

1 International Criminal Court
2 Appeals Chamber
3 Situation: Republic of Mali
4 In the case of The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag
5 Mahmoud - ICC-01/12-01/18
6 Presiding Judge Luz del Carmen Ibáñez Carranza
7 Delivery of Appeals Judgment (Interlocutory Appeal) - Courtroom 3
8 Thursday, 1 July 2021
9 (The hearing starts in open session at 4.31 p.m.)
10 THE COURT USHER: [16:31:35] All rise.
11 The International Criminal Court is now in session.
12 Please be seated.
13 PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:32:13] Good afternoon.
14 Could the court officer please call the case.
15 THE COURT OFFICER: [16:32:22] Good afternoon, your Honour.
16 This is the situation in the Republic of Mali, in the case of The Prosecutor versus
17 Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, case number
18 ICC-01/12-01/18.
19 And for the record, we are in open session.
20 PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:32:42] Thank you.
21 I am Judge Luz del Carmen Ibáñez Carranza, presiding in this appeal arising from the
22 case of the Prosecutor versus Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud.
23 My fellow judges in this appeal are Judge Piotr Hofmański, Judge Solomy Balungi
24 Bossa, Judge Rosario Salvatore Aitala and Judge Gocha Lordkipanidze.
25 May I ask the parties to introduce themselves for the record, please, starting with the

1 Defence.

2 MS TAYLOR: [16:33:30] Good afternoon, Madam President. And good afternoon
3 to my colleagues in the Prosecution and the victims' team and to everyone inside and
4 around the courtroom. The Defence for Mr Al Hassan is represented this afternoon
5 by Ms Kirsty Sutherland, Mr Shan Patel, Ms Sophia Westen. And on behalf of -- and
6 myself, Melinda Taylor.

7 And on behalf of Mr Al Hassan, I would like to respectfully submit or express my
8 gratitude for the Chamber excusing his presence. Thank you.

9 PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:34:11] Thank you very much.
10 The Office of the Prosecutor, please.

11 MS BRADY: [16:34:18] Good afternoon, your Honour. And good afternoon to
12 everyone in the courtroom. My name is Helen Brady. I'm the senior appeals
13 counsel for the Prosecution. And I'm here today with Ms Priya Narayanan, appeals
14 counsel, and Ms Nivedha Thiru, associate appeals counsel. Thank you.

15 PRESIDING JUDGE IBÁÑEZ CARRANZA: [16:34:39] Thank you.
16 Legal Representatives of Victims, please.

17 MR LUVENGIKA: [16:34:40] (Interpretation) Good afternoon, Madam President.
18 The victims are represented at this hearing by Maître Fidel Nsita Luvengika. And I
19 thank you.

20 PRESIDING JUDGE CARRANZA: [16:34:50] Thank you very much.

21 For the record, I note that Mr Al Hassan has submitted a waiver of his right to attend.
22 Today, the Appeals Chamber will deliver its judgment in the appeal of Mr Al Hassan
23 against the decision of the Trial Chamber X of 17 December 2020 entitled "Decision
24 and application for notice of possibility of variation of legal characterisation pursuant
25 to Regulation 55(2) of the Regulations of the Court."

1 This is a non-authoritative summary of the Appeals Chamber's written judgment in
2 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, the Trial Chamber X (the "Trial Chamber") issued a decision
5 with respect to the Prosecutor's application for notice under Regulation 55(2) of the
6 Regulations of the Court that the legal characterisation of some facts included in the
7 confirmed charges might change. It is this decision - which I shall refer to as the
8 "Impugned Decision" - that is the object of Mr Al Hassan's appeal.

9 In the Impugned Decision, the Trial Chamber considered, inter alia, acts of sexual
10 violence committed against four victims: P-0574, P-0542, P-0570 and P-0547. Those
11 acts had been included in the confirmed charge of persecution. The Prosecutor
12 sought notice of a possible re-characterisation so that these acts could also be
13 considered as torture, cruel treatment, and other crimes related to the detention of
14 those four victims which were charged under counts 1 to 5.

15 In the Impugned Decision, the Trial Chamber found it unnecessary to do so, as
16 similar acts against the same victims were already included in other confirmed
17 charges.

18 The Prosecutor's request also concerned police reports allegedly drafted or signed by
19 Mr Al Hassan and relied upon by the Islamic tribunal to pass sentences. The
20 Trial Chamber gave notice of a possible re-characterisation with respect to seven of
21 these reports so that they could be considered under Article 25(3)(c) of the Statute.
22 Having been granted leave to appeal the Impugned Decision with respect to two
23 issues, the Defence filed the appeal brief on 12 March 2021, and the Prosecutor filed
24 the response on 25 March 2021.

25 The Defence challenges the rulings of the Trial Chamber which I just mentioned.

1 Regarding the acts of sexual violence, the Defence argues that the Chamber has no
2 power, outside the scopes of Article 61(9) of the Statute or Regulation 55 of the
3 Regulations, to include additional acts in existing charges or to make substantive
4 changes to the manner in which the confirmed charges are pleaded. This is the first
5 ground of appeal.

6 With respect to the seven police reports, the Defence submits that the Trial Chamber's
7 finding concerning Mr Al Hassan's authorship or signature of those reports falls
8 outside of the scope of the confirmed facts. This is the second ground of appeal.

9 I will address these grounds of appeal in turn.

10 Regarding the first ground of appeal, the Appeals Chamber recalls that, while Article
11 74(2) of the Statute binds the Trial Chamber to the facts and circumstances described
12 in the charges, the Trial Chamber has the power to modify the legal characterisation
13 given to those facts by the Pre-Trial Chamber. However, when the possibility of
14 such modification appears to the Trial Chamber during the trial, it shall give notice
15 thereof to the participants in accordance with Regulation 55(2) of the Regulations.
16 When a possible change to the legal characterisation may affect the gravity of the
17 crimes charged and eventually the sentence of the person, it is of particular
18 significance that the accused person receives notice under Regulation 55 of the
19 Regulations of the Court.

20 In the present case, the facts upon which the Pre-Trial Chamber relied to confirm the
21 crimes under counts 1 to 5 in relation to P-0574 victim and the crimes under count 5 in
22 relation to all four victims in question did not expressly include the acts of sexual
23 violence of which these women allegedly fell victim.

24 The Pre-Trial Chamber relied on alleged acts of sexual violence against Victims
25 P-0574, P-0542, P-0570 and P-0547 to confirm the crime charged under count 13 as

1 persecution. It follows that if the Trial Chamber eventually were to convict
2 Mr Al Hassan under counts 1 to 5 on the basis of the facts and circumstances relevant
3 to this ground of appeal, it would change their legal characterisation. Accordingly,
4 notice under Regulation 55(2) of the Regulations is required.

5 Furthermore, if the acts of rape are considered in addition to the facts and
6 circumstances initially charged under counts 1 to 5, the gravity of the crimes charged
7 under these counts may increase. In particular, physical or mental pain or suffering
8 or a violation of the victim's dignity may be more severe, given that the current
9 charges under these counts only concern the detention of the four victims, its
10 conditions and the infliction of lashes. This could have an impact on the sentence of
11 Mr Al Hassan if he is convicted.

12 The Appeals Chamber therefore finds an error insofar as the Trial Chamber
13 considered that it need not apply Regulation 55(2) of the Regulations. However, the
14 Appeals Chamber is not satisfied that this error materially affected the Impugned
15 Decision.

16 This is because, although the Trial Chamber did not formally apply Regulation 55(2)
17 of the Regulations, it is ensured -- it ensured that the rights of the accused person in
18 the process of legal re-characterisation of facts would be preserved, consistent with
19 the goal of this regulation.

20 In particular, the Appeals Chamber notes that the relevant acts of rape allegedly
21 occurred during the detention of victims P-0574, P-0542, P-0570 and P-0547. This
22 detention, its conditions, and the related mistreatment are facts and circumstances
23 underlying the crimes charged under counts 1 to 5.

24 Given the close link between the acts of rape and the crimes charged in relation to the
25 detention of these victims, the Impugned Decision, in addition to the confirmation

1 decision and other documents, provides sufficient notice to Mr Al Hassan of the
2 relevant charges against him. Furthermore, the acts of rape that allegedly occurred
3 during the same detention and against the same victims are charged under count 13.
4 The Impugned Decision provides sufficient notice of the Trial Chamber's intention to
5 rely on acts of rape for purposes of counts 1 to 5. There is no indication that the
6 Trial Chamber disregarded Mr Al Hassan's right to time and facilities for the
7 preparation of his defence or the right to examine again a previous witness or call
8 new witnesses. The Appeals Chamber notes in this respect that the Impugned
9 Decision was rendered at an early stage of the trial, allowing the Defence to adapt its
10 strategy as necessary in light of the possible modification of the charges.
11 Therefore, the Appeals Chamber is not satisfied that the Impugned Decision would
12 have been substantially different if the Trial Chamber had not committed the error.
13 Regarding the second ground of appeal, the Appeals Chamber observes that, in
14 general, the decision of a Pre-Trial Chamber under Article 61(7) of the Statute is a
15 limited judicial intervention, the objective of which is to ensure that there is a case
16 worthy of trial and to define the parameters of the subject matter of the trial. The
17 Pre-Trial Chamber must calibrate its review of the factual allegations carefully
18 according to its role as a "gatekeeper", taking into account the need to proceed
19 expeditiously so as not to cause undue delay to the proceedings as a whole.
20 Where the confirmation decision does not directly address certain factual allegations
21 advanced by the Prosecutor, a Trial Chamber may find it necessary to read the
22 Confirmation Decision, together with the Document Containing the Charges and the
23 subsequent amendments, to see whether those allegations are within the scope of the
24 case. As the Pre-Trial Chamber's task is to determine the parameters of the charges,
25 it remains for the Trial Chamber to assess the individual factual allegations within the

1 scope of the charges.

2 Here, the Appeals Chamber observes that although the confirmation decision does
3 not specifically address the seven police reports referred to in the Prosecutor's
4 application in the section of the confirmation decision discussing Mr Al Hassan's
5 responsibility under Article 25(3)(c) of the Statute, this does not necessarily mean that
6 the Trial Chamber may not consider the allegation that these reports were drafted and
7 signed by Mr Al Hassan.

8 Rather, the Confirmation Decision defines the parameters of the facts and
9 circumstances in the charges. In this case, those parameters include the allegation
10 that Mr Al Hassan contributed to the crimes identified in the Document Containing
11 the Charges by serving an important role in his position during the relevant period
12 and that in this position, he carried out certain functions as set out in the confirmation
13 decision. The Appeals Chamber finds that this interpretation of the Confirmation
14 Decision is consistent with the decision, with this decision as a whole, and the manner
15 in which the Pre-Trial Chamber set out to make findings of fact.

16 Therefore, the Appeals Chamber finds that the Trial Chamber did not exceed the facts
17 and circumstances described in the charges in giving notice under Regulation 55(2) of
18 the Regulations.

19 To conclude, the Appeals Chamber recalls that in an appeal pursuant to Article
20 82(1)(d) of the Statute, the Appeals Chamber may confirm, reverse or amend the
21 decision appealed. In the present case, in light of the Appeals Chamber's conclusion
22 that the error found under the first ground of appeal did not materially affect the
23 Impugned Decision, as well as the conclusion rejecting the second ground of appeal,
24 the Appeals Chamber unanimously finds that it is appropriate to confirm the
25 Impugned Decision.

- 1 This brings us to the end of the summary of the Appeals Chamber's judgment.
- 2 I would like to thank the court reporters, interpreters and other Registry staff for their
- 3 valuable assistance today in holding this hearing.
- 4 The hearing is adjourned.
- 5 THE COURT OFFICER: [16:51:46] All rise.
- 6 (The hearing ends in open session at 4.51 p.m.)