

Decision on the Confirmation of Charges in the Al Hassan case : Expert Commentary - Part IV

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6. Rights of the Accused and Protection of Witnesses and Victims: Asymmetrical Interactions?

In the DCC, the Pre-Trial Chamber refrained from modifying the Prosecutor's legal characterisation of certain facts, while calling on the Trial Chamber to requalify *in limine litis* if it 'deems it appropriate' [our translation], as permitted by regulation 55 of the [Regulations of the Court \(DCC\)](#), paras. 315 and 682). The use of this regulation *proprio motu* by judges to requalify facts or modes of liability in this case as well, as in several others (see e.g. Lubanga, [Judgement pursuant to Article 74 of the Statute](#), paras. 566-67; Bemba, [Décision informant les parties et participants que la qualification juridique des faits peut être modifiée conformément à la norme 55-2 du Règlement de la Cour](#), para. 5; Katanga, [Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons](#), paras. 23-26) continues to be criticised. Many see it as an [abuse of power](#) limiting the accused's exercise of the rights to information, of his right to have the time and facilities necessary to prepare its defence, the right to be tried within a reasonable time and, ultimately, of his right to a fair and impartial trial. While this call to the Trial Chamber allows the defence to prepare in advance for possible changes, it is not enough to mitigate all the resulting violations of the rights of the defence.

The defence is also very concerned about the continued use of protection measures for witnesses, victims and their family members, and denounces the unprecedented scale of the redaction of the documents provided by the Prosecutor. These measures, although legitimate in view of the very high insecurity in the areas where these persons live (several murders have been reported and the authorities do not seem to control these areas or have a little control), nevertheless have a negative impact on the rights of the accused in that they hinder the preparation of a full defence, an essential bulwark against arbitrariness and bias. It also is for this reason that Al Hassan is detained under very restrictive conditions and has very little contact with the outside world, including his family, thus limiting his rights to privacy and to the family (Al Hassan, [Request on behalf of Mr Al Hassan to vary the conditions of his detention](#), para. 2). These restrictive measures to protect victims and witnesses would be justified by the presence of members of jihadist groups or their accomplices in the region. However, while necessary, they should not be unreasonable or disproportionate to the objectives pursued, and the ICC should mitigate its negative effects.

Finally, in a request submitted on 26 June 2020, the defense asked Trial Chamber X to terminate the ongoing proceedings and release Mr. Al Hassan, as the charges and evidence would be tainted by torture and cruel, inhuman and degrading treatment (Al Hassan, 'Corrigendum to "Defence Request to terminate the proceedings"', paras. 101 and 109). Future developments related to this request will be an aspect to follow closely in the coming weeks.

7. Conclusion

The trial of Al Hassan is an important step in the fight against impunity for international crimes committed in Mali. Despite the accused's hierarchically low level within the organisation of which he was a member, the case remains admissible, and is also likely to open the door to possible prosecution of higher officials. The accuracy of the charges brought by the OTP allows it to avoid the repetition of errors made in the context of the Bemba case, acquitted in 2018. The Chamber's analysis of war crimes reveals a fair application of international humanitarian law and the charges of crimes against humanity reflect the systematic nature of the crimes committed. Confirmation of the charge of crime against humanity of gender-based persecution is a historic first, which can be anticipated leading to an important clarification of the definition of gender in international criminal law. However, some challenges still seem to limit the accused's right to a full defence. These aspects will be closely observed throughout the trial, which begins on July 14.



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