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TRIAL CHAMBER I

Before: Judge Geoffrey Henderson, Presiding Judge
Judge Olga Herrera Carbuccion
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's response to Laurent Gbagbo's application for leave to appeal the
"Decision giving notice pursuant to Regulation 55(2) of the Regulations of the
Court"**

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 application for leave to appeal¹ the Trial Chamber's "Decision giving notice pursuant to Regulation 55 of the Regulations of the Court",² filed by the Defence of Laurent Gbagbo³ should be rejected. None of the five issues⁴ referred to in the Application are appealable issues arising from the Decision. In addition, they do not meet the criteria for leave to appeal under article 82(1)(d).

Submissions

(i) *The Issues do not constitute appealable issues arising from the Decision*

2. The First Issue, namely whether the Chamber erred by giving notice pursuant to regulation 55(2) prior to the commencement of the evidentiary phase of the trial,⁵ constitutes a mere disagreement with the Trial Chamber's interpretation of the term "any time during the trial".⁶ The Decision endorses a principle that is firmly established in the case-law of this Court. In fact, the Decision is consistent with the rulings of the Appeals Chamber that notice under regulation 55(2) "should always be given as early as possible",⁷ that "changing the legal characterisation of the facts may become necessary not only in the course of the hearing of evidence"⁸ and that "a trial must commence based on a set of clearly defined charges".⁹ In addition, it is consistent with the practice of the Trial Chambers.¹⁰ Even if, *arguendo*, the Trial Chamber was wrong in giving notice at this stage of the proceedings, the First Issue is not appealable, as it does not amount to "a subject the resolution of which is essential for the determination of matters arising in the judicial cause under

¹ ICC-02/11-01/15-193 ("Application").

² ICC-02/11-01/15-185 ("Decision").

³ "Defence".

⁴ "Issues".

⁵ Application, paras.13-17.

⁶ Decision, para.11.

⁷ Decision, para.11, citing to ICC-01/04-01/07-3363, paras.24, 102; ICC-01/04-01/06-3121, para.129.

⁸ ICC-01/04-01/07-3363, para.21.

⁹ ICC-01/04-01/06-3121-Red, para.129.

¹⁰ Decision, footnote 27.

examination.”¹¹ This is so because the Trial Chamber could also give notice at a later stage of the proceedings, which would remedy any error raised under the First Issue.

3. For similar reasons, the Second Issue is also not an appealable issue. The Defence merely disagrees with a specific factor that the Chamber took into consideration when exercising its discretion to give early notice, and in particular the fact that a possible re-characterisation of the charges in this case was already mentioned by the Pre-Trial Chamber in the confirmation of charges decision.¹² The Trial Chamber merely “emphasises [...] the exceptional circumstances” in this case.¹³ However, the Decision is clearly based on the Trial Chamber’s duty to give notice under regulation 55(2) “as early as possible”.¹⁴ The Defence does not demonstrate that the Second Issue is “essential for the determination of matters arising in the judicial cause under examination.”¹⁵

4. The Third Issue, namely whether the Trial Chamber erred in finding that “the possible recharacterisation would not exceed the facts and circumstances described in the charges”¹⁶ does not arise from the Decision. The Defence disregards that the actual change in the legal characterisation will, if at all, only take place in the Trial Chamber’s eventual decision under article 74 of the Rome Statute. As held by the Appeals Chamber, “it is only in that decision that the Trial Chamber will have to demonstrate that the legal characterisation of the facts has changed without exceeding the ‘facts and circumstances described in the charges’”.¹⁷ In addition, the Third Issue is not an appealable issue, as it is irrelevant to the Decision. The Defence incorrectly assumes that it was necessary for the Trial Chamber to make a detailed assessment of the legal elements for criminal responsibility under article 28 of the

¹¹ ICC-01/04-168 OA3, para.9. ICC-02/04-01/05-367, para.22; ICC-02/05-02/09-267, p. 6; ICC-01/04-01/06-2463, para.8; ICC-01/09-02/11-27, para.7.

¹² Decision, para.12.

¹³ Decision, para.12.

¹⁴ Decision, para.11, citing to ICC-01/04-01/07-3363, paras.24, 102; ICC-01/04-01/06-3121, para.129.

¹⁵ ICC-01/04-168 OA3, para.9. ICC-02/04-01/05-367, para.22; ICC-02/05-02/09-267, p.6; ICC-01/04-01/06-2463, para.8; ICC-01/09-02/11-27, para.7.

¹⁶ Application, paras.26-28; challenging the Trial Chamber’s finding at para.14 of the Decision.

¹⁷ ICC-01/04-01/07-3363, para.45.

Statute. As acknowledged by the Defence, the disagreement between the Defence and the Prosecution concerning article 28 is limited to the purported element of causation.¹⁸ However, in its request for notice to be given pursuant to regulation 55(2),¹⁹ the Prosecution has argued that the facts confirmed by the Pre-Trial Chamber in this case establish this element in any event.²⁰ As a result, the Trial Chamber did not need to enter legal findings on whether the causation element applies under article 28 to be satisfied that the possible recharacterisation would not exceed the facts confirmed by the Pre-Trial Chamber.

5. The Fourth Issue, namely whether the Decision fails to specify the relevant facts and circumstances,²¹ does not correctly represent the Decision and does therefore not arise from it. Even if the Decision follows a slightly different approach from that adopted in other cases,²² it leaves no doubt as to which facts and circumstances are subject to a possible re-characterisation. The Prosecution's Request identified in detail the facts that relate to each of the elements of article 28 as confirmed by the Pre-Trial Chamber.²³ As a result, there was no need for the Trial Chamber in its Decision to rehearse all those facts. The Trial Chamber concluded that it was satisfied that "the Prosecution demonstrates in the Request, [that] the possible recharacterisation would not exceed the facts and circumstances described in the charges".²⁴ Given the clarity of the confirmation decision, the Prosecution's Request, and the Trial Chamber's Decision, the Defence's submission that it is left to guess which facts could be used to support the elements under article 28,²⁵ is unfounded.

6. The Fifth Issue, namely whether the Trial Chamber erred in not granting the Defence additional time to prepare for trial in light of the additional mode of

¹⁸ Application, para.27.

¹⁹ ICC-02/11-01/15-43 ("Request").

²⁰ ICC-02/11-01/15-43, para.23.

²¹ Application, paras.29-35.

²² Application, para.34.

²³ ICC-02/11-01/15-43.

²⁴ Decision, para.14; see also para.13.

²⁵ Application, para.32.

liability,²⁶ is also not an appealable issue, but a mere disagreement on how the Chamber exercised its discretion in ensuring that the trial is fair and expeditious.²⁷ In its attempt to demonstrate that the Fifth Issue is appealable, the Defence merely repeats arguments that it had previously submitted to the Trial Chamber in its alternative request for recalculation of the trial commencement date.²⁸ However, as already found by the Trial Chamber, these arguments do not “provide any concrete indication as to the impact this decision would have on [the Defence’s] trial preparation”.²⁹

(ii) *In any event, the Issues do not meet the criteria for leave to appeal*

7. The Issues do not significantly affect the fair conduct of the proceedings. The Defence provided no argument on why early notice (as opposed to notice at a later stage in the proceedings) would impact on its ability to prepare for the trial or on the fairness of proceedings in general. To the contrary, as noted by the Trial Chamber, early notice ensures the fairness of the proceedings³⁰ and enables Mr Gbagbo to prepare his defence.³¹ As a result, the First, Second and Third Issues that relate to the *timing* of the notice,³² do not significantly impact on the fair conduct of the proceedings. In relation to the Fourth Issue, the Defence provides no reason why it would be unfair for the Trial Chamber to give notice to the Defence of the relevant facts by reference to the Prosecution’s Request, instead of repeating them in the Decision. As noted above, the Decision leaves no doubt as to which facts are subject to a possible recharacterisation. As a result, the Fourth Issue concerns a mere formality with no implications on the accused’s right to notice under article 67(1)(a) or the fair conduct of the proceedings in general. Finally, the Trial Chamber has already rejected the Defence’s arguments that the Fifth Issue affects the fair conduct

²⁶ Application, paras.36-43.

²⁷ Decision, para.17.

²⁸ Application, paras.39-43, repeating its arguments submitted in ICC-02/11-01/15-70, paras.48-49.

²⁹ Decision, para.17.

³⁰ Decision, para.11.

³¹ Decision, footnote 29.

³² Application, paras.11-12.

of the proceedings by dismissing its submission that fairness mandates that the Defence be given additional time to prepare for trial in case of a notice of re-characterisation under regulation 55(2).³³ Consequently, the Fifth Issue does not affect the fair conduct of the proceedings.

8. The Issues also do not significantly affect the expeditious conduct of the proceedings. Early notice, as opposed to notice at a later stage of the trial, does not have any detrimental impact on the expeditious conduct of the proceedings. Neither does the fact that the Chamber identified the relevant facts that are subject to a possible recharacterisation by way of reference to the Prosecution's Request. Finally, the Defence's argument that the Chamber's rejection of its request for additional time affects the expeditious conduct of proceedings is circular. Had the Trial Chamber given the Defence additional time, it would have delayed the proceedings.

9. The Issues do not affect the outcome of the trial either.³⁴ Because the Chamber could also give notice at a later stage, the First, Second and Third Issues, which concern the timing of the notice,³⁵ are irrelevant to the outcome of the trial. Similarly, the Fourth Issue does not impact on the outcome of the trial, as it does not matter how the relevant facts are identified to the Defence, as long as it is clear which facts are subject to a possible recharacterisation. The Defence's suggestion that the Trial Chamber's rejection of its request for additional time impacts on the outcome of the trial is unsupported and speculative.³⁶ In fact, the Fifth Issue does also not affect the outcome of the trial.

10. Finally, immediate resolution of the Issues by the Appeals Chamber would not materially advance the proceedings.³⁷ The Appeals Chamber already determined that

³³ Decision, para.17.

³⁴ *Contra*, Application, paras.47-48.

³⁵ Application, para.11.

³⁶ Application, para.48.

³⁷ *Contra*, Application, paras.49-52.

notice under regulation 55(2) “should always be given as early as possible”,³⁸ that “changing the legal characterisation of the facts may become necessary not only in the course of the hearing of evidence”³⁹ and that “a trial must commence based on a set of clearly defined charges”.⁴⁰ As a result, there is no need to refer the First, Second and Third Issues to the Appeals Chamber for an authoritative determination. Moreover, since the Fourth Issue concerns a mere formality which has no impact on the accused’s effective notice of the charges and his right under article 67(1)(a), appellate intervention is unnecessary to advance the proceedings. Lastly, the Appeals Chamber has stated that a Trial Chamber who gave notice under regulation 55(2) has an ongoing duty to ensure the fairness of the trial.⁴¹ As a result, it is unnecessary to refer the Fifth Issue to the Appeals Chamber. Any concern regarding the fair conduct of the trial, including the accused’s right to prepare for trial and to present his case can be raised with the Trial Chamber at any time.

Conclusion

11. For the reasons above, the Application should be dismissed.



Fatou Bensouda, Prosecutor

Dated this 31st day of August 2015
At The Hague, The Netherlands

³⁸ ICC-01/04-01/07-3363, paras.24, 102.

³⁹ ICC-01/04-01/07-3363, para.21.

⁴⁰ ICC-01/04-01/06-3121-Red, para.129.

⁴¹ ICC-01/04-01/07-3363, para.1.