

**Cour
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**International
Criminal
Court**

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Date: 19 May 2015

TRIAL CHAMBER I

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

SITUATION IN COTE D'IVOIRE

IN THE CASE OF
THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLE GOUDE

Public

Defence Observations on the “Prosecution request for notice to be given of a possible recharacterisation pursuant to regulation 55(2)” (ICC-02/11-01/15-43)

Source: Defence of Mr Charles Blé Goudé

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Eric MacDonald

Counsel for the Defence of Mr Blé Goudé

Mr Geert-Jan Alexander Knoops
Mr Claver N'dry

Counsel for the Defence of Mr Gbagbo

Mr Emmanuel Altit
Ms Agathe Bahi Baroan

Legal Representatives of the Victims

Ms. Paolina Massidda

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

Ms. Paolina Massidda
Mr. Enrique Carnero Rojo

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. The Defence of Charles Blé Goudé ('the Defence') hereby makes its observations in response to the "Prosecution's request for notice to be given of a possible recharacterisation pursuant to regulation 55(2)" ('Prosecution Request').¹ The Defence avers that the Prosecution's Request directly concerns Mr. Gbagbo. However, the Defence notes with growing concern that since the Prosecution's initial request to join the cases against Mr. Blé Goudé and Mr. Gbagbo,² the Prosecution has made submissions, which directly contradict the arguments it presented to join the cases. Through this request, the Prosecution demonstrates that its theory of the case appears not to be based on the alleged similarity of the charges against Charles Blé Goudé and Laurent Gbagbo.

2. The Defence herewith makes two observations, which may be of assistance to the Chamber in its deliberations concerning the Prosecution's request. First, contrary to the Prosecution's submissions, the facts and circumstances needed to support a finding of command and superior responsibility under article 28(a) and (b) would exceed the facts and circumstances found by the Pre-Trial Chamber in the Decision on the confirmation of charges against Laurent Gbagbo. Second, the timing of the Prosecution's request and the submissions found therein reveal that the Prosecution appears to no longer hold the position that the evidence against Mr. Blé Goudé and Mr. Gbagbo is the same. This recent development raises serious questions as to whether the basis of the joinder decision remains solid.

II. Procedural History

¹ ICC-02/11-01/15-43.

² ICC-02/11-02/11-194.

3. On 12 June 2014, Pre-Trial Chamber I issued the “Decision on the Confirmation of Charges against Laurent Gbagbo” (*Gbagbo Confirmation Decision*). In determining Mr. Gbagbo’s individual criminal responsibility, the Pre-Trial Chamber found substantial grounds to believe that Mr. Gbagbo was individual criminally responsible for the crimes charged under article 25(3)(a), (b), and (d) of the Rome Statute (‘the Statute’).³ It expressly refused to confirm the charges under article 28 of the Statute.⁴
4. On 11 December 2014, Pre-Trial Chamber I issued the “Decision on the Confirmation of Charges against Charles Blé Goudé” (*Blé Goudé Confirmation Decision*).
5. On 22 December 2014, the Prosecution requested Trial Chamber I (‘the Chamber’) to join the cases against Charles Blé Goudé and Laurent Gbagbo and submitted that the alleged facts and circumstances against both Accused were identical and that the confirmed modes of liability overlapped to a great extent.⁵
6. On 11 March 2015, the Chamber granted the Prosecution’s request to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé*.⁶
7. On 17 March 2015 both the Defence and the Defence of Mr. Gbagbo requested leave to appeal the “Decision on Prosecution requests to join the cases of the Prosecutor v. Laurent Gbagbo and The Prosecutor v. Charles Blé Goudé and related matters” (‘Decision on Joinder’).⁷

³ ICC-02/11-01/11-656, para. 266.

⁴ *Ibid.* para. 265.

⁵ ICC-02/11-02/11-194, para. 11

⁶ ICC-02/11-01/15-1.

⁷ ICC-02/11-01/15-5; ICC-02/11-01/15-6.

8. On 22 April 2015, a Majority of the Chamber rejected both requests for leave to appeal the Joinder Decision.⁸
9. On 24 April 2015, the Prosecution requested that before the commencement of trial the Chamber give notice under Regulation 55(2) of the Regulations of the Court ('R.O.C.') that the legal characterisation of the facts may be subject to change so as to taken into account an alternative form of Mr. Gbagbo's alleged participation, namely command and superior responsibility under article 28(a) and (b) of the Statute.⁹

III. Submissions

A. Through this request, the Prosecution wishes to introduce evidence pertaining to Mr. Gbagbo's alleged responsibility under article 28(a) and (b) in order to establish facts that exceed the facts and circumstances contained in the confirmation decision

10. Even though the text of Regulation 55(2) does not mention any limit as to the modifying the legal characterisation of facts, the Appeals Chamber in *The Prosecutor v. Lubanga* held that the Regulation 55(2) circumscribes the bounds of the Trial Chamber's discretion in providing notice as to a possible recharacterisation of facts in the same manner as Regulation 55(1).¹⁰ Therefore, any such possible modification shall not "exceed the facts and circumstances described in the charges and any amendments to the charges." In *Lubanga*, the Appeals Chamber found that the purpose of Regulation 55 is to close accountability gaps.¹¹ It defined the term "facts" in Regulation 55 as "the factual allegations, which support each of the legal elements of the crime charged."¹² The Appeals Chamber further emphasized that any other information contained in the Decision confirming the charges does not

⁸ ICC-02/11-01/15-42.

⁹ ICC-02/11-01/15-43.

¹⁰ See ICC-01/04-01/06-2205, paras. 1, 89-93.

¹¹ *Ibid.*, para. 77.

¹² *Ibid.*, (n) 163; see also ICC-01/04-01/06-2223, para. 29.

constitute specific factual allegations unless the Pre-Trial Chamber has “identified with sufficient clarity and detail in the Decision Confirming the Charges that they are facts which support the legal elements of the crimes charged.”¹³ Therefore, the Appeals Chamber determined that if the proposed modification of the legal characterisation exceeds the factual allegations contained in the Confirmation of Charges Decision, it should be rejected.¹⁴

11. Taking into account these strict requirements, in the Judgment rendered in *The Prosecutor v. Katanga*, the Majority of the Court refused to modify the legal characterisation of the mode of liability from principal liability under article 25(3)(a) to accessorial liability pursuant to article 25(3)(d) to the crime of conscripting children under the age of fifteen (article 8(2)(e)(vii)).¹⁵ Since the Pre-Trial Chamber had not made any determinations as to whether the members of the FPRI committed the crime of conscripting children intentionally, the Chamber found any modification pursuant to Regulation 55 impermissible with respect to the Accused’s responsibility under article 25(3)(d).¹⁶

12. While in regards to the other crimes charged the Accused’s participation was indeed assessed under article 25(3)(d), the Chamber clearly emphasized the importance of the factual narrative contained in the Confirmation of charges decision by finding that despite the modification pursuant to Regulation 55 of the Accused’s participation in the crimes, the recharacterisation did not *fundamentally* alter the narrative.¹⁷ In a spirited Minority Opinion, Judge Van den Wyngaert found that the Chamber had fundamentally altered the factual

¹³ *Ibid.*

¹⁴ ICC-01/04-01/06-2205, para. 88.

¹⁵ ICC-01/04-01/07-3436, para. 1483

¹⁶ *Ibid.*

¹⁷ ICC-01/04-01/07-3436, para. 1479.

narrative in recharacterizing the Accused's participation in the charged crimes pursuant to Regulation 55.¹⁸

13. In the instant case, the Prosecution misstates the law by arguing that the Chamber's decision may be "based on the totality of the material facts confirmed by the Pre-Trial Chamber."¹⁹ Such a position runs contrary to the Court's jurisprudence, which clearly limits the Court's decisions on requests for notice under Regulation 55(2) to specific factual allegations that the Pre-Trial Chamber determined establish each of the legal elements of the crimes charged.

14. In its request for notice under Regulation 55(2), the Prosecution avers that in the *Gbagbo* Confirmation Decision, the Pre-Trial Chamber specifically ruled on the question of Mr. Gbagbo's alleged individual criminal responsibility under article 28, and found that any such finding "would require the Chamber to depart significantly from its understanding of how events unfolded in Côte d'Ivoire during the post-electoral crisis and Laurent Gbagbo's involvement therein."²⁰ The Pre-Trial Chamber reasoned that the evidence taken as a whole did not established substantial grounds to believe that the alleged crimes took place as a result of Mr. Gbagbo's failure to prevent or punish the crimes.²¹

15. Thus, similar to *Katanga*, where the Court determined that the factual allegations relating to the conscription of children did not allow for a recharacterisation of the accused's mode of liability, the Chamber should find that the facts and circumstances relating to the charged crimes do not allow for a recharacterisation of Mr. Gbagbo's individual criminal responsibility

¹⁸ ICC-01/04-01/07-3436-AnxI, paras. 27 -28.

¹⁹ ICC-02/11-01/15-43, para. 14.

²⁰ ICC-02/11-01/15-43, para 11.

²¹ ICC-02/11-01/11-656-Red, para. 264 .

under article 28(a) or (b) of the Statute. As the facts and circumstances in *Katanga* did not establish the FPRI soldiers' intent to conscript children, so the facts and circumstances in the *Gbagbo* Confirmation Decision do not establish that the purported crimes occurred from the alleged failure of Mr. Gbagbo to prevent or punish them. Thus, the Prosecution's request for notification should be rejected for unlike the Majority of the Court's finding in *Katanga* where modifying the mode of liability with respect to other crimes was permitted, such a recharacterisation would *fundamentally* alter the factual narrative. In the instant case, the Pre-Trial Chamber in the *Gbagbo* Confirmation Decision already made such a finding by employing the words "significantly depart" instead of "fundamentally alter" with respect to the changing of the narrative that article 28(a) or (b) would cause.²²

16. Given the clear grounds upon which the Pre-Trial Chamber refused to confirm this form of liability, the Prosecution's Request seems to be an indirect attempt to appeal the ruling of the Pre-Trial Chamber, which did not confirm the charges *vis-à-vis* article 28. Thus, the Prosecutor seeks early approval from the Chamber to introduce evidence, by bypassing the procedure specified in article 61(9) of the Statute, which would otherwise be impermissible.

B. The Prosecution Request demonstrates that the facts on which the Prosecution intends to rely are not the same for each of the Accused, and therefore the basis of the Decision on Joinder should be called into question

17. The Defence observes that the Prosecution's Request pertains only to Mr. Gbagbo's alleged participation in the alleged crimes, and as such is wholly unrelated to Mr. Blé Goudé's alleged participation therein. The Defence also notes the timing of the Prosecution Request- the Prosecution made its

²² See ICC-02/11-01/15-43, para. 11.

submissions exactly two days after the Chamber denied both the Defence and the *Gbagbo* Defence requests for leave to appeal the Decision on Joinder.²³

18. Given that the Prosecution Request attempts, as substantiated in the aforementioned paragraphs to introduce a fundamentally different factual narrative than confirmed by the Pre-Trial Chamber, the Defence contends that the basis of the joinder, namely the purported close link between Mr. Blé Goudé's and Mr. Gbagbo's alleged conduct²⁴ may no longer be accurate. Moreover, the Prosecution through filing the request after any avenue to appeal the Decision on Joinder was closed deprived the Defence of presenting arguments to further substantiate its reasons against joining the *Blé Goudé* and *Gbagbo* cases.

19. The Defence respectfully recalls that the Chamber found joinder was appropriate for the following reasons: (1) the essential element founding the charges against both Mr. Gbagbo and Mr. Blé Goudé was the alleged existence of the common plan,²⁵ (2) their participation in the common plan was closely linked,²⁶ and (3) the Prosecution's presentation of the same evidence at trial against each Accused.²⁷ Moreover, the Chamber based one of its reasons for not finding any prejudice to the Accused that may arise from the merging of the charges on the fact that the Prosecution "has not requested, and the Chamber has no power to authorise, amendments to facts and circumstances described in the charges against either Accused."²⁸

20. Currently, the Prosecution is exceeding the boundaries of Regulation 55(2) by trying to add a charge that was expressly denied by the Pre-Trial Chamber in

²³ Compare ICC-02/11-01/15-42 with ICC-02/11-01/15-43.

²⁴ See ICC-02/11-01/15-1, paras. 56, 60.

²⁵ See *ibid.*, para. 55

²⁶ See *ibid.*, para. 56.

²⁷ See *ibid.*, para. 64.

²⁸ *Ibid.*, para. 59.

the *Gbagbo* Confirmation Decision. Thus, the Defence observes that it may suffer undue prejudice if the Prosecution presents evidence in relation to Mr. Gbagbo's responsibility under article 28 of the Statute. Unlike the Chamber's findings pertaining to the different forms of liability under article 25, the existence of an alleged common plan is not an essential element for responsibility under article 28. On the contrary, the focus of article 28 is not on the accused liability for his own crimes; instead it shifts to the duties and obligations the accused had to prevent or punish the crimes of others.²⁹ Mr. Gbagbo's alleged duty with respect to crimes committed by the alleged pro-Gbagbo forces is not closely linked to the alleged criminal conduct of Mr. Blé Goudé who has never been alleged to hold such a duty.³⁰ Therefore, while the Chamber in the Decision on Joinder found that the Defence had not substantiated that the Prosecution intends to rely on different evidence against each Accused,³¹ the Defence now is in a position to state that the Prosecution's request demonstrates this intention.

21. Since the Prosecution intends to introduce evidence in the case of Mr. Gbagbo under the legal umbrella of article 28, it may in effect indirectly taint the alleged evidence based on article 25 in the case against Mr. Blé Goudé. While in theory these are two distinct and non-overlapping modes of liability, in practice the Prosecution in its request wishes to present evidence on Mr. Gbagbo's alleged responsibility under article 28, which would coalesce with evidence presented against Mr. Blé Goudé pursuant to article 25. Whether the evidence presented at trial by the Prosecution pertains to either article 28 or article 25 would hardly be distinguishable for both the Defence and the Chamber. As such, granting the Prosecution's Request will cause prejudice to the evidentiary position of Mr. Blé Goudé.

²⁹See ICC-02/11-01/11-656-Red, para. 262.

³⁰ ICC-02/11-02/11-186, *Section III*.

³¹ ICC-02/11-01/15-1, para. 64.

22. Moreover, the Prosecution has indicated that it no longer holds the position that the cases against two Accused are essentially the same as it intimated in its Joinder Request. In its submissions on the provisional agenda for the 21 April 2015 Status Conference, the Prosecution submitted that certain details such as facts related to the *actus reus* and *mens rea* are different for each accused.³² The Defence submits that such facts are not details, but instead are the fundamental elements that comprise any crime under the jurisdiction of the Court. Given these recent developments in the Prosecution's theory of the case, the Defence respectfully finds that the basis of the Decision on Joinder may no longer be valid.

RELIEF SOUGHT

For the foregoing reasons, the Defence respectfully requests the honourable Trial Chamber I:

to deny the "Prosecution request for notice to be given of a possible recharacterisation pursuant to regulation 55(2)" (ICC-02/11-01/15-43) on the grounds that granting the Prosecution's request would exceed the facts and circumstances confirmed by the Pre-Trial Chamber, and it would merit the reconsideration of the Decision on Joinder.

³² ICC-02/11-01/15-35-Conf, para.38.



A handwritten signature in dark ink, appearing to read 'Mr. Knoops', is written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Mr. Knoops, Lead Counsel and Mr. N'Dry, Co-Counsel

Dated this

19 May 2015

At The Hague, the Netherlands