

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **French**

No.: **ICC-02/11-01/15**

Date: **19 May 2015**

TRIAL CHAMBER I

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

**SITUATION IN CÔTE D'IVOIRE
IN THE CASE OF
THE PROSECUTOR v. LAURENT GBAGBO
AND
*THE PROSECUTOR v. CHARLES BLÉ GOUDÉ***

**Public Document
One public annex**

**Defence Response to 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 team for Laurent Gbagbo

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

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I. Introduction

1. Thus stands the state of affairs in legal terms: On 12 June 2014, the Pre-Trial Chamber dismissed outright the Prosecutor's motion for the charges to be confirmed on the basis of superior liability (article 28), underscoring that: "a fundamental difference exists between the forms of commission incriminated in article 25 of the Statute, which establish liability for one's own crimes, and article 28 of the Statute, which establishes liability for violation of duties in relation to crimes committed by others"¹ and that "[...] consideration of Laurent Gbagbo's responsibility under article 28 of the Statute would require the Chamber to depart significantly from its understanding of how events unfolded in Cote d'Ivoire during the post-electoral crisis and Laurent Gbagbo's involvement therein."

2. Otherwise put, the Pre-Trial Chamber brought to the body of Prosecution allegations a coherent order underpinning a particular narrative in keeping with a particular view of the Accused's liability in particular circumstances. That narrative, the Chamber made clear, was consonant with "its understanding of how events unfolded in Cote d'Ivoire during the post-electoral crisis and Laurent Gbagbo's involvement therein".²

3. From the material submitted by the Prosecution, the Bench sifted out what seemed to it to be credible and the allegations that seemed to it to be substantiated. From that analysis founded on an objective finding they determined a congruent narrative consisting of charges (facts, legal characterisation of the facts and mode of liability) which have meaning within this context alone. The coherence of the decision on the confirmation of charges ("Confirmation Decision") reflects the Bench's understanding of the case founded on objective findings, and the selection it

¹ ICC-02/11-01/11-656-Conf, para. 262.

² ICC-02/11-01/11-656-Conf, para. 265.

made from among the possible modes of liability for each charge is part and parcel of that coherence.

4. The Confirmation Decision of 12 June 2014, as the present Chamber notes, “defines the parameters at trial”.³ It is impermissible to interfere with its letter and spirit, that is to say, to redefine “the parameters at trial”. To so proceed would render the confirmation phase redundant. Moreover, since the Confirmation Decision circumscribes the trial and the precise content of the accusations, the Statute and practice acknowledge that that document represents the most important notice of the charges to an accused. So the Appeals Chamber in *Lubanga* held in no uncertain terms:

the Appeals Chamber underlines at the outset that, given the Court’s statutory framework and the respective roles of the Prosecutor and the Pre-Trial Chamber in the confirmation process, there can be **no doubt that the decision on the confirmation of the charges defines the parameters of the charges at trial.**⁴

5. The Statute expressly provides that it is the prerogative of the Pre-Trial Bench to determine the charges (article 61). Interference with the purport and, what is more, the coherence of the Confirmation Decision would amount to denying the accused notice of the charges levied against him: if a pre-trial brief at variance with the Confirmation Decision is provided to the accused, how may he ascertain the charges laid against him and hence defend himself? Procedural fairness is, therefore, clearly at stake when the Prosecutor seeks to circumvent the decision of the Pre-Trial Bench so as to reinstate what it explicitly dismissed, wholly altering the coherence of the accusations, the content of the charges and hence the parameters of the trial.

6. For that is what the Prosecutor does here in attempting to reinstate the article 28 mode of liability. To that end the Prosecutor makes use of regulation 55, vesting it with a power that it does not possess. Regulation 55 is in fact subsidiary to the articles of the Statute which prescribe that the Pre-Trial Bench delineates the contours of the trial. So the rule stands, from which no derogation is possible lest the

³ ICC-02/11-01/15-58, para. 17.

⁴ ICC-01/04-01/06-3121-Red, para. 124.

coherence of the Statute be greatly eviscerated. The sole raison d'être of regulation 55 is to allow the ongoing discussion at trial to entertain fresh material which has come to the attention of the protagonists. This does not hold true here, where a clear attempt has been made by the Prosecutor to undermine the coherence of the Statute.

II. Applicable law

7. To duly discuss the motion advanced by the Prosecutor, there must be agreement on the meaning of the law applicable thereto, which entails analysis of regulation 55. The Defence recalls that the Vienna Convention on the Law of Treaties provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."⁵ That rule of general interpretation of international law may serve as guidance by analogy. Accordingly, an analysis of regulation 55 to determine how it applies to the case at bar requires analysis of (1) the ordinary meaning of the terms of regulation 55; (2) its context, *viz.* its status within the overarching legal framework of the Statute; and (3) its object and purpose – in other words, its raison d'être.

1. Ordinary meaning of the terms of regulation 55

8. By virtue of regulation 55 the Bench may engage in legal recharacterisation of the facts and circumstances stated in the charges confirmed, provided that recharacterisation is not founded on a new narrative, *viz.* facts or circumstances which differ from those relied on in the Confirmation Decision, and that modification of the charges does not ensue. Otherwise put, recharacterisation is contingent on compliance with the *modus operandi* of the Pre-Trial Bench vis-à-vis the accused.

⁵ Article 31(1) of the Convention.

2. Context of regulation 55: status of the regulation in the overarching legal framework of the instruments applicable before the ICC

9. Regulation 55 is a provision of the RoC, and not of the Statute or the RPE, which are the founding instruments of the Court and the fruit of negotiations and decision-making of States Parties' representatives. The Statute and the RPE are the instruments which stand at the apex of the pyramid of norms applicable before the Court. They take precedence over other corpuses of norms as does the application of their provisions.⁶

10. Since regulation 55 forms part of the RoC, which are judge-made, it must, logically and perforce, be interpreted in the light of the provisions of the Statute – not only its letter, but also its spirit. Otherwise put, never must implementation of regulation 55 violate the letter and spirit of the Statute, less still offend its coherence. In the present submission, regard will be had to the Prosecutor's use of regulation 55, but its legality will not be canvassed.⁷

11. The drafters of the Statute took the utmost care to set down coherently, clearly and in detail the procedural stages which culminate in trial. In particular, they crafted a procedure for the adjudication of the charges brought against the accused which is coherent and consistent with the rights of the defence.⁸

12. First, provision is made for a confirmation hearing,⁹ where an adversarial debate between Prosecution and Defence allows the Pre-Trial bench to determine whether there are reasons – substantial grounds to believe that crimes took place – to proceed to trial. Upon conclusion of the hearing, the bench hands down its decision and any charge (each consisting of the facts, the legal characterisation of the facts

⁶ Article 21.

⁷ ICC-01/04-01/06-2205.

⁸ K.J. Heller, "A Stick To Hit the Accused With", in C. Stahn *et al.* (forthcoming 2015); D. Jacobs, "A Shifting Scale of Power: Who is in Charge of the Charges at the ICC", W.A. Schabas *et al.*, *The Ashgate Research Companion to International Criminal Law* (2013), 205.

⁹ Article 61.

and the selected mode of liability) thereby confirmed circumscribes the trial and determines its content. The Trial Chamber, in the following terms, so reminded the Prosecutor, who had argued that the Trial bench was not bound by findings of fact and holdings of the Pre-Trial Chamber: “[t]he power to frame the charges lies at the heart of the Pre-Trial Chamber’s functions”.¹⁰ Likewise, the present Trial Chamber affirmed: “the Chamber recalls that the decision on the confirmation of the charges defines the parameters at trial”.¹¹

13. Of note is that, according to the Statute, (1) the Prosecutor may add to the charges after the Confirmation Decision **only with the permission of the Pre-Trial Chamber**;¹² (2) the designated trial chamber may exercise all the functions of the Pre-Trial Chamber, **save authorisation of modification of the charges**;¹³ and (3) once the trial has commenced **the Prosecutor may only withdraw the charges**, not add any.¹⁴

14. Of note is that regulation 55 serves only to complement – acting as an adjunct to a clear legal framework – in that it enables the charges to be amended, not altered. The regulation allows specific matters to be settled and is subsumed by an existing coherent framework. It must attune to the framework and may not be used to destroy it.

15. In any event, regulation 55 may be interpreted only in respect of the other Statutory provisions which concern notice of the charges and the parameters of trial. Never must it be used to call into question, in whole or in part, the decisions of the Pre-Trial bench. Hence, in Judge Tarfusser’s words: “Regulation 55 [...] is a provision of an exceptional nature, as such subject to narrow interpretation”.¹⁵

¹⁰ ICC-01/04-01/06-1084, para. 39.

¹¹ ICC-02/11-01/15-58, para. 17; ICC-02/11-01/11-810, para. 57.

¹² Article 61(9).

¹³ Article 61(11).

¹⁴ Article 61(9).

¹⁵ ICC-01/04-01/07-3363, Judge Tarfusser, para. 5.

3. The *raison d'être* of regulation 55

16. The *raison d'être* of the regulation is to allow the Prosecutor to present the strongest possible case – founded on the most salient mode of liability and not concurrent modes of liability – so she need not concern herself with “covering” a mode of liability whose relevance may subsequently emerge in the course of trial. As Judge Kaul opined:

such a provision was deemed essential to avoid lengthy indictments with cumulative and alternative charges. The judges want to conduct focused trials on clearly delineated charges, in the interest both of judicial economy and of the defense. [...] The regulation will enable the judges to be rigorous in confirming charges and to refer only those which seem sufficiently supported by evidence to constitute grounds to believe that a crime under the Statute has been committed.¹⁶

17. In the case at bar, had the Prosecutor stood by her initial line of reasoning and based her body of arguments on 25(3)(a) liability, indirect co-perpetration, as she did at the start of the case, she could have later drawn on regulation 55 to cover 25(3)(b), 25(3)(c) and 25(3)(d). Contrary to the intention of the proponents of the adoption of regulation 55, the Prosecutor intended to cover everything at the pre-trial stage, including article 28. Since that mode of liability was expressly dismissed by the Pre-Trial bench, the Prosecutor may not seek its reinstatement.

18. Recourse to regulation 55 finds even less justification in the case at bar in that the Pre-Trial Bench, contrary to practice at the Court, confirmed several alternative modes of liability. Yet, it was the hitherto refusal of the bench to use alternative modes which prompted the adoption of regulation 55, as Judge van de Wyngaert has noted:

there is merit in the principle of “fair labelling” and that, ideally, a Trial Chamber must accurately label an accused’s individual criminal responsibility in the final judgment [...] by applying the most accurate description of his responsibility under any of the paragraphs of Article 25(3) or Article 28. In this respect, it has not generally been the pre-trial chambers’ practice to confirm charges or issue arrest warrants on alternative modes of liability [...].¹⁷

¹⁶ H.P Kaul, “Construction Site For More Justice”, Vol. 99, *The American Journal of International Law*, 370 (2005), p. 377.

¹⁷ ICC-01/04-01/07-3319, Judge van den Wyngaert, para. 5.

III. Discussion

1. Adverse ramifications of recharacterisation for the subsequent proceedings

1.1. The Prosecutor misapplies regulation 55

19. Regulation 55 was conceived as a tool for the Chamber to introduce, when the need arises, in accordance with fresh material shedding new light on the facts and circumstances canvassed, a legal characterisation that is better suited to circumscribing the ongoing discussion and to properly pinpointing an accused's liability. Under no circumstance does it permit, before trial has even commenced and where there is no fresh material to warrant further elucidation, the Prosecutor to revert to the content of her initial DCC, thus ignoring the preceding debates with the Defence throughout the confirmation hearing and disregarding the Confirmation Decision, even though it is clear and reasoned and was deliberately crafted by the Bench so as to depart significantly from the Prosecutor's DCC, by dismissing, for example, in every respect her body of arguments founded on article 28.

20. In filing its third DCC on 13 January 2014,¹⁸ the Prosecutor introduced two new modes of liability to those previously selected: article 25(3)(b) and article 28. The Prosecutor stated that the addition of these two new modes of liability at this stage of the proceedings would be of benefit to the Defence, since it could address them in advance of the Confirmation Decision, thus obviating recourse to regulation 55.¹⁹ Two members of the triumvirate were minded to entertain new modes of liability in the amended DCC – even if, upon scrutiny, they may subsequently reject them – so as to dispose of the entire matter at a sloop, thereby obviating application of regulation 55 further on in the proceedings.²⁰

21. Of note, therefore, is that the Pre-Trial Chamber decided to consider all of the modes of liability advanced by the Prosecution solely and specifically to avoid subsequent

¹⁸ ICC-02/11-01/11-592-Conf-Anx2-Corr2.

¹⁹ ICC-02/11-01/11-612, para. 42

²⁰ ICC-02/11-01/11-619, paras. 21-22.

recourse to regulation 55. Thus it proceeded, so as to rule on the modes of liability which are consonant with the nature of the charges. Of further note is that the fact that the Prosecutor will have all the time and every opportunity to plead other modes of liability before the Pre-Trial Chamber – which included 25(3)(d) in 2013,²¹ and 25(3)(b) and 28 in 2014²² – is attributable to the Pre-Trial Chamber’s willingness to view the matter from the standpoint of regulation 55 and to foresee the motions the Prosecutor might bring under that provision at trial, with the aim of putting the Pre-Trial bench in a position to rule at a sloop before trial commences, allowing the proceedings to run a smooth course. The Pre-Trial Chamber adopted and confirmed only certain modes of liability, and, what is more, it did so only disjunctively. To its mind, it was a matter of sifting out, in the mass of the Prosecutor’s allegations, that which appeared to concern particular charges from that which seemed unconnected to the charges as construed within the meaning of the Statute. Otherwise stated, the Chamber brought coherence to the Prosecutor’s allegations. It further underscored that “confirmation of alternative charges may better preserve the interests of the Defence in that it provides early notification of potential alternatives and thus reduces the need to resort to regulation 55 of the Regulations”.²³

22. To invoke regulation 55 anew, whereas the Pre-Trial bench viewed the matter from the standpoint of the regulation to differentiate between alternative modes of liability and dismiss responsibility under article 28, would call into question the findings of the pre-trial phase and the coherence which informed the Confirmation Decision.

1.2 Recourse to regulation 55 at this juncture in the proceedings is an attempt to circumvent the Confirmation Decision

23. The Confirmation Decision circumscribes the trial and defines the content of the charges, that is to say, not only the facts and circumstances, but also their legal characterisation and the mode(s) of liability pertaining thereto. The decision binds the

²¹ ICC-02/11-01/11-357-Conf-Anx1.

²² ICC-02/11-01/11-592-Conf-Anx2-Corr2.

²³ ICC-02/11-01/11-680, para. 51.

parties and the Chamber. In the case at bar, the Pre-Trial Bench expressly declined to confirm the charges on the basis of article 28. To seek the reinstatement of article 28 with no justification at this juncture in the proceedings, whereas the Prosecutor has yet to disclose the body of her evidence, simply amounts to an attempt to call into question the decision of the Pre-Trial Bench.

24. Here, the Prosecutor makes use of regulation 55 not only in place of the appeal which she failed to raise²⁴ but also to circumvent the entire Confirmation Decision and subvert the coherence imparted by the Bench. Regulation 55, whose *raison d'être* is to *supplement* the body of provisions which specifically afford the accused proper notice of the charges brought against him, cannot be used to call into question all that took place at the pre-trial phase.

25. Regulation 55 may be invoked only at certain junctures and under certain circumstances, as the letter of the regulation and the spirit of the Statute so prescribe: it may be raised only on the basis of fresh material which emerges at trial “[i]f, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change”.²⁵

26. In all of the cases (*Bemba*, *Katanga* and *Ruto*), the matter of a possible recharacterisation of the mode of liability was raised at trial (see annex).

27. What is more, recharacterisation on the basis of a mode of liability explicitly and expressly dismissed by the bench at the pre-trial phase is unprecedented at the Court. The sole proceedings to concern possible recharacterisation addressed modes of liability not previously considered or matters which did not modify the modes of liability (see annex).

28. Endorsement of the Prosecutor's position would entail not only interference with the content of the Confirmation Decision and the coherence brought by the Bench which underlies the accusations and imparts order to them, but also denial of the entire *raison d'être* of the confirmation of charges phase. That route would further preclude notice of

²⁴ ICC-02/11-01/15-43, footnote 6.

²⁵ Regulation 55(2).

accurate charges to the accused, since they would have been altered between the time of the Confirmation Decision and the pre-trial brief. Yet, in the case at bar, the Chamber has underscored the critical importance of the Confirmation Decision, pointing out that an amended DCC was unnecessary and a pre-trial brief sufficed since the Confirmation Decision constitutes the substratum of notice of the charges to the accused.²⁶ How can that statement be considered consistent with the introduction of a new, unconfirmed mode of liability?

1.3. The perfunctory approach of the Prosecutor to the “facts and circumstances”

1.3.1. The Prosecutor’s *modus operandi*

29. To justify her attempt to circumvent the Confirmation Decision, the Prosecutor contends: “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.”²⁷

30. Firstly, the Prosecutor appears to pay no heed to the purport of the Bench’s express dismissal of 28. The Prosecutor intimates that the Bench did not conceive that the “elements of” that mode of liability could be “derived from the facts and circumstances confirmed by the Pre-Trial Chamber”. She also intimates that the Bench’s refusal to confirm the charges under article 28 was prompted solely by the paucity of evidence, hinting that a modicum of evidence might exist. Yet, the Pre-Trial made very plain that it had entertained all of the evidence tendered by the Prosecutor and deliberately rejected 28.

31. Secondly, the “facts and circumstances” at hand do not exist *per se*: the “facts and circumstances” relied on by the Bench were distinguished from other facts advanced by the Prosecutor in that, in accordance with proper legal reasoning, they bring to the fore a form of involvement arising from a particular mode of liability ascribed to the Accused. Otherwise stated, the Pre-Trial Chamber accepted the “facts and circumstances” only inasmuch as they corresponded to a species of conduct alleged against the Accused which

²⁶ ICC-02/11-01/15-58, para. 17.

²⁷ ICC-02/11-01/15-43, paras. 11-12.

may illuminate a certain mode of liability. To put this differently still, the factual narrative adopted by the Pre-Trial Chamber can be attributed solely to the *modus operandi* of the Bench, which was founded on the selection of certain modes of liability. Those particular facts were chosen because they sustain particular charges.

32. The Bench adopted a specific narrative made up of particular charges and each charge has intrinsic coherence. The facts relied on in the narrative are, therefore, those which underpin each charge and each charge is itself founded on a particular mode of liability. The facts on which the Bench draws hold meaning, therefore, only in the light of the charge. They cannot serve to substantiate a new charge lest the meaning imparted to them by the Bench in the narrative founding the Confirmation Decision be altered.

33. In her dissent in *Katanga* on the use of regulation 55, Judge Van den Wyngaert expounded on the coherence between the facts relied on and the narrative, *viz.* the method adopted by the bench:

Charges are not merely a loose collection of names, places, events, etc., which can be ordered and reordered at will. Instead, charges must represent a coherent description of how certain individuals are linked to certain events, defining what role they played in them and how they related to and were influenced by a particular context. Charges therefore constitute a narrative in which each material fact has a particular place. Indeed, the reason why facts are material is precisely because of how they are relevant to the narrative. Taking an isolated material fact and fundamentally changing its relevance by using it as part of a different narrative would therefore amount to a “change in the statement of facts”, something the Appeals Chamber has found to be clearly prohibited by Regulation 55(1).²⁸

34. In the matter at hand, the Prosecutor imparts a new meaning, something Judge Van den Wyngaert wished to avoid, to facts which held meaning only in the context of 25(3)(a). She reinterprets them arbitrarily in the light of 28, without adversarial debate, whereas they are devoid of meaning under that provision, as the Pre-Trial Bench held in dismissing 28.

²⁸ ICC-01/04-01/07-3319, Judge Van den Wyngaert, para. 20.

1.3.2. The Prosecutor errs in her analysis, undertaken from the standpoint of article 28, of the facts and circumstances relied on by the Pre-Trial Bench. In no way can the facts and circumstances relied on by the Bench substantiate responsibility of the Accused under article 28.

1.3.2.1 The perpetrators of the alleged crimes

35. The Pre-Trial Chamber does not at any point identify clearly the perpetrators of the alleged crimes or discuss their intent. To do so in respect of article 25(3)(a) was unnecessary: for an accused to incur liability, identification of a hierarchical structure characterised by its members' obedience to the accused suffices, and so the intent of the direct perpetrators need not be considered.

36. Matters are quite different as regards superior responsibility: for a superior to be held responsible for the crimes of his subordinates, it must first be proven that the subordinates committed crimes with intent. Yet, at no point does the Confirmation Decision advert to anything to establish that crimes were intentionally committed by subordinates. As Judge Van den Wyngaert pointed out in *Katanga*, recharacterisation would transform a "legion of [...] executants" blindly following orders into a collection of individuals, each driven by criminal intent and sufficiently autonomous to be regarded as perpetrators in their own right.²⁹

1.3.2.2 Effective control

37. Superior responsibility entails effective control over the direct perpetrators of the crimes. At no point, however, does the Prosecutor show that Laurent Gbagbo wielded effective control over the perpetrators of the alleged crimes and no such allegations appear in the Confirmation Decision. Further still, the facts as confirmed by the Bench do not in any way substantiate accusations ensuing from effective control. The sole point mentioned (which does not meet article 28 criteria) is that Laurent Gbagbo, as President, was considered pre-eminent in the military hierarchy.

²⁹ *Idem*, para. 22.

38. Examples abound of the incongruity of the facts confirmed with allegations founded on article 28. The most striking are the accusations against Laurent Gbagbo concerning events in Yopougon in April 2011, when he was arrested by the French forces and incarcerated. In such circumstances and at that very moment in time, how could he have had effective control over the perpetrators of the alleged crimes?

1.3.2.3 Knowledge of the crimes committed

39. To accrue liability under article 28 the accused must have knowledge of the crimes. At no point, however, does the Prosecutor prove that Laurent Gbagbo had knowledge of some of the alleged crimes that underpin the charges and nowhere in its Confirmation Decision does the Bench admit facts which would substantiate such proof. That Laurent Gbagbo was purportedly “briefed about the situation on the ground by his commander”³⁰ has not been proven and in no way implies that he knew of the crimes since the content of that briefing has not been discussed before the Pre-Trial Chamber, which did not accept it as part of the facts and circumstances confirmed.

1.3.2.4 Causal nexus

40. Article 28, as the jurisprudence holds,³¹ mandates, for responsibility to accrue, a causal nexus between the absence of effective control and the commission of the crimes. Yet, no fact relied on by the Bench in the Confirmation Decision allows such a causal nexus to be contemplated, despite the Prosecutor’s assurances.

1.3.2.5 Prevention or punishment of the alleged crimes

41. Responsibility under article 28 accrues only where the accused failed to take the necessary action to prevent, punish or submit the matter to the competent authorities, even where the other criteria necessary to establish this mode of liability have been ascertained. The Pre-Trial Chamber did not at any point delve into the substance of this question, taking the view that responsibility under 28 did not arise. In no way, therefore, do the facts

³⁰ ICC-02/11-01/15-43, para. 25.

³¹ ICC-01/05-01/08-424, para. 423.

and circumstances relied on in the Confirmation Decision justify calling into question responsibility under 28.

Conclusion:

42. The Prosecutor clutches at some isolated findings of fact in the Confirmation Decision to impart to them a meaning which, in the eyes of the Bench, they did not have, and to attach to them an importance which they did not possess in the decision; this she does by arranging them *ex post facto* and in disregard of the method adopted by the Bench, so as to mould them into a body of arguments central to the discussions on article 28, thus distorting the coherence of the Confirmation Decision.

1.3.3. Refusal of the Prosecution to distinguish between the modes of liability

43. By putting all the modes of liability on a par on the basis of a single narrative determined by the Bench, the Prosecutor wilfully disregards the coherence which informed the choice of narrative. The factual narrative conforms to that which the Pre-Trial Bench regards as possible omissions on the part of Laurent Gbagbo. The *ex post facto* introduction of a different interpretation of the narrative amounts to misapprehension of the line of reasoning adopted by the Bench and disregard for the coherence with which the charges were framed and for the facts which satisfy the modes of liability confirmed. As the Pre-Trial Chamber itself recalled,³² superior responsibility differs fundamentally from the responsibility of the perpetrator of a crime. Whereas responsibility under article 25 seeks to punish perpetrators of or accessories to crimes, article 28 seeks to punish superiors for alleged omissions in their duty to control their troops in very specific circumstances.

44. Accordingly, the facts undergirding the modes of liability under 25 cannot be regarded as substantiating the mode of liability under 28 – the facts cannot be transplanted from one mode to another. To do so would alter their meaning. For instance, in her request the Prosecutor makes systematic reference to the alleged common plan to keep Laurent Gbagbo in power by all means, including through the commission of crimes. However, a

³² ICC-02/11-01/11-656-Conf, para. 262.

finding by the Bench that that fact was proven at trial would allow application of responsibility only under article 25(3)(a) and not under article 28, since the existence of a common plan is a pivotal ingredient of indirect co-perpetration, but not superior responsibility.

45. Conversely, were the Chamber to entertain responsibility under 28 at trial, it would find that the article 25(3)(a) criteria are not met. Otherwise stated, the Prosecutor cannot draw on the *exact* same arguments to justify recourse to article 25 or article 28. That course of action is precluded. In *Bemba*, the Bench explained as much to the Prosecutor, who had cited the same factual considerations in support of implementation of responsibility under 25(3)(a) and 25(3)(d):

The Chamber further wishes to clarify that, bearing in mind its findings with respect to Mr Jean-Pierre Bemba's criminal responsibility under article 25(3)(a) of the Statute, (...), some of the arguments presented by the Prosecutor in support of its demonstration on Mr Jean-Pierre Bemba's *mens rea* under article 28 of the Statute can no longer be entertained.³³

2. Criteria of implementation of regulation 55

46. Should the Chamber endorse the Prosecutor's stance, it should consider the practical implications of recharacterisation:

47. Since additions would be made to the Confirmation Decision through the introduction of new charges founded on a different mode of liability and, what is more, the coherence which informed the Confirmation Decision would be called into question, it should be noted that the Confirmation Decision would no longer constitute sufficient notice of the charges to meet the requirements of article 67(1)(a), which lays down the right of the accused "[t]o be informed promptly and in detail of the nature, cause and content of the charge". In such eventuality, the Prosecutor should be directed to submit an amended DCC, so as to duly and fully inform the Accused of the charges laid against him. Else, procedural fairness would be violated. In similar vein, the Prosecutor should also provide a document, in the form of an EBC, specifying to the Defence which of the evidence disclosed substantiates her arguments, specifically as regards article 28.

³³ ICC-01/05-01/08-424, para. 480.

48. Beforehand, if it decides to entertain the possibility of recharacterisation, the Chamber will have allowed, pursuant to the letter of regulation 55, for discussion between protagonists in the proceedings, so as to seek their views, oral or written. The Chamber would have to suspend the time limits “to ensure that the participants have adequate time and facilities for effective preparation [for the discussion]”.

49. Lastly, the new mode of liability would have to be considered when setting the adequate time for the Defence to prepare for trial. Superior responsibility is wholly different in nature to the other modes of liability, entailing further investigations and an entirely different defence strategy, which necessitates time. Of note in this regard is that, in the other cases in which regulation 55 was implemented, the Chambers accorded further due time for the Defence’s preparation: two months in *Katanga*³⁴ and over three in *Bemba*.³⁵ In the event of recharacterisation, the Chamber should recalculate the adequate time for the Defence’s preparation for trial, and thereby set a new date for the opening of trial.

FOR THESE REASONS, MAY IT PLEASE TRIAL CHAMBER I TO:

Having regard to articles 61(3)(7)(a), (9) and 67(1)(a)(b) of the Statute and regulation 55 of the RoC:

In the main:

- **Deny** the Prosecution motion (ICC-02/11-01/15-43);

In the alternative, in the unlikely event that the Chamber decides to implement the recharacterisation procedure:

- **Hold** a discussion, oral or written, between the protagonists in the trial;
- **Suspend** the time limits set in the order of 7 May 2015 (ICC-02/11-01/15-58), for such time as is necessary for the discussion;
- **Order** the Prosecution to file an amended DCC;

³⁴ ICC-01/04-01/07-3319-tENG/FRA, p. 22.

³⁵ ICC-01/05-01/08-2480, para. 22.

- **Order** the Prosecution to file a new EBC;
- **Rule** that time accorded to the Defence for its preparation shall run as of the Prosecutor's submission of the amended DCC;
- **Extend** the time accorded to the Defence for its preparation before trial proper commences so as to allow for the analysis of the Prosecutor's evidence from the standpoint of the new mode of liability and for the conduct of further, necessary investigations.

[signed]

Emmanuel Altit

Lead Counsel for Laurent Gbagbo

Dated this 19 May 2015 at The Hague, The Netherlands.