

**Cour
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**International
Criminal
Court**

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No.: **ICC-01/12-01/18**

Date: **15 October 2021**

TRIAL CHAMBER X

Before: Judge Antoine Kesia-Mbe Mindua, Presiding
Judge Tomoko Akane
Judge Kimberly Prost

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 request for leave to appeal ‘Second Decision on notice of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court’” (ICC-01/12-01/18-1794-Conf, filed on 1 October 2021)

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court***to:****The Office of the Prosecutor**Mr Karim A. A. Khan QC
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I. Introduction

1. The Trial Chamber should dismiss the Defence request for leave to appeal (“Request”)¹ its Second Decision on notice of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court (“Decision”).² The single issue the Defence seeks leave to appeal concerns a matter that has already been resolved by the Appeals Chamber, namely, that Trial Chambers can re-characterise facts to a different/additional mode of liability and are not bound by Pre-Trial Chamber’s (legal) characterisation of the same facts, and in any event, amounts to mere disagreement with the Decision, and misreads and mischaracterises the Decision. It is thus not appealable under article 82(1)(d) of the Statute. Even assuming *arguendo* that the proposed issue is appealable, it does not meet the remaining article 82(1)(d) cumulative criteria. It would not significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial, and its immediate resolution by the Appeals Chamber may not materially advance the proceedings.

II. Confidentiality

2. Pursuant to regulation 23*bis*(2) of the Regulations of the Court (“Regulations”), this response is filed confidentially because the Request was filed with this classification. A public redacted version will be filed in due course.

III. Submissions

Issue: Whether the Trial Chamber erred in law by exceeding the facts and circumstances confirmed by Pre-Trial Chamber I when issuing notice of possible re-characterisation of Mr Al Hassan’s responsibility as a direct perpetrator for the charged incident involving [REDACTED] pursuant to article 25(3)(a) of the Statute

A. The proposed issue is not appealable.

3. This issue is not appealable because it concerns a matter already addressed by the Appeals Chamber, amounts to mere disagreement with the Decision, and is based on a misunderstanding and mischaracterisation of the Decision. It should therefore not be certified for appeal.³

The proposed issue concerns a matter already addressed by the Appeals Chamber, and in any event merely expresses disagreement with the Decision.

¹ ICC-01/12-01/18-1773-Conf (“Request”).

² ICC-01/12-01/18-1739-Conf (“Decision”). A public redacted version of the Decision was filed on 20 September 2021.

³ ICC-02/05-02/09-267, para. 4, 11-12; ICC-01/04-01/10-487, para. 32-33; ICC-01/05-01/13-1278, para. 9.

4. By seeking to appeal this issue, the Defence seeks to appeal a matter that has already been addressed by the Appeals Chamber, namely, that Trial Chambers can re-characterise facts (to a different/additional mode of liability) and are not bound by the Pre-Trial Chamber's (legal) characterisation of the same facts.⁴ In any event, the Defence merely disagrees with the Trial Chamber's issuance of the notice of possible re-characterisation of the Accused's liability as a direct perpetrator under article 25(3)(a) of the Statute for the flogging of ██████████.

5. The Defence alleges that the Trial Chamber exceeded the facts and circumstances confirmed by Pre-Trial Chamber I ("the PTC") by relying on the alleged fact of the Accused personally flogging ██████████ which was rejected by the PTC in its Confirmation Decision.⁵

6. The Trial Chamber explained in its Decision that it "can re-characterise facts and circumstances pursuant to Regulation 55 of the Regulations to include a mode of liability that was considered, but not confirmed by the Pre-Trial Chamber, so long as the facts and circumstances that could potentially be re-characterised were confirmed by the Pre-Trial Chamber."⁶

7. In its Decision, the Trial Chamber assessed that that the legal elements of Article 25(3)(a) of the Statute in relation to the incident concerning ██████████ under counts 1 to 5 may be derived from the facts and circumstances confirmed by PTC I and that the possible re-characterisation would not exceed the facts and circumstances described in the charges.⁸ In seeking leave to appeal, the Defence merely disagrees that the Accused's liability as a direct perpetrator under article 25(3)(a) of the Statute for flogging ██████████ may be derived from the facts and circumstances confirmed by the PTC.

8. The Trial Chamber recalled the Appeals Chamber's explanation that it may view the confirmation decision holistically in its interpretation of how the PTC set out to delimit the scope of the "facts and circumstances" at issue for trial, reading the confirmation decision

⁴ See ICC-01/05-01/08-2487-Red, para. 28.

⁵ Request, para. 27.

⁶ Decision, para. 29.

⁷ Decision, para. 30.

⁸ Decision, para. 36-38.

together with the document containing the charges and subsequent amendments if necessary.⁹ The Trial Chamber also cited the PTC's reasoning that while the Trial Chamber is barred from exceeding the facts and circumstances described in the charges, the Trial Chamber may nonetheless "evaluate them differently" and accordingly may re-assess the Accused's responsibility pursuant to Regulation 55 of the Regulations.¹⁰

9. The Trial Chamber noted the facts and circumstances as confirmed by PTC that the Accused participated in the flogging of [REDACTED]. Specifically, the PTC found that the Accused signed the Islamic police report concerning [REDACTED], that the Accused was present during the flogging of this individual, and that the Accused himself declared that he participated in this flogging.¹¹

10. The Trial Chamber noted that when the Prosecution sought to correct errors in the assessment or evaluation of evidence in the Confirmation Decision in relation to, among others, the Accused's admission that he personally flogged [REDACTED], the PTC considered that this did not concern an amendment of the factual scope of the charges already confirmed in the Confirmation Decision. The PTC recalled that it already confirmed the facts, including with respect to the flogging of [REDACTED]. The PTC stated that the corrections sought by the Prosecution could be canvassed at trial, and that any errors could be rectified by the Trial Chamber if necessary.¹²

11. The PTC itself therefore considered that the issue of whether the Accused admitted that he personally flogged [REDACTED] was not part of the facts and circumstances that needed to be confirmed at the pre-trial stage of the proceedings. Instead, the PTC considered it as an evidentiary issue best evaluated by the Trial Chamber during trial.¹³

12. In issuing its Decision, the Trial Chamber follows the PTC's explanation of the scope of the charges that it confirmed.

⁹ Decision, para. 29, citing ICC-01/12-01/18-1562-Red ("Appeals Judgement"), para. 94.

¹⁰ Decision, para. 30, citing ICC-01/12-01/18-608-Red-tENG ("PTC Decision on Corrections"), para. 46-47.

¹¹ Decision, para. 31, citing ICC-01/12-01/18-461-Conf-Corr (*see* ICC-01/12-01/18-461-Conf-Corr "Confirmation Decision"), para. 307, to be read in conjunction with para. 789 and 912.

¹² Decision, para. 33, citing Prosecution Request to Amend the Charges, ICC-01/12-01/18-568-Conf, paras 16-19 and PTC Decision on Corrections, para. 28, 44-46.

¹³ *See* PTC Decision on Corrections, para. 41 (finding that that it fell within the ultimate discretion of the Trial Chamber to determine the sequence of events in detail on the basis of the evidence adduced and canvassed by the parties before the Bench).

13. By seeking leave to appeal the present proposed issue, the Defence is merely expressing disagreement not only with the Decision, but also with the PTC's decision on the Prosecution request for corrections.¹⁴

The proposed issue arises from a misunderstanding and mischaracterisation of the Decision

14. Furthermore, the proposed issue is not appealable as it arises from the Defence's misunderstanding and mischaracterisation of the Decision (and of the Confirmation Decision). The Defence considers that the Decision entailed a notice of the possibility of a change in the statement of facts, rather than of a change in the legal characterisation of the facts, and thereby exceeds the remit of Regulation 55.¹⁵

15. The Trial Chamber recalled that in declining to grant the Prosecution request to correct the Confirmation Decision as regards the Accused's admission that he personally flogged [REDACTED], the PTC considered that the facts as regards this victim had been confirmed in the Confirmation Decision.¹⁶ The Trial Chamber noted the facts and circumstances as confirmed by PTC that the Accused participated in the flogging of [REDACTED]. Specifically, the PTC found that the Accused signed the Islamic police report concerning [REDACTED], that the Accused was present during the flogging of this individual, and that the Accused himself declared that he participated in this flogging.¹⁷ As discussed above, the PTC found that it was open to the Trial Chamber to make any necessary corrections during trial.¹⁸

16. The Defence argument that the Trial Chamber exceeded the confirmed facts and circumstances because the PTC made a factual finding in its Confirmation Decision that the Accused did not admit to flogging [REDACTED]¹⁹ thus misunderstands the Decision and the Confirmation Decision.

17. The PTC declined to confirm the Accused's liability as a direct perpetrator under article 25(3)(a) of the Statute for the flogging of [REDACTED] because it was not established to the requisite standard that the Accused had himself administered the flogging on the basis

¹⁴ PTC Decision on Corrections.

¹⁵ Request, para. 20, 26-27.

¹⁶ Decision, para. 33, citing PTC Decision on Corrections, para. 44-46.

¹⁷ Decision, para. 31, citing Confirmation Decision, para. 307, to be read in conjunction with para. 789 and 912.

¹⁸ Decision, para. 33, citing PTC Decision on Corrections, para. 44-46.

¹⁹ Request, para. 26.

that the PTC did not find that the Accused had admitted to flogging [REDACTED] but instead was of the view that the exact form of his participation in this flogging was unknown.²⁰ This, however, did not amount to a factual finding by the PTC that the Accused did not personally flog [REDACTED]. Nor does the Trial Chamber's notice of possible legal re-characterisation exceed the confirmed facts and circumstances.

18. The Defence further asserts that there was no specific finding by the PTC that the persons who executed the sentences on 29 November 2012 were members of the Islamic police, and instead only found that they were from Ansar Dine/AQMI generally.²¹ What the PTC in fact considered was that it was not necessary to establish that the crimes had been committed by members of the Islamic police, as it had been established to the required standard that the physical perpetrators of the crime and the persons present to ensure its execution were members of Ansar Dine/AQMI, among whom were members of the Islamic police.²²

19. The Trial Chamber made it clear in its Decision that "the legal elements of Article 25(3)(a) of the Statute in relation to the incident concerning [REDACTED] under counts 1 to 5 may be derived from the facts and circumstances confirmed by Pre-Trial Chamber I", specifically referring to paragraphs 307, 789 and 912 of the Confirmation Decision and the evidence received.²³

20. The Trial Chamber has now admitted into evidence relevant evidence in this regard – specifically, the audio recordings and transcripts of the Accused's interviews with the

²⁰ See Decision, para. 32, citing Confirmation Decision, para. 307 (n.858), 789-790.

²¹ Request, para. 26.

²² Confirmation Decision, para. 912: «Se fondant sur les faits établis aux paragraphes 307 à 308 de cette décision, la Chambre considère qu'il n'est pas nécessaire dans ce cas particulier de démontrer que les crimes ont été commis par des membres de la Police islamique, car, d'une part, il est établi au standard requis, au vu des circonstances, que les auteurs physiques du crime et les personnes présentes pour assurer son exécution étaient des membres d'Ansar Dine/AQMI, parmi lesquels des membres de la Police islamique.» See also Confirmation Decision, para. 307 ('La Chambre considère que le Procureur produit suffisamment d'éléments de preuve permettant d'établir, au standard requis, que M. Al Hassan a signé le rapport de la Police islamique concernant [REDACTED] Le [REDACTED], [REDACTED] ont été flagellés, de 100 coups de fouet chacun, [REDACTED], après avoir été condamnés par le Tribunal islamique [REDACTED]. Le Tribunal islamique les a condamnés à 100 coups de fouet, [REDACTED]

[REDACTED] M. Al Hassan était présent lors de la flagellation [REDACTED] et avec les hommes assurant un « cordon de sécurité » entre la personne qui était flagellée et le public, [REDACTED]

²³ Decision, para. 36.

Prosecution – and “is now in a better position to assess, based on evidence currently before it, the circumstances under which the accused allegedly participated in the flogging of [REDACTED] [REDACTED]”.²⁴ Corollary to this determination is the Trial Chamber’s ability to now determine “whether it accordingly appears, according to the standard applicable under Regulation 55 of the Regulations, that such participation may be legally re-characterised as direct participation under Article 25(3)(a) of the Statute.”²⁵

21. As the proposed issue for appeal is premised on the Defence’s misunderstanding and mischaracterisation of the Decision (and of the Confirmation Decision), in addition to expressing mere disagreement with the Decision, it is in fact not appealable. The Request must therefore be denied.

B. The Request fails to meet the remaining cumulative criteria under article 82(1)(d) of the Statute.

22. Even assuming *arguendo* that the proposed issue is appealable, the Request should still be denied because it does not show that the proposed issue for appeal would significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial, and that immediate appellate intervention may materially advance the proceedings.

23. The Trial Chamber emphasised in its Decision that the notice of possible re-characterisation of the Accused’s responsibility as direct perpetration under article 25(3)(a) of the Statute as regards [REDACTED] does not cause unfairness to the Accused at this stage of the proceedings. The Trial Chamber noted that “the Defence is informed in detail of the facts and circumstances relied upon for the proposed re-characterisations, as well as the relevant evidentiary basis” and that the Defence “has adequate time to prepare its defence and adapt its strategy as necessary.”²⁶

24. The Defence points to the timing of the Decision vis-à-vis the current stage of the Prosecution case in an attempt to buttress its argument that the Decision impacts upon the fair trial rights of the Accused.

25. This is an unfounded argument. First, the Prosecution case is still ongoing, and the

²⁴ Decision, para. 34.

²⁵ Decision, para. 34.

²⁶ Decision, para. 40.

Defence case has yet to begin. The Defence “has adequate time to prepare its defence and adapt its strategy as necessary.”²⁷

26. Second, the Decision in giving notice of possible legal re-characterisation does not exceed the confirmed facts and circumstances. The Defence does not explain how it is unfairly prejudiced by the Decision given that it had to respond to these facts and circumstances in the first place. This is all the more so considering that the PTC confirmed the Accused’s responsibility under Article 25(3)(c) and Article 25(3)(d) of the Statute in relation to the flogging of [REDACTED] for the same counts.

27. Third, the Defence was put on notice before trial commenced that article 25(3)(a) direct perpetration liability in relation to the flogging of [REDACTED] may attach to the Accused. It was in the document containing the charges. The Prosecution filed its request for corrections and amendments to the Confirmation Decision on 30 January 2020,²⁸ four months after the Confirmation Decision was issued and a substantial period before the start of trial. The PTC’s decision on this request was issued within three weeks, on 21 February 2020.²⁹ The Prosecution filed its application for notice to be given under Regulation 55(2) of the Regulations on 23 June 2020.³⁰ In its first decision on this application, issued on 17 December 2020, the Chamber declined to provide notice of possible re-characterisation for the Accused’s article 25(3)(a) direct perpetration in relation to the flogging of [REDACTED] but noted that its assessment in the First Decision was without prejudice to provide notice at a later point in time, either *proprio motu* or following a request, should it consider it to be appropriate to do so at the relevant time.³¹

28. Moreover, immediate resolution of the issue by the Appeals Chamber may not materially advance the proceedings. The Appeals Chamber already addressed the issue of facts and circumstances described in the charges in the present case and the roles of the Pre-Trial and Trial Chambers in this regard.³² The Decision was issued following this Appeals Judgment and was guided thereby.³³

²⁷ Decision, para. 40.

²⁸ ICC-01/12-01/18-568-Conf.

²⁹ PTC Decision on Corrections.

³⁰ ICC-01/12-01/18-0894-Conf.

³¹ ICC-01/12-01/18-1211-Conf, para. 100-101.

³² ICC-01/12-01/18-1562-Conf, para. 92-94, 106.

³³ Decision, para. 12.

29. The Appeals Chamber explained that “the correct balance between the pre-trial Chamber and trial chamber is struck where...the trial chamber is capable of ascertaining the scope of a case once the trial for that case is set.”³⁴ The Appeals Chamber noted that “[i]f the opposite were true, a trial chamber would be unable to apply regulation 55(1), which calls upon a trial chamber to ascertain the ‘facts and circumstances’ described in the charges.”³⁵

30. Accordingly, the proposed issue would not significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial, and immediate appellate intervention may not materially advance the proceedings.

IV. Conclusion

31. For the reasons set out above, the Defence Request should be denied.



Karim A. A. Khan QC, Prosecutor

Dated this 15th of October 2021

At The Hague, The Netherlands

³⁴ ICC-01/12-01/18-1562-Conf, para. 106.

³⁵ ICC-01/12-01/18-1562-Conf, para. 106.