any irreversible consequences.¹⁰ First, as the Impugned Decision only notifies of the possibility of re-characterisation of the facts, the Prosecutor argues that it would be premature to assess what the consequences of the Impugned Decision may be.¹¹ Second, the Prosecutor notes that sexual violence experienced by some witnesses relates to multiple counts unaffected by this appeal, and it is difficult to dissociate the acts of sexual violence that the concerned witnesses experienced from the other conditions of detention.¹² Third, the Prosecutor warns of the pitfalls of having to recall witnesses should they be precluded as an interim measure from testifying about certain aspects of their detention.¹³ Finally, in relation to the second issue on appeal, the Prosecutor notes that she has ‘already called two witnesses regarding the authenticity of Mr Al Hassan’s signature and handwriting on the Islamic Police Reports’, suggesting that any suspension of the operative part of the Impugned Decision will have no meaningful effect on this issue.¹⁴

6. The Appeals Chamber recalls that article 82(3) of the Statute provides, in respect of appeals under article 82 of the Statute, as follows:

An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.

Rule 156(5) of the Rules of Procedure and Evidence (the ‘Rules’) provides that, when filing the appeal, the party appealing may request that the appeal have suspensive effect. The decision on a request for suspensive effect under rule 156 of the Rules is within the discretion of the Appeals Chamber.¹⁵ When examining such a request, the Appeals Chamber ‘will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under these circumstances’.¹⁶ These

¹⁰ Prosecutor’s Response, para. 5.

¹¹ Prosecutor’s Response, para. 5.

¹² Prosecutor’s Response, para. 5.

¹³ Prosecutor’s Response, para. 5.

¹⁴ Prosecutor’s Response, para. 5.

¹⁵ See *Prosecutor v. Jean-Pierre Bemba Gombo*, ‘[Decision on the Request of the Prosecutor for Suspensive Effect](#)’, 3 September 2009, ICC-01/05-01/08-499 (OA 2), para. 11.

¹⁶ *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ‘[Decision on the Prosecutor’s urgent request for suspensive effect of the “Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido” of 21 October 2014](#)’, 22 October 2014, ICC-01/05-01/13-718 (OA 9), para. 5, referring to previous jurisprudence.

factors have in the past included whether the appellant had demonstrated that the implementation of the decision under appeal would lead to consequences that are either irreversible or difficult to correct, or would otherwise defeat the purpose of the appeal.¹⁷

7. In respect of the Defence's request in this appeal, the Appeals Chamber finds that the Defence has not substantiated its argument that the 'objective of the appeal' may be 'undermined through intervening developments at the trial level'.¹⁸ In particular, the Defence has not indicated with precision what potential 'developments' would have such an undesirable effect, should the Appeals Chamber ultimately grant the appeal. If the appeal were to be granted, it may indeed be the case that several of the concerned witnesses would have at that stage already testified about sexual violence taking place during their detention. However, even if such evidence, as a result of the Appeals Chamber's judgment, might not be relevant to counts 1-5, such evidence could potentially still be considered under other counts unaffected by this appeal.¹⁹

8. Therefore, in the absence of persuasive reasons in support of ordering suspensive effect, the Appeals Chamber rejects the request without prejudice to the Appeals Chamber's eventual decision on the merits of Mr Al Hassan's appeal.

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



Judge Luz del Carmen Ibáñez Carranza
Presiding

Dated this 19th day of April 2021

At The Hague, The Netherlands

¹⁷ *E.g. Prosecutor v. Omar Hassan Ahmad Al-Bashir*, [Decision on Jordan's request for suspensive effect of its appeal against the decision on the non-compliance by Jordan with the request for the arrest and surrender of Mr Omar Al-Bashir](#), 6 April 2018, ICC-02/05-01/09-333 (OA 2), paras 8-9. *See also Prosecutor v. Jean-Pierre Bemba Gombo*, '[Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the "Decision on the Admissibility and Abuse of Process Challenges"](#)', 9 July 2010, ICC-01/05-01/08-817 (OA 3), para. 11.

¹⁸ Appeal Brief, para. 4.

¹⁹ *See* Prosecutor's Response, para. 5.