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**International
Criminal
Court**

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Date: **30 July 2021**

APPEALS CHAMBER

Before: Judge Luz del Carmen Ibáñez Carranza, Presiding
Judge Piotr Hofmański
Judge Perrin de Brichambaut
Judge Solomy Balungi Bossa
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

Public redacted version of "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, 25 March 2021

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

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INTRODUCTION

1. Mr Al Hassan’s appeal against Trial Chamber X’s decision notifying the Parties and participants, under regulation 55(2) of the Regulations of the Court (“Regulations”), of a possible change in the legal characterisation set out in the charges should be dismissed.¹ The Appeal advances a legally incorrect and overly formalistic view of the issues, at odds with the approach set out by the Appeals Chamber² and the procedural history of this case.³ The Trial Chamber’s approach concerning both issues on appeal was properly based in the Court’s statutory framework.⁴ There is no error.

2. In his first ground of appeal, Mr Al Hassan incorrectly alleges that the Trial Chamber erred by finding that it could consider the alleged acts of a sexual nature (sexual violence) committed against four specific victims/witnesses (P-0574, P-0542, P-0570 and P-0547) under Counts 1-5 (namely, as torture as a crime against humanity and a war crime, other inhumane acts as a crime against humanity, cruel treatment as a war crime and outrages upon personal dignity as a war crime), and argues that doing so would violate his right under article 67(1)(a) of the Statute.⁵ Mr Al Hassan fails to demonstrate that the Trial Chamber erred in law or in the exercise of its discretion.⁶ The Trial Chamber correctly found that it could consider *all* relevant facts and circumstances, confirmed by the Pre-Trial Chamber, in assessing each count,⁷ including facts and circumstances linked to the acts of sexual violence allegedly committed against the four victims/witnesses in detention, so as to reflect exhaustively the suffering, humiliation, degradation and/or other violations of dignity endured

¹ ICC-01/12-01/18-1369-Conf (“Appeal”); ICC-01/12-01/18-1211-Conf (“Decision”). *See also* ICC-01/12-01/18-894-Conf-Corr (“Regulation 55(2) Request”); ICC-01/12-01/18-894-Conf (“Regulation 55(2) Response”); ICC-01/12-01/18-1251-Conf (“Regulation 55(2) ALA”); ICC-01/12-01/18-1261-Conf (“Regulation 55(2) ALA Response”); ICC-01/12-01/18-1319 (“[Regulation 55\(2\) ALA Decision](#)”).

² ICC-01/14-01/18-874 OA2 (“[Yekatom Scope of Charges AD](#)”), paras. 1-2, 36-63; ICC-01/04-01/06-3121-Red A5 (“[Lubanga AJ](#)”), paras. 118-137.

³ ICC-01/12-01/18-461-Conf-Corr (public redacted version: ICC-01/12-01/18-461-Corr-Red) (“[Confirmation Decision](#)”); ICC-01/12-01/18-608-Conf-tENG (public redacted version: ICC-01/12-01/18-608-Red-tENG) (“[Amendment Procedure Decision](#)”); ICC-01/12-01/18-767-Conf-Corr (public redacted version: ICC-01/12-01/18-767-Corr-Red) (“[Amendment Decision](#)”); ICC-01/12-01/18-789 (“[Conduct of Proceedings Decision](#)”); ICC-01/12-01/18-789-AnxA (“[Conduct of Proceedings Directions](#)”); ICC-01/12-01/18-789-AnxB-Conf (“Self-Contained Charges”); ICC-01/12-01/18-923-Conf (“Self-Contained Charges Decision”); ICC-01/12-01/18-923-Conf-AnxA (“Revised Self-Contained Charges”).

⁴ Decision, paras. 58-69, 102-114.

⁵ Appeal, paras. 1-3, 5-27. *See* [Confirmation Decision](#), pp. 452-458 (Count 1: Torture as a crime against humanity; Count 2: Other inhumane acts as crime against humanity; Count 3: Torture as a war crime; Count 4: Cruel treatment as a war crime; Count 5: Outrages upon personal dignity as a war crime). [Amendment Decision](#), paras. 101-128, 197-203; [REDACTED]. Consistent with appellate practice, the Prosecution refers to the “issues” as “grounds of appeal”.

⁶ Appeal, paras. 5-27.

⁷ Decision, para. 60.

by them.⁸ It also correctly found that doing so did not prejudice the Defence, and that Mr Al Hassan had proper notice, as the relevant incidents with reference to the specific victims were already included in Counts 1-5.⁹

3. In his second ground of appeal, Mr Al Hassan incorrectly claims that the Trial Chamber relied on purportedly unconfirmed facts to give notice of a potential requalification of Mr Al Hassan's liability under article 25(3)(c), regarding incidents relating to seven cases charged under Count 6 (passing of sentences without previous judgment pronounced by a regularly constituted court), and by doing so, exceeded the scope of regulation 55.¹⁰ This, according to Mr Al Hassan, constituted a *de facto* amendment of the charges and was a legal and procedural error.¹¹ However, Mr Al Hassan fails to show such errors. The Trial Chamber did not rely on unconfirmed facts, and its potential re-characterisation would not exceed the facts and circumstances described in the charges.¹² Rather, its proposed actions fall squarely within the permissible scope of regulation 55(2) of the Regulations. In arguing to the contrary, Mr Al Hassan mischaracterises the charges and misconstrues the Trial Chamber's powers under regulation 55. Moreover, as the Trial Chamber correctly found, the giving of notice under regulation 55 in relation to Count 6 at this stage did not cause unfairness to Mr Al Hassan, and will avoid any undue prejudice to him.¹³

4. Therefore, the Prosecution respectfully requests the Appeals Chamber to dismiss the Appeal.¹⁴

SUBMISSIONS

A. Preliminary issue: The Defence request for suspensive effect is unsubstantiated

5. The Defence's request to suspend the "operative parts of the Decision" under article 82(3) of the Statute should be rejected.¹⁵ While the Defence requests this measure to prevent the Trial Chamber from considering the impugned parts of the Decision in relation to

⁸ Decision, paras. 60-62 (noting that it may consider alleged acts of sexual violence committed against P-0574 in detention in assessing and analysing Counts 1-5); 68 (noting that it may consider alleged acts of sexual violence committed against P-0542, P-0570 and P-0547 in detention in assessing and analysing Count 5); 63, 69 (declining to provide notice under regulation 55(2) of the Regulations).

⁹ Decision, para. 60.

¹⁰ Appeal, paras. 1-3, 28-45.

¹¹ Appeal, paras. 28-45.

¹² Decision, para. 110.

¹³ Decision, paras. 112-113.

¹⁴ Pursuant to regulation 23*bis*(2) of the Regulations, this response is filed confidentially because it responds to a request and refers to a decision of the same classification.

¹⁵ Appeal, para. 4.

upcoming witnesses, implementing the Decision will not lead to any irreversible consequences that could not be corrected or that would defeat the purpose of the appeal.¹⁶ This is because, *first*, the Trial Chamber’s Decision only notifies Mr Al Hassan that it may consider allegations relevant to certain counts (ground 1) and *possibly* re-characterise facts (ground 2) in its article 74 decision at the end of trial. Therefore the effects of the Decision are premature at this stage. *Second*, [REDACTED],¹⁷ the witnesses’ evidence of the violence and conditions they experienced in detention—including sexual violence—will already be heard in relation to multiple counts unaffected by this Appeal.¹⁸ Nor is it possible in practice, as the Trial Chamber rightly noted, to dissociate the acts of sexual violence these witnesses experienced from the other conditions of detention, given they are inter-connected.¹⁹ *Third*, [REDACTED]. *Finally*, in relation to the second ground of appeal, the Prosecution has already called two witnesses regarding the authenticity of Mr Al Hassan’s signature and handwriting on the Islamic Police reports.²⁰ While the Prosecution may call an additional expert in handwriting, the evidence already heard by the Chamber on this issue is relevant to Mr Al Hassan’s alleged contribution to the Count 6 crimes under article 25(3)(d). Suspending the operative part of the Decision on this issue will have no meaningful effect.

B. Response to Ground 1: The Trial Chamber correctly found that it could consider all confirmed relevant facts and circumstances in assessing each count

6. In challenging the Trial Chamber’s approach that it could consider all confirmed relevant facts and circumstances in assessing each count (and thus consider the alleged sexual acts committed against P-0574, P-0542, P-0570 and P-0547 in relation to Counts 1-5), Mr Al Hassan claims that the Chamber erred in law and in exercising its discretion.²¹ Yet, he fails to establish either error.

7. *First*, while he argues that the Trial Chamber erred in law by proposing to take an *ultra vires* action “to add additional underlying acts to existing counts”,²² this mischaracterises the

¹⁶ ICC-02/05-01/20-134 OA (“[Abd-al-Rahman Suspensive Effect AD](#)”), para. 6; ICC-01/05-01/08-817 OA3 (“[Bemba Suspensive Effect AD](#)”), para. 11.

¹⁷ [REDACTED].

¹⁸ For instance, Counts 11, 12 and 13.

¹⁹ Decision, para. 61, citing [Confirmation Decision](#), para. 102.

²⁰ See below para. 36.

²¹ Appeal, paras. 5-27.

²² Appeal, paras. 2-3, 8.

Decision and the confirmed facts and circumstances at issue.²³ In particular, the Appeal fails to acknowledge that the alleged acts of a sexual nature that the Chamber proposed to consider for Counts 1-5 are neither new nor unknown to Mr Al Hassan. Those same alleged sexual acts against the four specified victims/witnesses fall squarely within the confirmed facts and circumstances, and are charged specifically as underlying acts of the crime of persecution (Count 13)²⁴—the umbrella crime in this case, for which the acts presently alleged in relation to Counts 1-5 are also underlying acts. The alleged acts of a sexual nature against the four victims are also mentioned with respect to the crime of rape under Counts 11 and 12.²⁵ Accordingly, the Trial Chamber was legally correct and fully entitled to rely on those facts also for Counts 1-5. Rejecting this common-sense approach would unwarrantedly curtail the Trial Chamber’s ability to assess all the facts and circumstances and require it to artificially split off the alleged sexual violence committed against the four victims from their other suffering for the purposes of Counts 1-5.²⁶ Mr Al Hassan fails to show that the Chamber erred in law, much less that the error materially affected the Decision.²⁷

8. *Second*, Mr Al Hassan incorrectly argues that the Trial Chamber abused its discretion and violated his right under article 67(1)(a), by finding that its approach raised no issues of notice and that he did not suffer prejudice.²⁸ Mr Al Hassan fails to explain how the Trial Chamber’s approach amounted to an error in exercising its discretion.²⁹ Moreover, he does

²³ Decision, para. 60. *Contra* Appeal, para. 2 (alleging that the Trial Chamber carved out additional powers to change the material facts underpinning specific charges).

²⁴ See [Confirmation Decision](#), paras. 677 (alleged sexual acts against P-0570, with respect to persecution in Count 13), 678 (alleged sexual acts against P-0547, with respect to persecution in Count 13), 679 (alleged sexual acts against P-0574, with respect to persecution in Count 13), 680 (alleged sexual acts against P-0542, with respect to persecution in Count 13), 681-682 (finding that the elements of the crime of rape under article 7(1)(g) and article 8(2)(e)(vi) were met), 682 (drawing the Trial Chamber’s attention to the possibility of legally re-characterising these facts under regulation 55 as rape as a crime against humanity and a war crime under Counts 11-12 also); [Amendment Decision](#), paras. 94-97 (again, noting that the alleged sexual acts against P-0570, P-0547, P-0542, P-0574 were confirmed under Count 13 (persecution), and the possibility of re-classifying those facts as rape under Counts 11-12); [REDACTED].

²⁵ [Confirmation Decision](#), para. 682; [Amendment Decision](#), paras. 94-97; Decision, paras. 46-56 (giving notice, under regulation 55(2) of the Regulations, that the alleged sexual acts against the four victims could be considered as rape under Counts 11-12). See also ICC-01/12-01/18-819-Conf-AnxA (public redacted version: ICC-01/12-01/18-819-AnxA-Red) (“[Trial Brief](#)”), paras. 140, 153-157 (Counts 1-5).

²⁶ [Amendment Decision](#), para. 102; Decision, para. 61 (“[...] ‘it is impossible in practice to dissociate [the act of rape and the other conditions of her detention as a whole] and reach the conclusion that the victim suffered inhumane acts and cruel treatment ‘on the one hand’ and a rape ‘on the other’, because it was the same victim, the same person, who experienced those events at the same time or within a very short space of time. The act of rape does not exist separately from the context of other inhumane acts and cruel treatment but aggravates [it].’”).

²⁷ [Lubanga AJ](#), para. 18; ICC-01/05-01/13-2275-Red A A2 A3 A4 A5 (“[Bemba et al. AJ](#)”), para. 90; ICC-02/05-01/09-397-Corr (“[Bashir AD](#)”), para. 33.

²⁸ Appeal, paras. 8, 14-27.

²⁹ See Appeal, paras. 15-21, 25 (alleging a violation of a right to timely notice under article 67(1)(a) of the Statute), 22-24, 26-27 (alleging that the Defence faced concrete prejudice as a result of the Trial Chamber’s

not establish that the Chamber's exercise of discretion (if that were the case) was based on an erroneous interpretation of the law, a patently incorrect conclusion of fact or an abuse of discretion—so as to require the Appeals Chamber's intervention.³⁰ In any event, Mr Al Hassan had proper notice of the alleged acts committed against the four specified victims,³¹ and he fails to show how he may be prejudiced if the alleged acts of a sexual nature are considered in relation to Counts 1-5.³²

i. The Trial Chamber's approach was legally correct

9. Mr Al Hassan fails to demonstrate that the Trial Chamber erred in law.³³

10. *First*, by arguing that the Trial Chamber had no power or discretion—outside the limits of article 61(9) of the Statute or regulation 55 of the Regulations—to consider the alleged acts of sexual violence under Counts 1-5, Mr Al Hassan impermissibly restricts the Trial Chamber's considerable ability under the Statute to assess and evaluate the confirmed facts and circumstances.³⁴ Apart from a Chamber's specific powers under article 61(9) and regulation 55, a Trial Chamber has an independent power and ability, as the primary trier of fact, to assess the confirmed facts and circumstances before it.³⁵ It can evaluate the confirmed facts and circumstances differently, more so because it is not bound by the Pre-Trial Chamber's reasoning and assessment or by its legal interpretation.³⁶ To argue otherwise

approach, in the circumstances of the case). See [Lubanga AJ](#), para. 34 (the Appeals Chamber may categorise errors differently).

³⁰ See [Bashir AD](#), paras. 34-35; ICC-02/05-01/09-397-Anx2 ("[Bashir Joint Dis Op of Judge Ibáñez and Judge Bossa](#)"), paras. 18-23 (setting out the standard of review for discretionary decisions, and noting that the Appeals Chamber does not exercise its own discretion, but rather reviews the exercise of the discretion).

³¹ See *above* para. 7.

³² Decision, para. 60; Appeal, paras. 26-27.

³³ Decision, paras. 5-13.

³⁴ Appeal, paras. 5, 9. Article 61(9) provides that the Prosecution may request the Pre-Trial Chamber to amend the charges. Once the trial has started, the Prosecutor may request the Trial Chamber to withdraw the charges.

³⁵ See articles 64, 69, Statute; rule 63(2) of the Rules of Procedure and Evidence (RPE); ICC-01/04-01/07-1547-tENG ("[Katanga & Ngudjolo Charges Summary Decision](#)"), paras. 21 (noting that while the Trial Chamber is bound by the facts and circumstances described in the charges under article 74(2), it may evaluate them differently), 25 ("[...] the evidence presented during the pre-trial phase can, by contrast, be amended or added to in the course of trial."); [Lubanga AJ](#), para. 24 ("[the Trial Chamber is better positioned to assess the reliability and credibility of evidence]"); [Amendment Procedure Decision](#), para. 46; ICC-01/04-01/10-514 OA4 ("[Mbarushimana Confirmation AD](#)"), paras. 39, 47 (noting that the Pre-Trial Chamber's function in evaluating the evidence is not identical to a Trial Chamber's); ICC-01/04-01/06-2205 OA15 OA16 ("[Lubanga Regulation 55 AD](#)"), paras. 75-76 (rejecting the submission that modifying the legal characterisation of facts amounts to amending the charges, as this would mean that the Trial Chamber could not revisit the legal characterisation).

³⁶ [Katanga & Ngudjolo Charges Summary Decision](#), paras. 21, 25; [Amendment Procedure Decision](#), para. 46 ("[...] It falls within the Trial Chamber's ultimate discretion to determine, within the bounds of the factual scope of the charges confirmed by the Pre-Trial Chamber, the sequence of events in detail on the basis of the evidence adduced and canvassed by the parties before the Bench."); [2019 ICC Chambers Practice Manual](#), para. 62 ("The binding effect of the confirmation decision is attached only to the charges and their formulation [...]. No such effect is attached to the reasoning provided by the Pre-Trial Chamber").

misunderstands the Pre-Trial Chamber's and the Trial Chamber's functions and powers to be the same, notwithstanding the different stages of the case and the different legal standards applied under article 61(7) and article 66(3) respectively.³⁷

11. *Second*, in suggesting that the Trial Chamber could not consider the previously confirmed facts alleging sexual violence under Counts 1-5,³⁸ the Appeal takes an overly restrictive view of the “facts and circumstances” confirmed for the purposes of article 74(2) of the Statute.³⁹ As the drafting history,⁴⁰ case law⁴¹ and commentary⁴² clearly state, the purpose behind limiting a Trial Chamber to the “facts and circumstances” under article 74(2) is so “the court may not hand down a judgment on acts which have not been included in the indictment or an amendment thereto”.⁴³ Thus, article 74(2) prevents a Trial Chamber from relying on *additional facts that were not previously described in the overall facts and circumstances, taken as a whole*.⁴⁴ It does not prevent a Trial Chamber from relying on *other confirmed facts* in the Confirmation Decision (and its amendments) in assessing individual

³⁷ [Lubanga Regulation 55 AD](#), para. 77 (noting that at confirmation, the Prosecutor needs only to ‘support each charge with sufficient evidence to establish substantial grounds to believe’, whereas during trial, the onus is on the Prosecutor to prove ‘guilt beyond reasonable doubt’); [Amendment Procedure Decision](#), paras. 46-47; ICC-01/05-01/08-3636-Anx1-Red A (“[Bemba Joint Dis Op of Judge Monageng and Judge Hofmański](#)”), paras. 33-34 (the confirmation process is not a laborious fact-finding process prior to trial).

³⁸ Appeal, paras. 10-13 (arguing that the factual matrix and specific wording, as crystallised by the Pre-Trial Chamber, forms the basis for trial, and pre-trial preparation).

³⁹ Article 74(2), Statute: The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges.

⁴⁰ [Lubanga Regulation 55 AD](#), para. 91 (citing the Working Paper submitted by Argentina to the Preparatory Committee on the Establishment of an International Criminal Court (12-30 August 1996), A/AC.249/L.6 and noting that “what would become the second sentence of article 74(2) of the Statute was first contained in an Argentinean proposal of 13 August 1996 [...] The commentary to the proposal explained that ‘the court may not hand down a judgement on acts which have not been included in the indictment or an amendment thereto’. Thus, the purpose of the provision was to bind the Chamber to the factual allegations in the charges.”); [Bemba Joint Dis Op of Judge Monageng and Judge Hofmański](#), paras. 23-25.

⁴¹ [Lubanga Regulation 55 AD](#), paras. 90, 92 (rejecting, as a conflict with article 74(2), the proposal to consider additional facts that have come to light during the trial, but not previously described in the charges or any amendment thereto); [Lubanga AJ](#), para. 124 (“[...]the decision on the confirmation of charges defines the parameters of the charges at trial. If it were otherwise, a person could be tried on charges that have not been confirmed by the Pre-Trial Chamber, or in relation to which confirmation was even declined.”); ICC-01/05-01/08-3636-Red A (“[Bemba AJ](#)”), paras. 105-115 (assessing the scope of charges against the overall facts and circumstances described in the [Confirmation Decision](#), for the purposes of article 74(2)); [Bemba Joint Dis Op of Judge Monageng and Judge Hofmański](#), paras. 25-26 (finding that article 74(2) enshrines the principle of congruence, and serves the essential function of limiting the jurisdiction of the trial chamber to the charges brought by the Prosecutor).

⁴² Otto Triffterer and Alejandro Kiss, “Article 74” in Triffterer *et al.*, The Rome Statute of the International Criminal Court: A Commentary, 3rd edn. (Oxford: CH Beck.Hart.Nomos, 2016) (“Triffterer/Kiss”), p. 1844, mns. 48-49; Fernandez *et al.*, Statut de Rome de la Cour Pénale Internationale: Commentaire Article par Article, Vol. 2, 2nd edn (Paris: Editions Pedone 2019) (“Fernandez *et al.*”), p. 1976 (“[...] Toutefois, la véritable importance de cette règle est plutôt dans la codification du principe accusatoire.”).

⁴³ [Lubanga Regulation 55 AD](#), para. 91.

⁴⁴ [Lubanga Regulation 55 AD](#), paras. 90, 92.

counts.⁴⁵ This also accords with the Appeals Chamber's recent pronouncement that the Confirmation Decision must be read as a whole.⁴⁶ The Trial Chamber has a broad discretion to interpret the facts and authority to draw out the 'facts and circumstances' of the charges in their totality, while respecting the scope of the charges.⁴⁷ Mr Al Hassan's argument that the Trial Chamber was limited to the 'factual matrix' of each charge (instead of the overall parameters described in the Confirmation Decision, and in any amendments) is unsupported.⁴⁸ Neither article 61(7)(a) of the Statute (on the Pre-Trial Chamber's role in confirming charges), rule 128(1) of the RPE (on the procedure to amend charges) nor rule 142(2) (regarding the Trial Chamber's deliberations at the end of a trial) support this.⁴⁹

12. Likewise, allowing the Trial Chamber to rely on the entirety of the facts and circumstances confirmed in relation to each witness's experience would not unduly alter the nature and gravity of charges.⁵⁰ The alleged facts on sexual violence are already included in the persecution count, reflecting their gravity. In any event, the Trial Chamber already has the power to alter the gravity of charges through changing the legal characterisation of facts charged *via* regulation 55. Hence, this concern lacks merit.

13. *Third*, limiting the Trial Chamber's evaluation to exclude consideration of the acts of sexual violence under Counts 1-5 would be artificial and counter-intuitive in this case:

i. The facts alleging sexual violence in detention against P-0574, P-0542, P-0570 and P-0547 underpin the crime of persecution (Count 13).⁵¹ Counts 1-5 are expressly included as underlying acts for Count 13,⁵² given the intertwined nature of the counts and the case.

ii. Those same facts with respect to those same victims are also mentioned as relevant to the crime of rape (Counts 11-12).⁵³ The Trial Chamber has given notice under regulation 55(2) accordingly and Mr Al Hassan did not appeal this aspect.⁵⁴

⁴⁵ *Contra* Appeal, paras. 10-13.

⁴⁶ [Yekatom Scope of Charges AD](#), para. 57 (considering the [Confirmation Decision](#) as a whole together with the relevant parts of the Document Containing the Charges). *Contra* Appeal, para. 12 (conveying the import of the [Yekatom Scope of Charges AD](#), in a limited way).

⁴⁷ [Conduct of Proceedings Directions](#), paras. 9-10. *See also* [2019 ICC Chambers Practice Manual](#), paras. 62-63.

⁴⁸ Appeal, para. 10.

⁴⁹ Appeal, paras. 12-13.

⁵⁰ *Contra* Appeal, para. 11.

⁵¹ *See* [Confirmation Decision](#), paras. 677-680; [Amendment Decision](#), paras. 94-97; [REDACTED].

⁵² [Confirmation Decision](#), p. 465 (including Counts 1-12 under Count 13).

⁵³ [Confirmation Decision](#), paras. 681-682; [Amendment Decision](#), paras. 94-97.

⁵⁴ Decision, para. 51 (noting that the circumstances in which the victims were allegedly arrested and detained ([Confirmation Decision](#), paras. 282, 331, 334 and 337) may be factually relevant to element 2 of the crime

iii. Separately, the Trial Chamber found that both the non-sexual and sexual acts committed against P-0542 were relevant to the legal re-characterisation as Count 2 (other inhumane acts as a crime against humanity) and Count 4 (cruel treatment as a war crime).⁵⁵ Likewise, the Chamber considered that all forms of ill-treatment (sexual and non-sexual in nature) with respect to P-0547 and P-0570 could be relevant to Counts 2 and 4—but declined to provide notice under regulation 55(2) at this stage.⁵⁶

iv. The charges describe other victims (P-1134, P-0636 and P-1674) who were subjected to sexual violence in detention.⁵⁷ The Pre-Trial Chamber found that the sexual violence in detention suffered by P-1134, P-0636 and P-1674 was the result of the coercive environment cultivated by Ansar Dine/AQMI and that it could be attributed to the common purpose under article 25(3)(d), and that Mr Al Hassan could be held individually responsible.⁵⁸ In this context, the Pre-Trial Chamber expressly found that the sexual violence against P-1134, P-0636 and P-1674 when detained was committed in a systematic manner, and noted the same *modus operandi* as against P-0570, P-0547, P-0574 and P-0542.⁵⁹

v. Finally, the charges under Counts 2, 4 and 5 refer specifically to the alleged acts of sexual violence and other ill-treatment against P-1134 and P-0636.⁶⁰ The ill-treatment of P-0570, P-0547, P-0574 and P-0542, also arrested and detained in a similar manner, is described under those counts, referring to “acts of violence” and “ill-treatment” against them in detention (but without stating that such violence included sexual acts).⁶¹ However, sexual violence is a form of violence, and should not be treated differently from other violent acts

against humanity and war crime of rape and the overall coercive environment in which these victims were allegedly placed).

⁵⁵ Decision, para. 70 (relying on the facts described in paras. 331 and 680 of the [Confirmation Decision](#)).

⁵⁶ Decision, paras. 72-75.

⁵⁷ [Amendment Decision](#), paras. 41-42 (P-1134), 46-48 (P-0636), 49-52 (P-1674), 93-97, 102-104 (drawing the Trial Chamber’s attention that the acts against P-1134 may be reclassified as torture under Count 13), pp. 67-68 (including all acts against P-1134 and P-0636 under Counts 2, 4 and 5).

⁵⁸ [Amendment Decision](#), paras. 179-196; Decision, para. 55.

⁵⁹ [Amendment Decision](#), para. 184 (« Au contraire, ces actes étaient perpétrés de manière systématique, suivant toujours le même mode opératoire : pour le moindre écart à la règle sur le port du voile, les femmes étaient arrêtées lors des patrouilles régulières de la *Hesbah* ou de la Police islamique, et emprisonnées à la BMS ou ailleurs, pendant une ou plusieurs nuits ; durant la nuit, la victime était séparée du groupe de femmes avec qui elle était détenue et entraînée dans une autre pièce où elle subissait des abus sexuels aux mains d’un ou plusieurs membres d’Ansar Dine/AQMI, avant d’être finalement libérée »); fn. 307 (« La Chambre renvoie, concernant le mode opératoire suivi lors des viols en détention, à la description des faits établis concernant les viols subis par [REDACTED] alors qu’elles étaient en détention sous le contrôle de membres d’Ansar Dine/AQMI (Décision de confirmation de charges, paras [REDACTED]) »).

⁶⁰ [Amendment Decision](#), pp. 67-68; [REDACTED].

⁶¹ [REDACTED].

and ill-treatment,⁶² more so, in the coercive circumstances of detention. Significantly, precluding consideration of the alleged sexual acts against P-0570, P-0547, P-0574 and P-0542 under Counts 1-5 would (incorrectly) prioritise “form” over “substance”—an approach the Appeals Chamber has recently discouraged.⁶³

14. Accordingly, the Trial Chamber did not err in law. Mr Al Hassan’s submissions should be dismissed.

ii. The Trial Chamber properly exercised its discretion

15. Mr Al Hassan fails to show that the Trial Chamber erred in exercising its discretion.⁶⁴

16. *First*, while Mr Al Hassan argues that the Trial Chamber violated “his right to timely notice as concerns the nature of the charges that he would face at trial”,⁶⁵ his rights under article 67(1)(a) are intact.⁶⁶ As the Trial Chamber correctly noted, Mr Al Hassan had already been notified of the relevant incidents in detention with reference to the particular victims (P-0570, P-0547, P-0574 and P-0542) under Counts 1-5.⁶⁷ When Counts 1-5 are read with Count 13 for which they are underlying acts, and considering the Confirmation Decision as a whole, Mr Al Hassan also knows of the specific alleged acts of sexual violence against the specific victims in detention.⁶⁸ As the Appeals Chamber has held, what is sufficient for an accused to understand the nature of the charges against him depends on the particular circumstances and varies from case to case.⁶⁹ Moreover, the right to be informed does not impose any special formal requirement as to the manner in which notice is given.⁷⁰ In the circumstances of this case, the notice Mr Al Hassan received was proper and sufficient. It was also timely: these

⁶² See e.g., ICC-01/04-02/06-2359 (“[Ntaganda TJ](#)”) paras. 805-806; ICC-02/11-01/15-1263-AnxC-Red (“[Gbagbo Dis. Op of Judge Herrera Carbuccia](#)”), para. 438 (“Sexual violence is [...] a strategy for asserting social control and for humiliating, retaliating against or intimidating victims.”); *Prosecutor v. Đorđević*, IT-05-87/1-A, Judgement, 27 January 2014 (“[Đorđević AJ](#)”), para. 887 (noting that sexual crimes must not be treated differently from other violent acts simply because of their sexual component), in a different but relevant context.

⁶³ [Yekatom Scope of Charges AD](#), para. 60 (“The argument that this inherently vitiates proper notice to Mr Yekatom favours form over substance, and the Appeals Chamber finds it to be unpersuasive.”).

⁶⁴ Appeal, paras. 14-27.

⁶⁵ Appeal, para. 15.

⁶⁶ Article 67(1)(a), Statute: To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks; ICC-02/05-01/20-199-Anx OA (“[Abd-al-Rahman Dis. Op of Judge Ibáñez Carranza](#)”), paras. 1, 7-11 (interpreting article 67 as a whole).

⁶⁷ Decision, para. 60.

⁶⁸ See e.g., [Confirmation Decision](#), paras. 677-680; [REDACTED].

⁶⁹ [Yekatom Scope of Charges AD](#), paras. 38 (“Ultimately, the courts have taken a case-by-case approach, ensuring that the information provided in each case is adequate so as to enable the accused to prepare his or her defence accordingly.”), 54; [Abd-al-Rahman Dis. Op of Judge Ibáñez Carranza](#), paras. 1, 7-11, 18-19.

⁷⁰ [Yekatom Scope of Charges AD](#), para. 54.

facts for the specific witnesses were confirmed before trial,⁷¹ and Mr Al Hassan could prepare his defence accordingly. *Arguendo* that Mr Al Hassan only knew of the sexual violence against the four victims *via* the Decision for Counts 1-5 (which he did not), he fails to show how his defence was impaired, or indeed, how he would have prepared differently for Counts 1-5 and Count 13. His explanation that he “could have addressed and rebutted the count of persecution by focusing on persecutory intent” alone is unpersuasive, since Counts 1-5, and the alleged sexual acts, always served as underlying persecutory acts.⁷² While Mr Al Hassan may well make strategic choices regarding his defence, he had proper notice of the allegations. Similarly, his arguments on the specificity required for pleading other inhumane acts do not reflect the specific circumstances at hand.⁷³

17. The ICTR precedents that Mr Al Hassan relies on are inapposite.⁷⁴ The indictments and procedural history differ significantly from this case. In *Muvunyi*, the paragraph in question relied on to support the charge of other inhumane acts did not feature in the indictment *in support of any count*⁷⁵—in contrast to this case, where the acts in question were alleged under Count 13 of the Confirmation Decision. Likewise, in *Karera*, the allegation was charged with respect to the lesser and more specific crime (murder), and not the broader and potentially graver crimes of genocide and extermination, leading, as one factor, to the reversal of the convictions for the latter crimes.⁷⁶ In contrast, the Confirmation Decision included the allegations (victims in detention) under Counts 1-5, with the additional acts clearly mentioned underpinning the greater crime of persecution. While Mr Al Hassan claims, relying on *Karera*, that the Prosecution “contributed to the defendant’s lack of notice”,⁷⁷ his procedural narrative is incomplete⁷⁸ and inaccurate.⁷⁹ Notwithstanding that the relevant counts may have differed, the relevant facts of the incidents were always clear.

⁷¹ *E.g.*, the [Confirmation Decision](#) was first issued on 30 September 2019, with a corrigendum issued on 8 November 2019.

⁷² Appeal, para. 26.

⁷³ Appeal, paras. 24-25.

⁷⁴ Appeal, paras. 20-22.

⁷⁵ *Muvunyi v. The Prosecutor*, Case No. ICTR-2000-55A-A, Judgment, 29 August 2008 (“[Muvunyi AJ](#)”), paras. 149-158 (referring to paragraph 3.47 of the Indictment, added in the Schedule of Particulars).

⁷⁶ *Karera v. The Prosecutor*, Case No. ICTR-01-74-A, Judgment, 2 February 2009 (“[Karera AJ](#)”), paras. 365-370.

⁷⁷ Appeal, para. 22.

⁷⁸ *Contra* Appeal, para. 22. See ICC-01/12-01/18-35-Red2-tENG (“[Article 58 Decision](#)”), paras. 77-79 (including facts relating to rape in custody as well as in the context of forced marriage), 166, fn. 286; [Confirmation Decision](#), paras. 677-682; [Amendment Decision](#), paras. 94-97; [REDACTED]. Mr Al Hassan speculates that the acts of a sexual nature “only fell for consideration under count 13”, without showing how this would have affected his defence (Appeal, para. 23).

⁷⁹ Appeal, para. 22 (relying on the language in the [Trial Brief](#) filed *before* the regulation 55(2) Request).

18. *Second*, Mr Al Hassan has not shown that he suffered concrete prejudice as a result of the Trial Chamber’s approach to Counts 1-5.⁸⁰ [REDACTED]. Moreover, the Trial Chamber will finally assess that evidence only at the article 74 stage, giving Mr Al Hassan ample time to prepare and address necessary issues.⁸¹ Mr Al Hassan’s claim of an “absence of certainty” of the allegations is unjustified.⁸² Neither is his reliance on “multiple changes made to the charges in this case” warranted—when he was on proper notice.⁸³ While the Prosecution moved formally to re-characterise these allegations under Counts 1-5 in its regulation 55(2) request filed before the start of trial, this does not detract from Mr Al Hassan’s proper notice of the facts, which he always had. Further, while investigation conditions may not be easy, this cannot be sufficient reason to exclude the Trial Chamber from considering relevant evidence under Counts 1-5, when it will be elicited anyway for Counts 11, 12 and 13.⁸⁴

19. Accordingly, the Trial Chamber did not err in exercising its discretion. Mr Al Hassan’s submissions should be dismissed. Ground 1 of the Appeal should be dismissed.

20. *Finally*, and in the alternative, if the Appeals Chamber finds that the Trial Chamber erred in its approach to Counts 1-5, the Prosecution respectfully requests the Appeals Chamber to consider providing the appropriate notice under regulation 55(2) to re-characterise the allegations of sexual violence for P-0574, P-0570, P-0542 and P-0547 under Counts 1-5, or to remand the matter back to the Trial Chamber to do so. The Trial Chamber did not address the substance of the request under regulation 55(2), but merely declined to do so in the circumstances.⁸⁵

C. Response to Ground 2: The Trial Chamber did not rely on unconfirmed facts or exceed the scope of regulation 55 of the Regulations

21. Mr Al Hassan bases his second ground of appeal on the incorrect claim that the Trial Chamber relied on unconfirmed facts in giving notice of the possible re-characterisation of his liability to article 25(3)(c) of the Statute for seven of the cases under Count 6⁸⁶ (“the seven

⁸⁰ Appeal, paras. 26-27.

⁸¹ *Contra* Appeal, para. 26.

⁸² Appeal, para. 26. *See* ICC-01/12-01/18-1292-Conf-AnxA (“Trial Brief Addendum”), paras. 15-27.

⁸³ Appeal, para. 27; [Lubanga Regulation 55 AD](#), paras. 83-87.

⁸⁴ Appeal, para. 27.

⁸⁵ Decision, paras. 60, 63, 69.

⁸⁶ The seven cases and their corresponding Islamic Police reports are: (1) [REDACTED]; (2) [REDACTED]; (3) [REDACTED]; (4) [REDACTED]; (5) [REDACTED]; (6) [REDACTED]; (7) [REDACTED]. *See* [Confirmation](#)

cases”).⁸⁷ The Defence argues that because the Pre-Trial Chamber had found there was no linkage between Mr Al Hassan’s authorship of the Islamic Police reports and the seven cases, the Trial Chamber impermissibly extrapolated/added new material facts to the charges in finding that there was such a link, thus amounting to a *de facto* amendment of the charges and constituting a legal and procedural error⁸⁸ which violated his right to fair and impartial proceedings.⁸⁹ Mr Al Hassan’s second ground of appeal fails to demonstrate any error and should be dismissed.⁹⁰ He misinterprets the Pre-Trial Chamber’s findings in the Confirmation Decision and misconstrues the Trial Chamber’s powers to assess the confirmed facts and circumstances before it. Moreover, Mr Al Hassan was provided with timely and clear notice of this re-characterisation to enable him to prepare his defence, and he has suffered no prejudice as a result of the Trial Chamber’s Decision.

i. The Trial Chamber did not err legally

22. Regulation 55(1) provides a Trial Chamber with the authority to change the legal characterisation of the crimes or the accused’s form of participation, even to recognise a mode of liability that the pre-trial chamber may have declined to confirm, provided that the change does not exceed the facts and circumstances charged and such re-characterisation is consistent with the accused’s right to a fair trial.⁹¹ Regulation 55 thus enables a Trial Chamber to close accountability gaps—a purpose that is recognised as being fully consistent with the Statute⁹²—while providing safeguards to ensure that this power is not exercised in a manner which renders the trial unfair to the accused.⁹³ The Trial Chamber acted within the confines of this legal framework when giving notice under regulation 55(2) of the possible re-characterisation of Mr Al Hassan’s liability for the seven cases. The Defence fails to identify any legal error.

[Decision](#), para. 435 ([REDACTED]); ICC-01/12-01/18-568-Conf (public redacted version: ICC-01/12-01/18-568-Red) (“[Amendment Request](#)”), paras. 10-11, 22-23.

⁸⁷ *Contra* Appeal, paras. 28-35.

⁸⁸ See [Bemba et al. AJ](#), paras. 90, 99-108; see also [Lubanga AJ](#), paras. 18-20.

⁸⁹ Appeal, paras. 28-29, 36-45.

⁹⁰ Given that the Trial Chamber has only issued notice pursuant to regulation 55(2), and has not effected an *actual* change in legal characterisation, the Appeals Chamber’s review is limited to determining whether it is immediately apparent at this stage that the change in legal characterisation contemplated by the Trial Chamber would exceed the facts and circumstances described in the charges: ICC-01/04-01/07-3363 (“[Katanga Regulation 55 AD](#)”), para. 46.

⁹¹ Decision, paras. 9-10, 13, 90, 112-113; [Lubanga Regulation 55 AD](#), paras. 88, 93; ICC-01/14-01/18-542 (“[Yekatom & Ngaißona Regulation 55 Decision](#)”), paras. 9, 13; ICC-02/11-01/15-369 (“[Gbagbo & Blé Goudé Regulation 55 AD](#)”), para. 32.

⁹² Decision, para 9, citing [Lubanga Regulation 55 AD](#), para. 77; [Katanga Regulation 55 AD](#), paras. 22, 104; [Yekatom & Ngaißona Regulation 55 Decision](#), para. 10.

⁹³ See regulation 55(2) and (3) of the Regulations; [Lubanga Regulation 55 AD](#), para. 85.

23. *First*, the Trial Chamber explicitly identified the facts and circumstances that were relevant to determining Mr Al Hassan’s contributions to the cases under Count 6.⁹⁴ These findings did not relate to *specific* contributions that Mr Al Hassan made to individual cases under Count 6, but instead related to some of the types of *general* contributions that he made, including that in his role in the Islamic Police, Mr Al Hassan “drafted and signed Islamic Police reports, making written records of the accounts given by persons who reported incidents and by suspects in relation to cases which arose in Timbuktu or in the Timbuktu region, and affixed his own signature to the Islamic Police’s reports”, “‘investigated’ at the request of the Emirs of the Islamic Police, made written records of the facts reported, and signed the documents which he compiled as an investigator”, and “acted on behalf of the Islamic Police and sent, at least on some occasions, Islamic Police reports to the Islamic Tribunal, notably the ones he had written and signed”.⁹⁵ The Chamber determined on the basis of these findings that “Mr Al Hassan’s role with regard to the drafting of Islamic Police reports and their transmission to the Islamic Tribunal form[ed] an integral part of PTC I’s factual findings and narrative”.⁹⁶ The Chamber also identified the findings relevant to the seven cases in the Confirmation Decision,⁹⁷ and correctly noted that the Pre-Trial Chamber had not made any explicit finding in relation to Islamic Police reports authored by Mr Al Hassan which corresponded to these seven cases.⁹⁸ In light of these circumstances, the Trial Chamber concluded that Mr Al Hassan’s liability for the seven cases could be re-characterised to article 25(3)(c).⁹⁹ The Trial Chamber’s decision was therefore based on findings which fell squarely within the facts and circumstances charged.¹⁰⁰

24. *Second*, the Defence does not dispute the relevance of the above findings on Mr Al Hassan’s contributions to the Trial Chamber’s assessment of Mr Al Hassan’s possible liability under article 25(3)(c), nor does it claim that these findings fall outside the scope of the charges. The Defence’s appeal could be rejected on this basis alone. Instead the Defence claims that these findings were “broad and abstract descriptions” of Mr Al Hassan’s role from which the Trial Chamber “extrapolated” or “added” material facts, and that while such an approach might be permissible in relation to “background or subsidiary facts”, it was not so

⁹⁴ *Contra* Appeal, paras. 30-35. *See* Decision, paras. 107-109.

⁹⁵ Decision, para. 109, citing [Confirmation Decision](#), paras. 733-735, 740-743, 754-758.

⁹⁶ Decision, para. 109.

⁹⁷ Decision, paras. 107 (citing [Confirmation Decision](#), paras. 436, 448, 457-458, 462, 466-467, 469, 472), 110.

⁹⁸ Decision, para. 107. *Contra* Appeal, paras. 31-32; *see below* paras. 28-29.

⁹⁹ Decision, paras. 110-111.

¹⁰⁰ Decision, paras. 110-111.

for “material facts”.¹⁰¹ Such a hierarchy of facts for the purposes of regulation 55 finds no support in law, nor does the Defence proffer any. To the contrary, the Appeals Chamber has confirmed that there is no limitation in the text of article 74(2) or regulation 55(1) that only “material” and not “subsidiary” facts may be subject to change in their legal characterisation.¹⁰²

25. Accordingly, the Trial Chamber was entitled to find that evidence of Mr Al Hassan’s specific contributions to the seven cases (namely, his authorship of the relevant Islamic Police reports) 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).¹⁰³ Indeed, the Trial Chamber was also entitled to rely on the general findings alone to find that such re-characterisation was possible. This is because in reaching its decision under article 74(2) of the Statute, the Trial Chamber is entitled to assess the evidence and to interpret the facts and circumstances differently to the Pre-Trial Chamber.¹⁰⁴ This is in accordance with the Trial Chamber’s “broad discretion to interpret the facts” and authority to “draw out the ‘facts and circumstances’ of the charges, as it considers appropriate, from the decision of the Pre-Trial Chamber in its totality, while respecting the Pre-Trial Chamber’s findings as to the scope of the charges”.¹⁰⁵

26. *Third*, the Pre-Trial Chamber itself agreed that the re-characterisation of Mr Al Hassan’s liability to article 25(3)(c) for the seven cases could fall *within* the scope of the facts and circumstances of the charges.¹⁰⁶ Following the issuance of the Confirmation Decision, in which the Pre-Trial Chamber confirmed Mr Al Hassan’s liability for five other cases under article 25(3)(c) on the basis that he had authored the corresponding Islamic Police reports, the Prosecution filed a request to the Pre-Trial Chamber noting that the [REDACTED] for which there were also corresponding Islamic Police reports authored by the Accused. The Prosecution requested the Pre-Trial Chamber to amend the charges to additionally confirm his liability under article 25(3)(c) for those seven cases.¹⁰⁷ The Pre-Trial Chamber rejected this request, finding that the corrections requested by the Prosecution “*do not concern an amendment of the factual scope of the charges already confirmed within the meaning of*

¹⁰¹ Appeal, paras. 28-29, 30-31.

¹⁰² [Katanga Regulation 55 AD](#), para. 50.

¹⁰³ *Contra* Appeal, para. 40 (5th bullet point).

¹⁰⁴ Article 74(2); [2019 Chambers Practice Manual](#), paras. 58, 62; [Amendment Procedure Decision](#), paras. 46-47.

¹⁰⁵ [Conduct of Proceedings Directions](#), paras. 9-10. *See also* [2019 ICC Chambers Practice Manual](#), paras. 58, 62.

¹⁰⁶ [Amendment Procedure Decision](#), paras. 45-47.

¹⁰⁷ [Amendment Request](#), paras. 10-12, 20, 22-23.

article 61(9) of the Statute” given that the Chamber had already confirmed the facts with respect to the seven cases,¹⁰⁸ and stated that “the correction requested by the Prosecution on the facts as found by the Chamber could be canvassed at trial [...]”.¹⁰⁹ The Pre-Trial Chamber affirmed that while the Trial Chamber is barred from exceeding the facts and circumstances described in the charges, it may nonetheless “evaluate them differently”¹¹⁰ and could consider using regulation 55 in relation to article 25(3)(c) for the seven cases.¹¹¹ The Trial Chamber subsequently endorsed the Pre-Trial Chamber’s understanding of its powers to interpret the confirmed facts differently to the Pre-Trial Chamber.¹¹²

27. Both the Pre-Trial and Trial Chambers in this case therefore recognised that the possible re-characterisation of Mr Al Hassan’s liability for the seven cases on the basis of the corresponding Islamic Police reports that he allegedly authored was within the facts and circumstances charged. The Chambers’ clear and common understanding of the facts and circumstances charged in this regard undermines the Defence’s claim that the Trial Chamber inferred facts from “generic or ambiguous narratives”.¹¹³

28. *Fourth*, the Defence mischaracterises the Confirmation Decision in arguing that Mr Al Hassan’s authorship of the Islamic Police reports relating to the seven cases was a fact not “evidentially established” or confirmed by the Pre-Trial Chamber.¹¹⁴ As the Trial Chamber rightly found, the Pre-Trial Chamber did not make *any* explicit finding regarding a link (or absence thereof) between the Islamic Police reports and the seven cases.¹¹⁵ This interpretation is reinforced by the Pre-Trial Chamber’s own view that the Trial Chamber would not be precluded from giving notice of a possible re-characterisation of Mr Al Hassan’s liability for the seven cases on the basis of such a link.¹¹⁶ Moreover, where the Pre-Trial Chamber is silent as to a particular allegation made in the DCC, “it cannot be presumed to have been rejected”.¹¹⁷

29. That the Pre-Trial Chamber did not intend to be exhaustive in its findings on Mr Al

¹⁰⁸ [Amendment Procedure Decision](#), para. 44.

¹⁰⁹ [Amendment Procedure Decision](#), para. 45.

¹¹⁰ [Amendment Procedure Decision](#), para. 46.

¹¹¹ [Amendment Procedure Decision](#), para. 47.

¹¹² [Conduct of Proceedings Directions](#), para. 9; *see also* para. 10.

¹¹³ Appeal, para. 44.

¹¹⁴ *Contra* Appeal, paras. 29, 32-33.

¹¹⁵ Decision, para. 107.

¹¹⁶ *See above* paras. 26-27.

¹¹⁷ ICC-01/04-02/06-450 (“[Ntaganda Updated UDCC Decision](#)”), para. 39. *See also* para. 32 (noting that the Pre-Trial Chamber did not make exhaustive findings on alternate *mens rea* requirements in the law and finding that it did not consider these alternate requirements to have been rejected in the confirmation decision).

Hassan’s authorship of the reports in the context of the Count 6 crimes is also evident from the fact that when it assessed Mr Al Hassan’s role and functions, it found that he had indeed authored the Islamic Police reports in *three* of the seven cases.¹¹⁸ These findings located throughout the Confirmation Decision demonstrate that the Pre-Trial Chamber had not made exhaustive findings on the evidence—nor was it required to,¹¹⁹ given its role is to confirm the charges and send a case to trial, not to be the primary trier of fact.¹²⁰ Moreover, the Trial Chamber’s notice of possible re-characterisation was consistent with these findings of the Pre-Trial Chamber that Mr Al Hassan had authored the reports.

30. *Finally*, the Defence mischaracterises several aspects of the Prosecution’s submissions and materials in this case.¹²¹ Contrary to the Defence’s contention: (i) there was no “absence” of pleadings or evidence from the Prosecution regarding Mr Al Hassan’s contributions to the seven cases¹²²—the Prosecution pleaded in the DCC the types of contribution it alleged Mr Al Hassan made to all Count 6 crimes, including that he conducted investigations and wrote and signed Islamic Police reports that were transmitted to the Islamic Tribunal,¹²³ and cited at various instances [REDACTED],¹²⁴ and the Amendment Request set out the Prosecution’s submissions on his specific contribution to the seven cases based on his authorship of the relevant reports;¹²⁵ (ii) in the case regarding [REDACTED], the Prosecution did not “concede” that it did not allege that the Accused drafted the report in this case,¹²⁶ but in fact submitted in its Amendment Request that the Accused had signed the Islamic Police report for this case;¹²⁷ (iii) [REDACTED]¹²⁸— [REDACTED]¹²⁹ and the Prosecution specified [REDACTED] in its Amendment Request;¹³⁰ (iv) while report [REDACTED] is not signed, the Prosecution alleges that the report is in Mr Al Hassan’s handwriting,¹³¹ and

¹¹⁸ [Confirmation Decision](#), paras. 718 (fn. 1956) (re [REDACTED] corresponding to [REDACTED]); and [REDACTED], corresponding to [REDACTED]), 740 (fn. 2015) (re [REDACTED], corresponding to [REDACTED]).

¹¹⁹ *Contra* Appeal, paras. 33-35. See [2019 Chambers Practice Manual](#), para. 63.

¹²⁰ *See above* para. 11.

¹²¹ *Contra* Appeal, paras. 33-34.

¹²² *Contra* Appeal, para. 33.

¹²³ *See e.g.* ICC-01/12-01/18-335-Conf-Corr (“DCC”), paras. 285-308 (regarding Mr Al Hassan’s contribution under article 25(3)(a)), 409 (regarding his contribution under article 25(3)(c)), 419 (regarding his contribution under article 25(3)(d)).

¹²⁴ DCC, paras. [REDACTED].

¹²⁵ [Amendment Request](#), paras. 10, 11, 22-23.

¹²⁶ *Contra* Appeal, para. 34.

¹²⁷ [Amendment Request](#), para. 11.

¹²⁸ Relevant to [REDACTED].

¹²⁹ *Contra* Appeal, para. 34; *see* DCC, para. [REDACTED].

¹³⁰ [Amendment Request](#), para. 11.

¹³¹ DCC, para. [REDACTED]; [Amendment Request](#), para. 11.

[REDACTED],¹³² (v) [REDACTED] the Amendment Request expressly cite report [REDACTED].¹³³ Therefore, the Trial Chamber did not legally err and Mr Al Hassan's submissions should be dismissed.

ii. The Trial Chamber did not err procedurally

31. 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.¹³⁴ As shown above, the Trial Chamber relied upon the confirmed facts and circumstances in this case in giving notice of the possible re-characterisation. Its actions were squarely within the scope of regulation 55. In arguing that the Chamber adopted a hybrid procedure and acted without affording Mr Al Hassan the proper procedural safeguards, the Defence merely disagrees with the Trial Chamber's findings, misconstrues the *sui generis* nature of proceedings before the ICC and the role of regulation 55,¹³⁵ and makes inapposite arguments regarding the delineation in roles of the Pre-Trial and Trial Chambers.¹³⁶

32. Contrary to the Defence's arguments regarding a procedural error in this respect: (i) the Prosecution provided the Defence with particulars of the relevant Islamic Police reports and Mr Al Hassan's authorship of them;¹³⁷ (ii) that the Pre-Trial Chamber confirmed Mr Al Hassan's liability for some of the cases under article 25(3)(c) did not mean it ruled out the possibility of such a re-characterisation for other cases;¹³⁸ (iii) in deciding to give notice under regulation 55, the Trial Chamber did not disagree with the Pre-Trial Chamber as to the "underlying existence of facts"¹³⁹ as the Pre-Trial Chamber had made no ruling on the authorship of the reports relating to the seven cases;¹⁴⁰ (iv) the charges did not need to cite all of the reports relating to the seven cases as these were matters of evidence,¹⁴¹ but in any event the Confirmation Decision made relevant findings of Mr Al Hassan's authorship of the reports in three of the seven cases,¹⁴² and the [REDACTED] Amendment Request provided

¹³² [REDACTED].

¹³³ Relevant to [REDACTED]. *Contra Appeal*, para. 34. *See* [REDACTED]; [Amendment Request](#), para. 11.

¹³⁴ *Contra Appeal*, paras. 36-40.

¹³⁵ *Contra Appeal*, paras. 29, 35, 40-42. *See above* para. 10.

¹³⁶ *Contra Appeal*, para. 44.

¹³⁷ *Contra Appeal*, para. 40 (2nd bullet point). *See above* para. 30.

¹³⁸ *Contra Appeal*, para. 40 (3rd bullet point). *See above* paras. 26-27.

¹³⁹ *Contra Appeal*, para. 40 (5th bullet point).

¹⁴⁰ *See above* para. 23.

¹⁴¹ *Contra Appeal*, para. 40 (6th bullet point).

¹⁴² *Contra Appeal*, para. 40 (6th bullet point). *See above* para. 29.

these details for all seven cases.¹⁴³ The charges for the purposes of understanding the Prosecution's allegations in this count must be read as a whole.¹⁴⁴

iii. Mr Al Hassan suffers no prejudice

33. The Trial Chamber properly applied regulation 55(2) to ensure that no unfairness results to Mr Al Hassan.¹⁴⁵ He therefore suffers no prejudice.¹⁴⁶

34. *First*, Mr Al Hassan received sufficient information to assist him in understanding the nature, cause and content of the charge¹⁴⁷ concerning the seven cases *via* the Prosecution's filing of the DCC and Amendment Request;¹⁴⁸ the Pre-Trial Chamber's reliance upon several Islamic Police reports in the Confirmation Decision,¹⁴⁹ and the Decision notifying Mr Al Hassan of his possible liability under article 25(3)(c).¹⁵⁰ Relevantly, the Prosecution's trial brief¹⁵¹ and addendum also provided full details of the allegations regarding Mr Al Hassan's authorship of the Islamic Police reports corresponding to the seven cases, and confirmed the Prosecution's view that he was liable for these cases under article 25(3)(c).¹⁵²

35. *Second*, the re-characterisation was foreseeable to the Defence.¹⁵³ The Prosecution had initially charged article 25(3)(c) in the alternative for all the cases under Count 6, and provided the full particulars of the allegations by at least January 2020.¹⁵⁴ By February 2020 the Defence was on notice of the Pre-Trial Chamber's view that the Trial Chamber could possibly re-characterise Mr Al Hassan's liability to article 25(3)(c) for the seven cases and that this would not exceed the scope of the facts and circumstances charged.¹⁵⁵ Subsequently in June 2020, the Prosecution filed its regulation 55(2) Request. Accordingly, by that time, the

¹⁴³ *Contra* Appeal, para. 40 (6th bullet point).

¹⁴⁴ [Yekatom Scope of Charges AD](#), para. 57 (considering the [Confirmation Decision](#) as a whole together with the relevant parts of the Document Containing the Charges).

¹⁴⁵ Decision, paras. 112-113. See [Katanga Regulation 55 AD](#), para. 100; ICC-01/04-01/06-1084 ("[Lubanga Evidence Decision](#)"), para. 47.

¹⁴⁶ *Contra* Appeal, paras. 41-45.

¹⁴⁷ *Contra* Appeal, para. 44; see [Yekatom Scope of Charges AD](#), para. 54.

¹⁴⁸ See above para. 30.

¹⁴⁹ See e.g. [Confirmation Decision](#), paras. 431, 712-714, 733-735, 740-741, 754-758, 885, 880, 882, 884, 928.

¹⁵⁰ [Confirmation Decision](#), para. 928.

¹⁵¹ [Additional Details Decision](#), para. 34; [Lubanga AJ](#), para. 124; [Ntaganda TJ](#), para. 37.

¹⁵² [Trial Brief](#), paras. 187 ([REDACTED]), 195 ([REDACTED]), 204 ([REDACTED]), 205 ([REDACTED]), 209 ([REDACTED]), 210 ([REDACTED]), 213 ([REDACTED]), 218; Trial Brief Addendum, paras. 36, 37.

¹⁵³ Cf. ICC-01/04-01/07-3436-AnxI ("[Katanga TJ, Judge Van den Wyngaert Dis Op](#)"), para. 43 (stating that it was "entirely unforeseeable to the Defence and rendered at a point in the proceedings when the Defence was unable to effectively respond to it").

¹⁵⁴ [Amendment Request](#), paras. 10-12, 20, 23.

¹⁵⁵ [Amendment Procedure Decision](#), paras. 45-47.

Defence was well-positioned to anticipate the possibility of a re-characterisation of Mr Al Hassan’s liability for the seven cases.

36. *Third*, and relatedly, Mr Al Hassan’s right to examine the evidence against him¹⁵⁶ has not been infringed.¹⁵⁷ The Prosecution called two expert witnesses to testify at trial in September and October 2020 in relation to Mr Al Hassan’s handwriting and signature on numerous documents, [REDACTED],¹⁵⁸ [REDACTED].¹⁵⁹ By this time, as shown above, the Defence had long been aware of the possible re-characterisation relating to the seven cases and had the opportunity to adapt its strategy accordingly. The Defence exercised its right to cross-examine the two witnesses, taking a global approach to testing their evidence by challenging the witnesses’ methodology rather than their assessment of individual documents.¹⁶⁰ In any event, the Defence may request that it be given the opportunity to re-examine those witnesses, or to call a new witness or to present other evidence to respond to the proposed re-characterisation, but has not elected to do so.¹⁶¹

37. *Fourth*, the Trial Chamber provided prompt and timely notice of the possible re-characterisation.¹⁶² While notice under regulation 55(2) should be given “as early as possible”,¹⁶³ even notice issued when a Trial Chamber retires to deliberate has been found not *per se* incompatible with the rights of the accused.¹⁶⁴ The notice in this case was issued at a far earlier stage while the Prosecution’s presentation of evidence at trial is still ongoing, thus enabling the Defence to be able to address the available evidence relevant to the proposed re-characterisation.¹⁶⁵

38. *Finally*, the Defence’s argument regarding the Trial Chamber’s alleged lack of impartiality should be dismissed *in limine*.¹⁶⁶ The Trial Chamber’s giving of notice under regulation 55(2) is “a neutral judicial act, which, without more, has no impact on the impartiality of the Judges exercising their powers”.¹⁶⁷ The Defence’s arguments alleging the impartiality of the Trial Chamber are based on its repeated disagreement with the Trial

¹⁵⁶ Article 67(1)(e) of the Statute.

¹⁵⁷ *Contra* Appeal, para. 45.

¹⁵⁸ P-0620: T-033-Conf; [REDACTED].

¹⁵⁹ P-0621: T-025-Conf; [REDACTED].

¹⁶⁰ P-0621: T-025-Conf-Eng, 22:21-38:21; P-0620: T-033-Conf-Eng, 34:16-81:24.

¹⁶¹ Regulation 55(3) of the Regulations.

¹⁶² *Contra* Appeal, para. 45.

¹⁶³ [Gbagbo & Blé Goudé Regulation 55 AD](#), para. 49.

¹⁶⁴ [Katanga Regulation 55 AD](#), paras. 14, 25.

¹⁶⁵ [Lubanga Evidence Decision](#), para. 50.

¹⁶⁶ *Contra* Appeal para. 44.

¹⁶⁷ [Katanga Regulation 55 AD](#), para. 104.

Chamber's interpretation of the facts and circumstances charged and they identify no error. Therefore, the Trial Chamber did not err procedurally. Mr Al Hassan's submissions should be dismissed. Ground 2 of the Appeal should be dismissed.

CONCLUSION AND RELIEF SOUGHT

39. For the reasons set out above, the Prosecution respectfully requests the Appeals Chamber to dismiss Mr Al Hassan's Appeal and to confirm the Decision.



Karim A. A. Khan QC, Prosecutor

Dated this 30th of July 2021

At The Hague, The Netherlands