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TRIAL CHAMBER I

Before: Judge Geoffrey Henderson, Presiding Judge
Judge Olga Herrera-Carbuccia
Judge Bertram Schmitt

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

***IN THE CASE OF
THE PROSECUTOR v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ***

Public

**Prosecution request for notice to be given of a possible recharacterisation
pursuant to regulation 55(2)**

Source: Office of the Prosecutor

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

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Introduction

1. The Office of the Prosecutor (“Prosecution”) requests that Trial Chamber I (“Chamber”) give notice to the Parties and participants pursuant to regulation 55(2) of the Regulations of the Court (“RoC”) that the legal characterisation of the facts confirmed by Pre-Trial Chamber I (“Pre-Trial Chamber”) may be subject to change to accord with a further alternative form of participation of the Accused Laurent Gbagbo (“Gbagbo”): superior responsibility under article 28(a) and (b) of the Rome Statute (“Statute”) for all crimes (“Request”).
2. As stated by the Appeals Chamber, “a principal purpose of Regulation 55 is to close accountability gaps, a purpose that is fully consistent with the Statute”.¹ Providing notice prior to the start of the trial² of this possibility allows the Parties to prepare their cases on the basis that the Chamber may make such a modification and respects the Accused’s fair trial rights by limiting prejudice and delays which could ensue were the Chamber to provide notice at a later stage in the proceedings.

Procedural history

3. On 13 January 2014, the Prosecution submitted the *Document amendé de notification des charges*³ in which it charged Gbagbo with the crimes against humanity of murder, rape, other inhumane acts (or, alternatively, attempted murder) and persecution. The modes of liability alleged were indirect co-perpetration (article 25(3)(a) of the Statute), ordering, soliciting or inducing (article 25(3)(b) of the Statute), otherwise contributing to the commission (article 25(3)(d) of the Statute), as well as command responsibility and superior responsibility (article 28(a) and (b), respectively, of the Statute).

¹ ICC-01/04-01/06-2205 OA15 OA16, para.77; ICC-01/04-01/07-3363 OA13, paras.22, 104.

² Regulation 55(2) provides that notice may be provided at “at any time during the trial”. Notice should “always be given as early as possible”: ICC-01/04-01/07-3363, para.24.

³ ICC-02/11-01/11-592 (“Amended DCC”).

4. On 12 June 2014, the Pre-Trial Chamber issued its Decision on the confirmation of charges against Gbagbo (“Confirmation Decision”).⁴ It found substantial grounds to believe that Gbagbo was responsible for the crimes as charged under articles 25(3)(a), 25(3)(b) and 25(3)(d) of the Statute.⁵ It declined, however, to confirm the charges based on Gbagbo’s alleged responsibility under article 28 of the Statute.⁶
5. On 11 March 2015, the Chamber granted the Prosecution’s request to join the *Gbagbo* and *Blé Goudé* cases.⁷

Applicable Law and Jurisprudence

Alternative Modes of Liability

6. As the Pre-Trial Chamber correctly acknowledged in its Confirmation Decision, it is possible, and indeed appropriate, for all available legal characterisations of the confirmed facts to be placed before the Trial Chamber for its ultimate determination.⁸ The charging of alternative modes of liability is not precluded by the Statute,⁹ and finds support in decisions of Pre-Trial Chamber II in *Ntaganda*,¹⁰ and *Ruto and Sang*.¹¹

Regulation 55

7. Regulation 55 of the RoC provides as follows:
 1. In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under

⁴ ICC-02/11-01/11-656.

⁵ ICC-02/11-01/11-656, para.266.

⁶ ICC-02/11-01/11-656, para.265. The Prosecution has not sought leave to appeal this issue arising from the Confirmation Decision, because it has determined that due to the availability in this case of a legal re-characterisation pursuant to regulation 55 of the RoC of the confirmed facts to accord to the modes of liability under article 28, immediate resolution by the Appeals Chamber of such an issue was not necessary to materially advance the proceedings. *See*, for instance, ICC-01/04-01/06-915, paras.41-45.

⁷ ICC-02/11-01/11-810; ICC-02/11-02/11-222; ICC-02/11-01/15-1.

⁸ ICC-02/11-01/11-656, paras.227-228.

⁹ Article 61(5) of the Statute states that “the Prosecutor shall support *each charge* with sufficient evidence”(emphasis added).

¹⁰ ICC-01/04-02/06-309, para.100.

¹¹ ICC-01/09-01/11-1, para.36; ICC-01/09-01/11-373, paras.284-285.

articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.

2. If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change.
3. For the purposes of sub-regulation 2, the Chamber shall, in particular, ensure that the accused shall:
 - (a) Have adequate time and facilities for the effective preparation of his or her defence in accordance with article 67, paragraph 1 (b); and
 - (b) If necessary, be given the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence admissible under the Statute in accordance with article 67, paragraph 1(e).
8. Article 74(2) of the Statute provides that the Trial Chamber's decision "shall not exceed the facts and circumstances described in the charges and any amendments to the charges." The Appeals Chamber has confirmed in the *Lubanga* case that regulation 55 "may not be used to exceed the facts and circumstances described in the charges or any amendment thereto."¹² In interpreting this pronouncement, Trial Chamber I in the same case found that "it is necessary to focus on the factual allegations in that Decision [the Decision on the Confirmation of Charges] and on whether the requested modification of the legal characterisation of facts arises (i) from factual allegations included in the Decision on the Confirmation of Charges, which (ii) support each of the legal elements of the crimes with which the accused is charged."¹³

¹² ICC-01/04-01/06-2205, para.1.

¹³ ICC-01/04-01/06-2223, para.30.

9. In relation to the recharacterisation of an accused's role in an alleged crime, the Appeals Chamber in the *Katanga* case rejected the proposition that it was "obviously impermissible to recharacterise the facts so that the role of [the accused] changes...".¹⁴ On the contrary, the Chamber held that "[a]ny change from, for example, being alleged to be a principal to being alleged to have in fact been an accessory will always necessarily involve a change in the characterisation of the role. Were such a change not to be permissible, it would defeat the purpose of regulation 55 of the Regulations of the Court."¹⁵ Trial Chamber II, in its article 74 Judgment asked "*si les «éléments factuels» sous-tendant la nouvelle qualification... sont contenus dans la Décision relative à la confirmation des charges, en d'autres termes, s'ils se situent «à l'intérieur» du cadre des faits contenus dans ladite décision et s'ils ne le dépassent pas*".¹⁶
10. Trial Chambers of this Court have given notice under regulation 55(2) that the legal characterisation of facts may be subject to change on multiple occasions. In the *Lubanga* case, pursuant to a request by the Prosecution,¹⁷ Trial Chamber I gave notice before trial began that it might "modify the characterisation of the facts" in relation to the nature of the armed conflict,¹⁸ and advised the parties to prepare their case on that basis.¹⁹ In *Ruto and Sang*, Trial Chamber V(A) provided notice shortly after the commencement of trial of the possibility that Ruto's alleged criminal responsibility may be recharacterised under article 25(3)(b), (c) or (d) of the Statute.²⁰ Trial Chamber V(A) noted that "for an application for the notice of a possibility of a legal recharacterisation, facts and circumstances pleaded in the charging document can also sufficiently inform the Chamber as to the apparent possibility of an eventual change in legal characterisation."²¹ The *Katanga*²² and

¹⁴ ICC-01/04-01/07-3363, para.57.

¹⁵ ICC-01/04-01/07-3363, para.57.

¹⁶ ICC-01/04-01/07-3436, para.1450.

¹⁷ ICC-01/04-01/06-953.

¹⁸ ICC-01/04-01/06-1084, para.48.

¹⁹ ICC-01/04-01/06-1084, para.49.

²⁰ ICC-01/09-01/11-1122, p.20.

²¹ ICC-01/09-01/11-1122, para.24.

²² See ICC-01/04-01/07-3319-tENG/FRA, p.29. This decision was confirmed by the Appeals Chamber, see ICC-01/04-01/07-3363, p.39.

*Bemba*²³ Trial Chambers also gave regulation 55(2) notices, albeit at a later stage of the proceedings.

Submissions

Notice is required in the instant case

11. The facts and circumstances described in Section 4 of the Confirmation Decision support each of the legal elements of command responsibility and superior responsibility under article 28(a) and (b), respectively, of the Statute. Significantly, Pre-Trial Chamber I's decision to decline to confirm the charges based on article 28 was not due to a lack of evidential support for the facts relevant to the legal elements of the mode of liability or the absence of the necessary factual findings. Instead, it was based on the Pre-Trial Chamber's view that article 28 – a mode of liability focusing on the mere failure to prevent or repress crimes – less aptly reflected the narrative of facts established by the evidence, namely: that the crimes were committed pursuant to Gbagbo's deliberate effort to maintain power at all costs.²⁴ The Pre-Trial Chamber therefore did not proceed to consider Gbagbo's responsibility under article 28, stating that such consideration "would require the Chamber to depart significantly from its understanding of how events unfolded in Cote [sic] d'Ivoire during the post-electoral crisis and Laurent Gbagbo's involvement therein."²⁵

12. Although the Pre-Trial Chamber did not make express findings with respect to the elements of article 28, these elements can be derived from the facts and circumstances confirmed by the Pre-Trial Chamber.²⁶ Specifically, the Pre-Trial Chamber considered that the evidence, taken as a whole, demonstrated that Gbagbo's failure "to prevent violence or to take adequate steps to investigate and

²³ See ICC-01/05-01/08-2324, para.5.

²⁴ ICC-02/11-01/11-656, paras.263-265.

²⁵ ICC-02/11-01/11-656, para.265.

²⁶ As long as the Trial Chamber does not "exceed the facts and circumstances described in the Charges" (see article 74(2)), it is free to "change the legal characterisation of these facts" (regulation 55(1)).

punish the authors of the crimes” was “an inherent component of the deliberate effort to achieve the purpose of retaining power at any cost, including through the commission of crimes”, thereby appearing to indicate that Gbagbo’s failure to prevent or repress crimes was in fact subsumed under the deliberate effort to commit the crimes.²⁷ Furthermore, the Pre-Trial Chamber explicitly acknowledged that its approach to modes of liability is “without prejudice to the possibility that trial judges, following the applicable procedure, consider other alternatives as well”,²⁸ and that a different legal characterisation of the facts may occur at trial.²⁹

13. According to the jurisprudence of the Court³⁰ and a plain reading of the Statute, and as demonstrated in more detail below, the elements of article 28 are the following:

- a. the accused must be a military commander or person effectively acting as a military commander (in the case of article 28(a)), or a superior (in the case of article 28(b));
- b. the crimes must be committed by forces under the accused’s effective command and control, or effective authority and control (in the case of article 28(a)), or by subordinates under the accused’s effective authority and control (in the case of article 28(b));
- c. the crimes must be a result of the accused’s failure to exercise control properly over such forces (in the case of article 28(a)), or over such subordinates (in the case of article 28(b));
- d. the accused must have known (in the case of both article 28(a) and (b)), or owing to the circumstances at the time, should have known (in the case of article 28(a)), or consciously disregarded information which clearly

²⁷ ICC-02/11-01/11-656, para.264.

²⁸ ICC-02/11-01/11-656, para.228.

²⁹ ICC-02/11-01/11-656, para.263.

³⁰ See ICC-01/05-01/08-424, paras.404-443.

indicated (in the case of article 28(b)), that the forces or subordinates were committing or about to commit such crimes;

- e. the crimes must have concerned activities that were within the effective responsibility and control of the superior (in the case of article 28(b) only); and
- f. the accused must have failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of the crimes or to submit the matter to the competent authorities for investigation and prosecution (in the case of both article 28(a) and (b)).

14. The following section expands upon these legal elements and sets out, in respect of each element, the material facts confirmed by the Pre-Trial Chamber in Section 4 (paragraphs 267 to 277) of the Confirmation Decision.³¹ While the Prosecution submits that the elements of article 28 can be derived from those facts, the Chamber is not limited, either in its decision on this request for notice, or in its future judgment pursuant to article 74, by the specific facts listed below. The Chamber's decision should be based on the totality of the material facts confirmed by the Pre-Trial Chamber.³²

a. Military commander or superior

Law:

15. Article 28(a) covers military commanders or persons effectively acting as such.³³

The latter category includes superiors with authority and control over regular government forces such as armed police units, or irregular forces such as rebel groups, armed resistance movements and militias that follow a structure of

³¹ Facts of a subsidiary nature found in the Confirmation Decision are also provided to fully appreciate the meaning of the material facts as found by the Decision. However, they are not by themselves the subject of recharacterisation pursuant to regulation 55. Decisions of the Pre-Trial, Trial Chambers make a distinction between 'material facts' and 'subsidiary facts'. Material facts are "those facts and circumstances that underlie the charges" (ICC-02/11-01/11-325, para.27). Subsidiary facts, on the other hand, "may be analysed by the Pre-Trial Chamber insofar as relevant to determine the existence of material facts, but are not themselves part of the charges and are not subject to confirmation by the Pre-Trial Chamber under article 61(7) of the Statute" (ICC-02/11-01/11-325, para.27). See, also, ICC-02/05-03/09-121-Corr-Red, paras.36-37; ICC-01/09-02/11-382-Red, paras.56-60; ICC-01/09-01/11-373, paras.44-48; ICC-01/09-02/11-536, paras.13-14.

³² Article 74(2).

³³ ICC-01/05-01/08-424, paras.408-409.

military hierarchy or a chain of command.³⁴ Pre-Trial Chamber III in *Bemba* found that this provision also captures situations where the superior does not exclusively perform military functions³⁵ and applies to a head of state who is *de jure* the commander in chief of the armed forces.³⁶ Article 28(b) is worded to encompass those superiors who are part of a superior-subordinate relationship with the direct perpetrators but are *not* covered by article 28(a).

Facts as confirmed by the Pre-Trial Chamber:

16. The Pre-Trial Chamber found that:

- “At the relevant time, Laurent Gbagbo exercised command, control and authority over the Defence and Security Forces (FDS).”³⁷
- “At the relevant time, he also exercised control and authority, directly and through his inner circle, on pro-Gbagbo youth, militia members and mercenaries who lent their support to the FDS (jointly referred to as “pro-Gbagbo forces”).”³⁸
- “The pro-Gbagbo forces constituted an organised and hierarchal apparatus of power.”³⁹

17. These findings indicate that Gbagbo was a military commander or person effectively acting as a military commander in respect of the pro-Gbagbo forces, for the purposes of article 28(a). It should further be open to the Chamber – at the time of rendering its judgment – to conclude whether on the same facts, in the alternative, Gbagbo was a superior under the meaning of article 28(b).

³⁴ ICC-01/05-01/08-424, para.410.

³⁵ ICC-01/05-01/08-424, para.408 and corresponding fn.522.

³⁶ ICC-01/05-01/08-424, fn.522.

³⁷ Confirmation Decision, para.269. *See, also*, paras.86-99, 127, 150-151, 171, 230, 232-234, 244-245, 255.

³⁸ Confirmation Decision, para.269. *See, also*, paras.68, 87, 89, 100-109, 135-137, 145, 230, 232-234, 244-246, 255.

³⁹ Confirmation Decision, para.270. *See, also*, paras.94-96, 219, 230, 233-234.

b. Perpetrators under the Accused's control

Law:

18. Pre-Trial Chamber II in the *Bemba* case pointed out that “‘effective control’ is generally a manifestation of a superior-subordinate relationship between the suspect and the forces or subordinates in a *de jure* or *de facto* hierarchal relationship”.⁴⁰ Drawing on the jurisprudence of the *ad hoc* Tribunals, it explained effective control as “‘the material ability [or power] to prevent and punish’ the commission of offences, and, as such, failure to exercise such abilities of control gives rise to criminal responsibility if other requirements are met.”⁴¹ The Pre-Trial Chamber went on to list various indicia of such power, including the suspect’s official position; his power to issue or give orders and capacity to ensure compliance therewith; his capacity to re-subordinate units or make changes to command structure; the power to promote, replace, remove or discipline any member of the forces; and the authority to send forces where hostilities take place and withdraw them at any given moment.⁴² In terms of the temporal relationship between the ‘effective control’ and the criminal conduct, effective control must have existed at least at the time the crimes by the subordinates were about to be committed.⁴³

Facts as confirmed by the Pre-Trial Chamber:

19. The Prosecution refers to the findings of the Pre-Trial Chamber set out in paragraph 16 above, which are equally applicable to this element. In addition, the Pre-Trial Chamber also found that:

- “Laurent Gbagbo created a structure which enabled him to implement the common plan... by appointing or promoting persons loyal to him to key posts in the government and the FDS, by tasking his subordinates with the

⁴⁰ ICC-01/05-01/08-424, para.414.

⁴¹ ICC-01/05-01/08-424, para.415 (internal footnotes omitted).

⁴² ICC-01/05-01/08-424, paras.416-417.

⁴³ ICC-01/05-01/08-424, paras.418-419.

recruitment of additional members, including pro-Gbagbo youth and militia men, to the FDS and by supervising their recruitment".⁴⁴

- "Laurent Gbagbo armed the forces loyal to him and which committed the crimes charged, by placing weapons which he controlled at their disposal, by tasking his subordinates with purchasing additional weapons, by providing the necessary funding and by ensuring that weapons and ammunition were supplied to these forces".⁴⁵
- Gbagbo held "frequent meetings and regular dialogue with his inner circle and other members of his support network on the subject [of the common plan] in order to be briefed about the situation on the ground by his commanders and to issue them with operational instructions."⁴⁶
- Gbagbo "incited the Yopougon pro-Gbagbo youth and militia members, either directly or through Charles Blé Goudé, to fight to protect the nation and not to let it fall into the hands of the enemy, and called on his supporters to continue to resist and to fight Alassane Ouattara and his 'terrorists'".⁴⁷

20. In relation to specific incidents, the Pre-Trial Chamber further found that:

- Gbagbo "ordered the deployment of armed forces against demonstrators opposed to his politics".⁴⁸
- Gbagbo "instructed the forces loyal to him to stop the pro-Ouattara march on the RTI headquarters on 16 December 2010".⁴⁹
- Gbagbo "ordered these forces [forces loyal to him] to lay siege to the Golf Hotel and its residents".⁵⁰

⁴⁴ Confirmation Decision, para.276(b). *See, also*, paras.93, 109, 124-125, 133-149, 153, 160-162, 177-181, 218, 230-234, 237, 245-246, 250, 255, 258.

⁴⁵ Confirmation Decision, para.276(c). *See, also*, paras.92, 102, 131-132, 141-142, 146, 153, 231-234, 237, 245-246, 248, 250, 254-258.

⁴⁶ Confirmation Decision, para.276(d). *See, also*, paras.89, 150-164, 175, 231, 237, 248, 254-258.

⁴⁷ Confirmation Decision, para.276(d). *See, also*, paras.70, 83-85, 105-109, 165-166, 180-181, 231-234, 237, 245-248, 250, 254-258.

⁴⁸ Confirmation Decision, para.276(d). *See, also*, paras.25-26, 40, 43.

⁴⁹ Confirmation Decision, para.276(d). *See, also*, paras. 26, 40, 152, 232, 246-247, 255.

⁵⁰ Confirmation Decision, para.276(d). *See, also*, paras.121-122, 231, 258.

- Gbagbo “directed these forces [forces loyal to him] to stand fast and not to lose Abobo”.⁵¹

21. These findings indicate that the pro-Gbagbo forces were, at the relevant time, under Gbagbo’s effective command and control, or alternatively his effective authority and control. They also provide specific indicia and examples of his exercise of command, authority and control over such forces. Finally, the finding that the essence of the common plan was “to maintain [Gbagbo] as President by all necessary means”⁵² places Gbagbo at the centre of the common plan. The fact that the direct perpetrators then acted in pursuance of the common plan is an indicator that they acted under his authority and control.

c. Result of the failure to exercise control

Law:

22. Article 28(a) establishes criminal responsibility of commanders for crimes committed by their subordinates “as a result of his or her failure to exercise control properly over [his or her] forces”. The Prosecution notes the findings of Pre-Trial Chamber II in the *Bemba* case, namely that—with respect only to the duty to prevent the commission of future crimes⁵³— article 28(a) includes an “element of causality”⁵⁴ which requires proof that “the commander’s failure to exercise his duty to prevent crimes increased the risk” of the commission of the crimes charged.⁵⁵ However, it is the Prosecution’s position that this is not the case: article 28(a) does not create an additional element for the mode of liability under article 28. Such an interpretation would create a double standard between failure to prevent crime and failure to punish crimes, because any “element of causality” cannot logically apply to the latter. To the contrary, the language of article 28 means that *criminal responsibility* under the Statute arises “as a result of” the

⁵¹ Confirmation Decision, para.276(d). See, also, paras.155, 170-176, 246-247, 250, 255, 257.

⁵² Confirmation Decision, para.268. See, also, paras.79, 110-122, 218, 231, 236-237, 246, 248, 254, 256-258.

⁵³ ICC-01/05-01/08-424, para.424.

⁵⁴ ICC-01/05-01/08-424, para.423. The Pre-Trial Chamber found that the “element of causality” did not require proof of a “direct causal link” between “the superior’s omission and the crime committed by his subordinates”:

ICC-01/05-01/08-424, para.425.

⁵⁵ ICC-01/05-01/08-424, para.426.

accused's failure to exercise effective control (his material ability to prevent or punish), and not that the *crime* itself is a result thereof.

Facts as confirmed by the Pre-Trial Chamber:

23. In any event, even if the Chamber finds that a causal element ("increased the risk") applies to article 28, it can be derived from the material facts as confirmed by the Pre-Trial Chamber in this case. Indeed, the fact that Gbagbo's omissions increased the risk that his forces would commit crimes derives from the facts and circumstances demonstrating Gbagbo's failure to exercise his duty to prevent crimes as outlined below at paragraph 30, as well as the facts demonstrating Gbagbo's high degree of control over pro-Gbagbo forces (paragraphs 19 to 21 above). The Prosecution further recalls the finding that the essence of the common plan was to maintain Gbagbo as President by all necessary means.⁵⁶ The common plan revolved around Gbagbo and therefore the crimes would not have been committed if he had exercised control.

d. Knowledge

Law:

24. The *mens rea* element of article 28(a)(i) requires that the accused knew (actual knowledge) or should have known that his subordinates were about to engage or were engaging or had engaged in conduct constituting the crimes.⁵⁷ According to Pre-Trial Chamber II in *Bemba*, actual knowledge may be established through various indicia, including the number of illegal acts; their scope; whether their occurrence was widespread; the type and number of forces involved; the scope and nature of the superior's position and responsibility in the hierarchal structure.⁵⁸ The 'should have known' standard "requires more of an active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his subordinates",⁵⁹ and negligence on the superior's part in failing

⁵⁶ Confirmation Decision, para.268. See, also, paras.79, 110-122, 218, 231, 236-237, 246, 248, 254, 256-258.

⁵⁷ ICC-01/05-01/08-424, para.428.

⁵⁸ ICC-01/05-01/08-424, para.431.

⁵⁹ ICC-01/05-01/08-424, para.433.

to acquire that knowledge.⁶⁰ Possible indicia include the same indicia of actual knowledge, as well as the availability of general information to put the superior on notice of crimes committed by subordinates and sufficient to justify further inquiry or investigation.⁶¹ The *mens rea* element of article 28(b)(i) requires that the accused either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit a crime.

Facts as confirmed by the Pre-Trial Chamber:

25. Both legal requirements under article 28(a)(i) and 28(b)(i) can be derived from the same facts listed below. The Pre-Trial Chamber found that:

- “In advance of the presidential election of 2010, Laurent Gbagbo and his inner circle jointly designed and implemented a common plan to maintain him as President by all necessary means, including by committing the crimes charged. By 27 November 2010, the implementation of the common plan had evolved to include a State or organisational policy to launch a widespread and systematic attack against civilians perceived to support Alassane Ouattara. *Pursuance of this common plan and policy was criminal in nature...*”.⁶²
- “Laurent Gbagbo... could use these forces [pro-Gbagbo forces] to implement the plan and the policy by committing the crimes charged.”⁶³
- The crimes were committed over a four-month period “(b)etween 16 December 2010 and on or around 12 April 2011”.⁶⁴
- Gbagbo “coordinated the implementation of the common plan which resulted in the commission of the crimes, by holding frequent meetings and regular dialogue with his inner circle and other members of his support network on the subject [of the common plan] in order to be briefed about the situation on

⁶⁰ ICC-01/05-01/08-424, para.432.

⁶¹ ICC-01/05-01/08-424, para.434.

⁶² Confirmation Decision, para.268 (emphasis added). See, also, paras.79, 110-122, 131-159, 218, 225, 230-231, 236-238, 248, 250, 254, 256-258.

⁶³ Confirmation Decision, para.270. See, also, paras.123-130, 150-162, 230-234, 245-246.

⁶⁴ Confirmation Decision, paras.271-273. See, also, paras.75-77, 238, 250, 257.

the ground by his commanders and to issue them with operational instructions.”⁶⁵

- “Laurent Gbagbo, either directly or through members of his inner circle, tasked his subordinates with implementing, or incited them to implement, the common plan, which resulted in the commission of the crimes”.⁶⁶
- “In performing these actions and omissions, Laurent Gbagbo had the requisite intent and knowledge in relation to the crimes charged. He also knew that his conduct was, or intended it to be, part of a widespread of systematic attack against a civilian population pursuant to or in furtherance of the policy.”⁶⁷

26. The finding that Gbagbo designed and implemented a common plan that was criminal in nature abundantly demonstrates the *mens rea* of ‘actual knowledge’. The level of briefing he received from his commanders about the situation on the ground would in any case be sufficient to demonstrate Gbagbo’s actual knowledge of the crimes committed. At the very least, his superior position (paragraph 16 above) and control over the pro-Gbagbo forces (paragraphs 19 to 20 above) is sufficient to demonstrate the ‘should have known’ standard.

e. Activities within Gbagbo’s responsibility and control (article 28(b)) only

Law:

27. The purpose of this element – unique to article 28(b) responsibility – is to restrict the liability of a civilian superior to only those activities that were within his or her effective responsibility and control.⁶⁸ In fact, this element would appear to add little beyond the requirement of a superior-subordinate relationship where the superior has effective control over the subordinate, already expressed in article 28(b).

⁶⁵ Confirmation Decision, para.276(d). See, also, paras. 89, 150-164, 175, 231, 237, 248, 254-258.

⁶⁶ Confirmation Decision, para.276(d). See, also, paras.150-162, 230-231, 234, 244-246, 248.

⁶⁷ Confirmation Decision, para.277. See, also, paras.85, 230-231, 236-239, 249-250, 257.

⁶⁸ Greg Vetter, ‘Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)’ (2000) 25 *Yale Journal of International Law* 89, p. 120.

28. The Prosecution recalls the Pre-Trial Chamber's findings on Gbagbo's superior position (paragraph 16 above), his control over the pro-Gbagbo forces (paragraphs 19 to 20 above), and his design and implementation of the common plan (paragraph 25 above). It flows from these findings that the crimes concerned activities that were within Gbagbo's responsibility and control, occurring as they did in pursuance of the common plan.

f. Failure to take all necessary and reasonable measures

29. For this final element, it is necessary to prove that the superior failed to fulfil one of three duties: to prevent crimes (before their commission), to repress crimes (during and after their commission), or to submit the matter to the competent authorities for investigation and prosecution (after the commission of crimes).⁶⁹ What constitutes 'necessary and reasonable measures' will depend on the superior's degree of effective control over his subordinates at the time his duty arises, requiring an assessment of his *de jure* power and his *de facto* ability to take such measures.⁷⁰

Facts as confirmed by the Pre-Trial Chamber:

30. The Pre-Trial Chamber found that:

- "Laurent Gbagbo incited the forces loyal to him to commit crimes: (i) by ordering them not to question the lawfulness of the orders they had received, by making it clear to them that they would not be punished for the crimes committed; (ii) by failing to take measures within his power to prevent or halt the commission of these crimes during the post-election crisis or to punish the perpetrators; and (iii) by failing to refer the matter to the competent authorities for investigation and prosecution."⁷¹

⁶⁹ ICC-01/05-01/08-424, paras.435-437, 439, 442.

⁷⁰ ICC-01/05-01/08-424, para.443.

⁷¹ Confirmation Decision, para.276(e). See, also, paras.182-192, 231, 258.

31. This finding of the Pre-Trial Chamber explicitly addresses in turn Gbagbo's failure to fulfil all three duties, namely of i) prevention, ii) repression, and iii) submission to investigating authorities.
32. All elements of article 28 being supported by the facts and circumstances found in the Confirmation Decision, it would be possible to re-characterise Gbagbo's conduct as entailing command responsibility or superior responsibility without exceeding these facts and circumstances. If all factual components of the charged conduct, including those underpinning the charges confirmed under article 25(a), (b), and (d) of the Statute, are established, it should be open to the Chamber to consider the Accused's responsibility under article 28(a) and (b) of the Statute.

Notice should be provided prior to the start of trial

33. Although notice of the possibility of a recharacterisation may be given at any time during the trial, the Appeals Chamber has stated that it is preferable that it "should always be given as early as possible".⁷² Trial Chamber V(A) has also stated that it is best to assess the need for the legal recharacterisation of facts as early as possible "particularly in circumstances in which the Prosecution has made an early application for this notice on the basis of the facts and circumstances pleaded in the charging document".⁷³
34. Providing notice prior to the start of the trial, rather than at a later stage, will safeguard the Accused's rights pursuant to article 67(1) of the Statute by ensuring that the Accused: (i) is informed in detail of the nature, cause and content of the charges against him; (ii) has adequate time for the preparation of his defence; and (iii) is tried without undue delay. Ultimately, the timely provision of notice would fully preserve the Accused's right to an effective defence.
35. Should notice be provided at the outset of the trial, both the Prosecution and the Defence could present their evidence and examine witnesses with full knowledge

⁷² ICC-01/04-01/07-3363, para.24.

⁷³ ICC-01/09-01/11-1122, para.27.

of the possibility that the Accused's conduct could be recharacterised as article 28 responsibility.

36. Providing notice at this early stage would also avoid delays by making adjournments unnecessary, such as those envisaged in regulation 55(3)(a) of the RoC, or the recall of witnesses and/or calling of new witnesses, envisaged in regulation 55(3)(b) of the RoC. Therefore, giving notice of the possibility of recharacterisation early in the proceedings could avoid significantly extending the length of the trial.⁷⁴

37. As held by Trial Chamber V(A),

“waiting to give such notice increases the chances of prejudice to the Defence. The remediation of this prejudice may involve pressures either to reopen the case in certain respects, recall witnesses that have already testified or, out of respect for the rights of the accused, to forego legal recharacterisation that might otherwise have been in the interests of justice in the case. Such pressures are highly undesirable, and if earlier notice is given then they are avoidable.”⁷⁵

⁷⁴ ICC-01/09-01/11-1122, para.42.

⁷⁵ ICC-01/09-01/11-1122, para.27.

Relief Requested

38. Based on the foregoing, the Prosecution requests that, prior to the start of trial, the Chamber give notice to the Parties and participants pursuant to regulation 55(2) of the RoC that the legal characterisation of the facts may be subject to change to accord with a further alternative form of Gbagbo's participation: command responsibility and superior responsibility under article 28(a) and (b) of the Rome Statute for all counts.



Fatou Bensouda, Prosecutor

Dated this 24th day of April 2015

At The Hague, The Netherlands