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TRIAL CHAMBER I

Before: Judge Geoffrey Henderson, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

SITUATION IN CÔTE D'IVOIRE

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

Public Document

Common Legal Representative's Response to Mr. Gbagbo's application for leave to appeal the "Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court" (ICC-02/11-01/15-185)

Source: Office of Public Counsel for Victims

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

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I. PROCEDURAL BACKGROUND

1. On 12 June 2014, Pre-Trial Chamber I, by majority, issued a decision confirming the charges against Mr. Gbagbo under article 61(7)(a) of the Rome Statute and committed him for trial (the “*Gbagbo Confirmation Decision*”).¹

2. On 11 March 2015, Trial Chamber I (the “Chamber”) issued 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” (the “Joinder Decision”), joining the two cases.²

3. On 24 April 2015, the Prosecution filed its “Request for notice to be given of a possible recharacterisation pursuant to regulation 55(2)” requesting the Chamber to “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” (the “Prosecution’s Request”).³

4. On 19 May 2015, the Defence for Mr Gbagbo and the Defence for Mr Blé Goudé responded to the Request.⁴

5. On 20 August 2015, the Chamber issued the “Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court” (the “Impugned Decision”),⁵

¹ See the “Decision on the confirmation of charges against Laurent Gbagbo” (Pre-Trial Chamber I), No. ICC-02/11-01/11-656-Red, 12 June 2014, p. 131 (the “*Gbagbo Confirmation Decision*”).

² See 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” (Trial Chamber I), No. ICC-02/11-01/15-1, 11 March 2015 (the “Joinder Decision”).

³ See the “Prosecution request for notice to be given of a possible recharacterisation pursuant to regulation 55(2)”, No. ICC-02/11-01/15-43, 24 April 2015, para. 38 (the “Prosecution’s Request”).

⁴ See the “Réponse de la Défense à la « Demande de l’Accusation aux fins de notification d’une possible requalification en vertu de la Norme 55-2 » (ICC-02/11-01/15-43-tFRA)”, No. ICC-02/11-01/15-70, 19 May 2015 and the “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)”, No. ICC-02/11-01/15-71, 19 May 2015.

granting the Prosecution's Request and thus (i) notifying the parties and participants of the possibility that the legal characterisation of the facts set out in the *Gbagbo* Confirmation Decision may be subject to change to include Mr Gbagbo's liability under article 28(a) or (b) of the Rome Statute; and (ii) ordering the Prosecution to file an amended version of or an addendum to its Pre-Trial Brief or to indicate that such amendment or addendum is unnecessary.⁶

6. On 26 August 2015, the Defence for Mr. Gbagbo filed an application for leave to appeal the Decision (the "Application").⁷

7. Pursuant to regulation 65(3) of the Regulations of the Court, the Principal Counsel of the Office of Public Counsel for Victims, acting as common legal representative of the victims admitted to participate in the case (the "Common Legal Representative"),⁸ respectfully submits her response to the Application.

II. RESPONSE OF THE COMMON LEGAL REPRESENTATIVE

1. The criteria contained in article 82(1)(d) of the Rome Statute

8. Article 82(1)(d) of the Rome Statute limits the possibility to file an application for leave to appeal against "*a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings*".

⁵ See the "Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court" (Trial Chamber I), No. ICC-02/11-01/15-185, 20 August 2015 (the "Impugned Decision").

⁶ *Idem*, p. 11.

⁷ See the "Demande d'autorisation d'interjeter appel de la «Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court » (ICC-02/11-01/15-185)", No. ICC-02/11-01/15-193, 26 August 2015 (the "Application").

⁸ See the "Decision on victim participation" (Trial Chamber I), No. ICC-02/11-01/11-800, 6 March 2015, para. 61. See also the Joinder Decision, *supra* note 3, para. 74 and p. 33 ("*all decisions and orders made in the Gbagbo and Blé Goudé cases shall continue to apply [...] in the joint case*").

9. The jurisprudence of the Court established the complementary character of the two components mentioned in article 82(1)(d) of the Rome Statute, as well as the necessity to show their cumulative existence in order for leave to appeal to be granted.⁹

10. In this regard, the Appeals Chamber ruled that “[e]vidently, article 82 (1) (d) of the Statute has two components. The first concerns the prerequisites for the definition of an appealable issue and the second the criteria by reference to which the Pre-Trial Chamber may state such an issue for consideration by the Appeals Chamber”.¹⁰ The Appeals Chamber stated that “[o]nly an ‘issue’ may form the subject-matter of an appealable decision”,¹¹ and defined the term “issue” as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.¹² The Appeals Chamber also considered that “[n]ot every issue may constitute the subject of an appeal. It must be one apt to ‘significantly affect’, i.e. in a material way, either a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’”.¹³

11. Accordingly, discrete issues for resolution by the Appeals Chamber must be articulated when requesting leave to appeal and it is generally insufficient to argue that the entirety of a Chamber’s reasoning is erroneous.¹⁴ For the same reasons,

⁹ See the “Decision on Prosecutor’s Application for leave to appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under article 58” (Pre-Trial Chamber II), No. ICC-02/04-01/05-20, 19 August 2005, para. 21. See also the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), No. ICC-01/04-168 OA3, 13 July 2006, paras. 8 and 14.

¹⁰ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 9, para. 8.

¹¹ *Idem*, para. 9.

¹² *Ibid.*

¹³ *Ibid.*, para. 10.

¹⁴ See the “Decision on Babala Defence request for leave to appeal ICC-01/05-01/13-800” (Trial Chamber VII), No. ICC-01/05-01/13-877, 27 March 2015, para. 7. See also the “Decision on Defence Request for Leave to Appeal the ‘Decision Providing Materials in Two Independent Counsel Reports and Related Matters’” (Trial Chamber VII), No. ICC-01/05-01/13-1096, 21 July 2015, para. 7, and references contained therein.

article 82(1)(d) of the Rome Statute cannot be used to litigate “abstract or hypothetical issues”.¹⁵

12. In determining whether an issue meets the criteria of article 82(1)(d), “[t]he Chamber will first consider whether the issue or issues identified by the party arise from the operative part of the impugned decision. For example, if an issue put forward by a party misstates or misapprehends the disposition of the Chamber, it cannot be said to have arisen from the decision as such and must be dismissed”.¹⁶

13. Similarly, the mere dispute over the correctness of a Chamber’s reasoning does not constitute sufficient reason to be granted leave to appeal an interlocutory decision.¹⁷ In this regard, the Chamber has found that “[i]n deciding on a request for leave to appeal, a Trial Chamber is not concerned with the correctness of the impugned decision, per se; determination of whether the Chamber erred is a matter for the Appeals Chamber should leave be granted. Rather, the role of the Trial Chamber is simply to determine whether any of the issues presented by the parties seeking leave meet the requirements as set out in Article 82(1)(d) of the Statute”.¹⁸

14. Moreover, pursuant to the constant jurisprudence of the Court, “the mere fact that an issue is of general interest or could be raised in future pre-trial or trial proceedings is

¹⁵ See the “Decision on ‘Defence Request for Leave to Appeal the ‘Decision on Defence Request for Relief for Abuse of Process’” (Trial Chamber III), No. ICC-01/05-01/08-3273, 24 July 2015, para. 6, and references contained therein.

¹⁶ See the “Decision on Defence requests for leave to appeal the ‘Order setting the commencement date for trial’” (Trial Chamber I), No. ICC-02/11-01/15-117, 2 July 2015, para. 19. See also the “Decision on request for leave to appeal the ‘Decision on objections concerning access to confidential material on the case record’” (Trial Chamber I), No. ICC-02/11-01/15-132, para. 3 and references contained therein.

¹⁷ See the “Decision on the joint defence request for leave to appeal the decision on witness preparation” (Trial Chamber V), No. ICC-01/09-01/11-596, 11 February 2013, para. 6; and the “Decision on Prosecution’s Application for Leave to Appeal the ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’” (Trial Chamber V(a)), No. ICC-01/09-01/11-817, 18 July 2013, para. 12.

¹⁸ See the “Decision on Defence requests for leave to appeal the ‘Order setting the commencement date for trial’”, *supra* note 16, para. 20.

not sufficient to warrant the granting of leave to appeal”,¹⁹ and “[l]eave to file interlocutory appeals against decisions should therefore only be granted in exceptional circumstances”.²⁰

15. In this regard, since the Appeals Chamber will interfere with a discretionary decision only under limited conditions, a difference of opinion as to a Chamber’s exercise of its discretion is an appealable issue only if the Chamber improperly exercised its discretion.²¹

16. Further, it is insufficient that an appeal may be legitimate or even necessary at some future stage, as opposed to requiring immediate resolution by the Appeals Chamber in order to materially advance the proceedings.²²

17. Once an appealable issue is properly identified, the relevant Chamber will analyse whether it would “significantly affect” the fair and expeditious conduct of the proceedings under article 82(1)(d) of the Rome Statute. However, the Chamber presented with an application for leave to appeal must not enter into examining or considering “arguments on the merits or the substance of the appeal” because said arguments are more appropriately for consideration and examination before the

¹⁹ See the “Decision on the Prosecutor’s application for leave to appeal the Decision on the ‘Protocol on investigations in relation to witnesses benefiting from protective measures’” (Trial Chamber II), No. ICC-01/04-01/07-2375-tENG, 8 September 2010, para. 4. See also the “Decision on ‘Defence Request for Leave to Appeal the ‘Decision on Defence Request for Relief for Abuse of Process’””, *supra* note 15, para. 9; and the “Decision on Ruto Defence’s Application for Leave to Appeal the ‘Decision on the Prosecution’s Request to Add New Witnesses to its List of Witnesses’” (Trial Chamber V(a)), No. ICC-01/09-01/11-983, 24 September 2013, para. 20.

²⁰ See the “Decision on the Prosecutor’s application for leave to appeal the Decision on the ‘Protocol on investigations in relation to witnesses benefiting from protective measures’””, *supra* note 19, para. 4. See also the “Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges” (Pre-Trial Chamber I), No. ICC-02/11-01/11-464, 31 July 2013, para. 7.

²¹ See the “Judgment on the appeal of the Defence against the ‘Decision on the admissibility of the case under article 19 (1) of the Statute’ of 10 March 2009” (Appeals Chamber), No. ICC-02/04-01/05-408 OA3, 16 September 2009, para. 80. See also the “Decision on ‘Defence Request for Leave to Appeal the ‘Decision on issues related to the conclusion of the defence’s presentation of oral evidence at trial and on the ‘Defence Request for an Order for Cooperation’”” (Trial Chamber III), No. ICC-01/05-01/08-2925-Red, 20 December 2013, para. 30.

²² See the “Decision on ‘Defence Request for Leave to Appeal the ‘Decision on Defence Request for Relief for Abuse of Process’””, *supra* note 15, para. 9 and references contained therein.

Appeals Chamber if and when leave to appeal is granted.²³ As a consequence, applications for leave to appeal should not contain in detail the arguments which the party intends to raise before the Appeals Chamber, but only the appealable issue(s) *“by way of indicating a specific factual and/or legal error”*.²⁴

18. Pursuant to the jurisprudence of the Court, in conducting the analysis of appealable issues the notion of “fairness” must be understood as making reference to situations *“when a party is provided with the genuine opportunity to present its case - under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent - and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision”*.²⁵ In turn, “expeditiousness” must be read as *“closely linked to the concept of proceedings ‘within a reasonable time’, namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned”*.²⁶

19. Finally, the Appeals Chamber stated that in order to determine whether an issue would significantly affect the “outcome of the trial” under article 82(1)(d) of the Rome Statute, *“[t]he Pre-Trial or Trial Chamber must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence”*.²⁷

²³ See the “Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58”, *supra* note 9, para. 22.

²⁴ See the “Decision on three applications for leave to appeal” (Pre-Trial Chamber I), No. ICC-02/11-01/11-307, 30 November 2012 (dated 29 November 2012), para. 70.

²⁵ See *e.g.* the “Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure” (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-75, 25 August 2008, para. 14.

²⁶ *Idem*, para. 18.

²⁷ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 9, para. 13.

2. The Application does not satisfy the criteria contained in article 82(1)(d) of the Rome Statute

20. The Defence for Mr. Gbagbo seeks leave to appeal the Impugned Decision on two issues divided in further sub-issues: 1) the Chamber erred in deciding to trigger regulation 55 of the Regulation of the Court;²⁸ and 2) the Chamber erred in the manner in which it decided to implement regulation 55 of the Regulations of the Court (the “Issues”).²⁹

21. Since the two Issues are considered as strictly connected by the Defence, the Common Legal Representative addresses the Defence’s arguments for both issues jointly.

22. The Common Legal Representative submits that the Application does not satisfy the requirements of article 82(1)(d) of the Rome Statute. Indeed, the Application does not demonstrate that the Issues arise from the Impugned Decision and can be the subject of an interlocutory appeal, nor does it show how said Issues would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. In fact, the Application is based on a misreading of the Impugned Decision and, at the most, merely expresses the disagreement of the Defence with the ruling.

23. Moreover, the Common Legal Representative wishes to underline that, as indicated by the Chamber,³⁰ a decision pursuant to regulation 55(2) of the Regulations of the Court has the limited purpose of giving notice to the parties and the participants of the *possibility* of a legal recharacterisation and is “*without prejudice*

²⁸ See the Application, *supra* note 7, paras. 11 -28.

²⁹ *Idem*, para. 29 - 43.

³⁰ See the Impugned Decision, *supra* note 5, paras. 10 and 14.

to any decision under Regulation 55(1) of the Regulations and Article 74 of the Statute”.³¹ Therefore, insofar as the Application challenges an alleged amendment of the charges or an actual legal recharacterisation of the facts and circumstances described therein and the lack of adequate time and facilities needed by the Defence to be effectively prepared for it, said arguments have no incident on the alleged Issues.

a. The Issues do not arise from the Decision

24. The Defence reiterates or advances arguments similar to those previously submitted before the Chamber in its Response of 19 May 2015 to the Prosecution’s Request,³² without presenting additional submissions. Said arguments were considered and dismissed by the Chamber in the Impugned Decision. Consequently, the contentions raised by the Defence in the Application simply reflect a mere disagreement with the conclusions of the Chamber, which as such does not meet the requisite threshold for leave to appeal to be granted.³³

25. Firstly, the Defence argues that the Chamber committed an error of law by applying regulation 55 before having heard the whole or, at least, part of the evidence of the Prosecution case, or in any case before the start of the trial.³⁴ In this regard, the Common Legal Representative submits that the Defence’s argument is based on a misreading of the Impugned Decision, as well as on a misinterpretation of regulation 55(1) and (2) of the Regulations of the Court.

³¹ *Ibid.*, para. 14. See the “Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled “Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons”” (Appeals Chamber), No. ICC-01/04-01/07-3363 OA13, 27 March 2013, paras. 91 and 105. In particular : “[T]he final decision on the legal re-characterisation, if any, would and could only be taken in the decision pursuant to article 74 of the Statute, following, *inter alia*, the receipt of submissions from the parties”. See also the “Decision on Applications for Notice of Possibility of Variation of Legal Characterisation” (Trial Chamber V(A)), No. ICC-01/09-01/11-1122, 12 December 2013, para. 18.

³² See the “Réponse de la Défense à la « Demande de l’Accusation aux fins de notification d’une possible requalification en vertu de la Norme 55-2 » (ICC-02/11-01/15-43-tFRA)”, *supra* note 4.

³³ See *supra* note 12.

³⁴ See the Application, *supra* note 7, paras. 11-25.

26. Indeed, the Defence confounds the object and purpose of a decision giving notice pursuant to regulation 55(2), on one side, and a ruling under paragraph 1 of the same regulation or article 74 of the Rome Statute, on the other side.³⁵ As indicated *supra*,³⁶ the Chamber underlined that the scope of a decision pursuant to regulation 55(2) is limited to giving notice to the parties and participants that a *possible* recharacterisation might take place during the trial and it does not imply any conclusive finding thereon. Accordingly, the Chamber - having reasonably found that a possible recharacterisation would not exceed the facts and circumstances described in the charges - gave notice and informed the parties and participants that they will have the opportunity to make oral or written submissions in this regard after the presentation of the relevant evidence.³⁷

27. Indeed, in accordance with the wording of paragraph (2) of regulation 55, a Chamber is bound to hear the evidence and the relevant submissions of the parties and participants before deciding to actually change the legal characterisation of facts and not when it is simply giving notice of a hypothetical recharacterisation.³⁸ Contrary to the Defence's arguments,³⁹ this interpretation is consistent with the Chamber's obligation to give notice under regulation 55(2) "*as early as possible*".⁴⁰

28. Consequently, the Defence's contention must be read as a disagreement with the Chamber's reasoning and interpretation of the relevant provision, and - as ruled by the Appeals Chamber - it cannot be subject to an interlocutory appeal under article 82(1)(d) of the Rome Statute.⁴¹

³⁵ *Idem*, in particular para. 21.

³⁶ See *supra*, para. 23.

³⁷ See the Impugned Decision, *supra* note 5, paras. 13-14 and 16.

³⁸ See the "Decision on Applications for Notice of Possibility of Variation of Legal Characterisation", *supra* note 31, para. 19.

³⁹ See the Application, *supra* note 7, paras. 16 and 21.

⁴⁰ See the "Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons"", *supra* note 31, para. 24.

⁴¹ See *supra* note 12.

29. Secondly, the Defence alleges that since the Impugned Decision does not indicate which facts and circumstances described in the charges may be subject to change, the Chamber failed to properly notify the Accused of the charges brought against him.⁴² In the same vein, the Defence submits that - by adding a mode of liability and at the same time refusing to grant its request for a postponement of trial - the Chamber violated the rights of the Accused and prevented him to have adequate time to prepare for trial.⁴³

30. In this regard, the Common Legal Representative submits that revising generally the content of previously presented arguments without demonstrating the conditions relevant for leave to appeal the Impugned Decision cannot suffice to satisfy the requirements set forth in article 82(1)(d) of the Rome Statute.⁴⁴ In these circumstances, the Common Legal Representative contends that the Defence's challenge is thus premature and based on the wrong assumption that a change in the legal characterisation has been already decided upon by the Chamber.

31. Moreover, the Defence's allegation of a supposed violation of the right of the Accused to be provided with adequate time to prepare for trial - in light of a legal recharacterisation of facts and circumstances - is merely speculative. Indeed, as indicated by the Appeals Chamber, *"it is to avoid violations of this right that regulation 55(2) and (3) set out several stringent safeguards for the protection of the rights of the accused"*.⁴⁵ In particular, after the hearing of the evidence and having given the parties and 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*

⁴² See the Application, *supra* note 7, paras. 29-35.

⁴³ *Idem*, paras. 36-43.

⁴⁴ See the "Réponse de la Défense à la « Demande de l'Accusation aux fins de notification d'une possible requalification en vertu de la Norme 55-2 » (ICC-02/11-01/15-43-tFRA)", *supra* note 4, paras. 4-6; 22-28.

⁴⁵ See the "Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court"" (Appeals Chamber), No. ICC-01/04-01/06-2205 OA15 OA16, 8 December 2009, para. 85.

facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change".⁴⁶ Furthermore, paragraph (3) of the regulation indicates explicitly that the Chamber shall ensure that the accused has adequate time and facilities to prepare his or her defence in accordance with article 67(1)(b) of the Rome Statute and the opportunity to examine witnesses or to present other evidence in accordance with article 67(1)(e) of the Rome Statute.⁴⁷

32. The Chamber considered those safeguards in the Impugned Decision and reasonably concluded that it would have been premature to set modalities for submissions on a possible legal recharacterisation before having heard the evidence.⁴⁸ The Common Legal Representative contends that, at the present stage of the proceedings, the Appeals Chamber cannot be called upon to rule on measures that the Trial Chamber may take in the future in order to ensure that the rights of the accused are protected should the recharacterisation proceed.⁴⁹

33. Therefore, the Common Legal Representative submits that the Defence fails once again to identify any "issue" which may merit the intervention of the Appeals Chamber. Indeed, the Defence's challenge is merely hypothetical. As already found in the past, submissions of this nature cannot provide sufficient basis to be granted leave to appeal an interlocutory decision.⁵⁰

⁴⁶ See Regulation 55(2) of the Regulations of the Court.

⁴⁷ See in this regard, the "Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons", *supra* note 31, paras. 86-88.

⁴⁸ See the Impugned Decision, *supra* note 5, para. 16.

⁴⁹ See the "Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons", *supra* note 31, paras. 90-91.

⁵⁰ See "Decision on 'Defence Request for Leave to Appeal the 'Decision on Defence Request for Relief for Abuse of Process'", *supra* note 15.

b. The Issues do not affect the fair and expeditious conduct of the proceedings

34. Since it is clear that the Issues do not arise from the Impugned Decision, the Application should be dismissed on this basis alone. Assuming *arguendo* that the Issues arise from the Impugned Decision, the Common Legal Representative contends that, contrary to the Defence's contentions, they do not significantly affect the fairness and expeditiousness of the proceedings.

35. A notice pursuant to regulation 55(2) of the Regulations of the Court does not *per se* affect the fairness of the proceedings; on the contrary it constitutes one of the safeguards to the rights of the accused pending a possible recharacterisation.⁵¹

36. However, the alleged impact of the Issues on the fairness and expeditiousness of the proceedings is inconsistent with the possibility enjoyed by the Defence under regulation 55(2) and (3) of the Regulations of the Court to request - if the recharacterisation was to proceed - further safeguards to protect its rights as to make oral or written submissions; request a suspension of the hearing or to hold a hearing in order to discuss the proposed change; and to be given the opportunity to examine a previous witness or to call a new witness, or present other evidence.

37. As such, the Impugned Decision cannot be said to create conditions placing the Defence in a substantial disadvantage *vis-à-vis* the other parties and participants or to force the Defence to make an unreasonable use of the time.⁵²

38. Moreover, the Defence fails to take into account that the Chamber has a duty to ensure that making the proposed recharacterisation must not render the trial unfair⁵³ also without the guidance of the Appeals Chamber.⁵⁴

⁵¹ See *supra* note 47.

⁵² See *supra* notes 25 and 26.

⁵³ See the "Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the

39. The Common Legal Representative also contests the Defence's contention that the immediate resolution of the Issues by the Appeals Chamber may materially advance the proceedings. In this regard, the Defence merely refers to abstract and hypothetical considerations,⁵⁵ which as such cannot be the subject of an interlocutory appeal under article 82(1)(d) of the Rome Statute.⁵⁶

40. In any event, since the Issues do not affect the fair and expeditious conduct of the proceedings, it is unnecessary to consider whether an immediate resolution by the Appeals Chamber may materially advance the proceedings.⁵⁷

FOR THE FOREGOING REASONS, the Common Legal Representative respectfully requests the Trial Chamber to reject the Application.



Paolina Massidda
Principal Counsel

Dated this 31st day of August 2015

At The Hague, The Netherlands

Regulations of the Court", *supra* note 45, para. 85; see also the "Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons", *supra* note 31, para. 95 and the "Decision on Applications for Notice of Possibility of Variation of Legal Characterisation", *supra* note 31, para. 20.

⁵⁴ See the "Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date" (Trial Chamber V(B)), No. ICC-01/09-02/11-908, 31 March 2014, para. 80. See also the "Decision on 'Defence Submissions on the Testimony of CAR-D04-PPPP-0007'" (Trial Chamber III), No. ICC-01/05-01/08-2839, 21 October 2013, para. 17; and the "Decision on issues related to the testimony of Witness D04-19 via video-link" (Trial Chamber III), No. ICC-01/05-01/08-2509, 15 February 2013, paras. 11 and 16.

⁵⁵ *Idem*, para. 49 ("[L]a Défense pourrait se voir obligée d'aller au procès sur la base d'un mode de responsabilité rejeté par la Chambre préliminaire, et sans avoir eu le temps d'analyser la preuve du Procureur et de procéder aux enquêtes nécessaires pour pouvoir présenter une défense adéquate").

⁵⁶ See *supra* note 15.

⁵⁷ See the "Decision on Defence requests for leave to appeal the 'Order setting the commencement date for trial'", *supra* note 16, para. 26.