

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/11-01/15
Date: 10 September 2015

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

**Decision on request for leave to appeal the 'Decision giving notice pursuant to
Regulation 55(2) of the Regulations of the Court'**

Decision 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 Mr Laurent Gbagbo

Mr Emmanuel Altit

Ms Agathe Bahi Baroan

Counsel for Mr Charles Blé Goudé

Mr Geert-Jan Alexander Knoops

Mr Claver N'dry

Legal Representatives of Victims

Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**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**

Others

Trial Chamber I ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, having regard to Article 82(1)(d) of the Rome Statute ('Statute'), issues the following 'Decision on request for leave to appeal the "Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court"'.

I. Background

1. On 19 August 2015, pursuant to Regulation 55(2) of the Regulations of the Court ('Regulations'), the Chamber, *inter alia*, notified the parties and participants of the possibility that the legal characterisation of the facts described in the charges may be subject to change to include Mr Gbagbo's liability under Article 28(a) or (b) of the Statute ('Impugned Decision').¹
2. On 26 August 2015, the defence for Mr Gbagbo ('Gbagbo Defence') sought leave to appeal ('Request') five issues ('Issues') in two categories, namely whether the Chamber erred in law by issuing the Impugned Decision at this stage of the proceedings ('Category One Issues') and whether the Chamber erred in implementing Regulation 55 of the Regulations ('Category Two Issues').²

Category One Issues

- i) The Chamber erred in interpreting the phrase 'any time during the trial' as covering the pre-trial period ('Issue One');
- ii) The Chamber used an irrelevant concept, namely 'special circumstances of this case' ('Issue Two');
- iii) The Chamber erred in finding that recharacterisation would not exceed the facts and circumstances described in the charges ('Issue Three');

¹ Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court, ICC-02/11-01/15-185.

² *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), ICC-02/11-01/15-193.

Category Two Issues

- iv) The Impugned Decision does not identify the facts and circumstances which may be recharacterised ('Issue Four'); and
 - v) The Chamber erred in denying the request for additional time ('Issue Five').
2. On 31 August 2015, the Office of the Prosecutor ('Prosecution')³ and Legal Representative for Victims ('LRV')⁴ opposed the Request ('Prosecution Response' and 'LRV Response', respectively).

II. Submissions

Request

3. The Gbagbo Defence contends that the Impugned Decision challenges the authority of the Pre-Trial Chamber, and undermines the fairness of the proceedings by changing the charges after the end of the confirmation phase and reducing the amount of preparation time.⁵
4. In relation to Issue One, the Gbagbo Defence submits that the Impugned Decision contradicts the plain language of Regulation 55(2) of the Regulations and is inadequately reasoned.⁶ Issue Two is premised on the assertion that 'exceptional circumstances', namely indications that the Pre-Trial Chamber left open the possibility of liability under Article 28 of the Statute, constituted an irrelevant and incorrect consideration.⁷ In support of Issue Three, the Gbagbo Defence alleges that the Chamber provided insufficient reasoning for its finding that the proposed recharacterisation did not exceed the facts and circumstances described in the

³ 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", ICC-02/11-01/15-195.

⁴ 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), ICC-02/11-01/15-196.

⁵ Request, ICC-02/11-01/15-193, paras 10-11.

⁶ Request, ICC-02/11-01/15-193, paras 13-17.

⁷ Request, ICC-02/11-01/15-193, paras 18-25.

charges. The Gbagbo Defence notes, in particular, the difference between the parties as to the legal interpretation of Article 28 of the Statute.⁸

5. Concerning Issue Four, the Gbagbo Defence submits that the Chamber was obliged to set out the relevant facts and circumstances and could not delegate this task to the Prosecution.⁹ In support of Issue Five, the Gbagbo Defence contends that the Impugned Decision inevitably requires additional time for further investigations and changes in defence strategy, and claims that the criteria for adjustments to the schedule leading to the trial commencement are unclear.¹⁰
6. Finally, the Gbagbo Defence argues that the Issues would impact on the fair and expeditious conduct of the proceedings or outcome of the trial, and appellate resolution would materially advance the proceedings for the following reasons: (i) adding a mode of liability profoundly changes the charges;¹¹ (ii) the Chamber could now convict the accused on a mode of liability rejected by the Pre-Trial Chamber;¹² (iii) the accused may be tried on the basis of an unconfirmed mode of liability and without adequate preparation time;¹³ (iv) only appellate resolution could ensure that the judicial process is not tainted;¹⁴ and (v) the Appeals Chamber has never ruled on whether Regulation 55 of the Regulations applies to modes of liability rejected at the confirmation stage.¹⁵

Prosecution Response

7. The Prosecution submits that the issues do not constitute appealable issues¹⁶ and, in any event, do not meet the leave to appeal criteria. It claims that the Gbagbo

⁸ Request, ICC-02/11-01/15-193, paras 26-28.

⁹ Request, ICC-02/11-01/15-193, paras 29-35.

¹⁰ Request, ICC-02/11-01/15-193, paras 36-43.

¹¹ Request, ICC-02/11-01/15-193, paras 44-46 and 48.

¹² Request, ICC-02/11-01/15-193, para. 47.

¹³ Request, ICC-02/11-01/15-193, para. 49.

¹⁴ Request, ICC-02/11-01/15-193, paras 50-51.

¹⁵ Request, ICC-02/11-01/15-193, para. 52.

¹⁶ Prosecution Response, ICC-02/11-01/15-195, paras 1-6.

Defence did not demonstrate that the Category One Issues, relating to the timing of the notice, would impact on its trial preparations.¹⁷ Further, the Prosecution submits that Issue Four is a formal argument with no implications on the rights of the accused; regardless of whether the Prosecution or Chamber provided notice of the relevant facts and circumstances, it only matters that Mr Gbagbo received adequate notice.¹⁸ In relation to Issue Five, the Prosecution submits that the Chamber has already addressed and dismissed the submission, which the Prosecution argues is also speculative and unsupported,¹⁹ that additional time is necessary.²⁰ For similar reasons, the Prosecution submits that the Issues would not impact on the expeditious conduct of the proceedings²¹ or the outcome of the trial.²²

8. Finally, the Prosecution submits that appellate resolution would not advance the proceedings because the Impugned Decision accords with appellate jurisprudence and any issue concerning the rights of the accused may be raised with Chamber over the course of the trial.²³

LRV Response

9. The LRV submits that the Issues do not constitute appealable issues and do not affect the fair and expeditious conduct of the proceedings.²⁴ She argues that any alleged impact on the fair and expeditious conduct of the proceedings is inconsistent with the opportunities the Gbagbo Defence has to request further safeguards over the course of the trial and the Chamber's obligations to ensure

¹⁷ Prosecution Response, ICC-02/11-01/15-195, para. 7.

¹⁸ Prosecution Response, ICC-02/11-01/15-195, para. 7.

¹⁹ Prosecution Response, ICC-02/11-01/15-195, para. 9.

²⁰ Prosecution Response, ICC-02/11-01/15-195, para. 7.

²¹ Prosecution Response, ICC-02/11-01/15-195, para. 8.

²² Prosecution Response, ICC-02/11-01/15-195, para. 9.

²³ Prosecution Response, ICC-02/11-01/15-195, para. 10.

²⁴ LRV Response, ICC-02/11-01/15-196, paras 22-33.

that the proceedings are fair.²⁵ For the same reasons, the LRV submits that immediate appellate resolution would not materially advance the proceedings.²⁶

III. Analysis

10. The Chamber recalls the applicable law relating to Article 82(1)(d) of the Statute as set out in previous decisions.²⁷

11. At the outset, the Chamber notes that, insofar as the Gbagbo Defence alleges insufficient reasoning with regard to (i) the Chamber's interpretation of Regulation 55²⁸ and (ii) its determination that a possible recharacterisation would not exceed the facts and circumstances described in the charges,²⁹ it misrepresents the Impugned Decision. The Chamber, in the particular circumstances of the case, provided the basis for the Impugned Decision, identifying those facts it found to be relevant before coming to its conclusion.³⁰ The Chamber has therefore disregarded these arguments in considering the Request.

12. Notwithstanding, the Chamber considers that Issues One and Two are discrete, identifiable and arise from the Impugned Decision. In this regard, the Chamber notes that there is some disagreement among trial chambers as to the meaning of the phrase 'at any time during the trial' in Regulation 55(2) of the Regulations.³¹ In addition, if the phrase 'at any time during the trial' means that a Chamber may only give notice of the possibility that the legal characterisation is subject to

²⁵ LRV Response, ICC-02/11-01/15-196, paras 34-38.

²⁶ LRV Response, ICC-02/11-01/15-196, paras 39-40.

²⁷ See Decision on request for leave to appeal the 'Decision on objections concerning access to confidential material on the case record', 10 July 2015, ICC-02/11-01/15-132, para. 3 and the decisions cited in footnote 5.

²⁸ Request, ICC-02/11-01/15-193, para. 15.

²⁹ Request, ICC-02/11-01/15-193, paras 26-28.

³⁰ See *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for redactions under Rule 81', 14 December 2006, ICC-01/04-01/06-773 OA5, para. 20.

³¹ Trial Chamber II interpreted (albeit *in dicta*) this phrase differently than the Chamber in the Impugned Decision. See *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, Reasons for Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), 15 July 2009, ICC-01/04-01/07-1213-tENG, para. 40 (noting that Regulation 55 of the Regulations 'seems to offer a narrow definition of the term 'trial', limiting it to the presentation of evidence and argument during the hearing').

change after commencement, then there could be no ‘exceptional circumstances’³² warranting giving notice now. Thus, if the timing of the Impugned Decision was in error, the related proceedings may continue on an unsound legal basis. In light of the above, the Chamber is satisfied that appellate resolution of these issues could ‘ensur[e] that the proceedings follow the right course’, thereby removing any doubt that any consequences of the Impugned Decision – such as the additional investigations or changes in strategy the Gbagbo Defence claims to be necessary – are justified.³³ Accordingly, the Chamber considers that Issues One and Two satisfy the leave to appeal criteria: they may have a significant impact on the fair and expeditious conduct of the proceedings or outcome of the trial, and immediate appellate resolution may materially advance the proceedings.

13. On the other hand, the Chamber does not consider that the Category Two Issues satisfy Article 82(1)(d) criteria. At this stage, the parties and participants were only notified of a *possibility* that the legal characterisation of the facts and circumstances described in the charges may be subject to change.³⁴ As stressed in the Impugned Decision, this is without prejudice to any future decision under Regulation 55(1) of the Regulations and Article 74 of the Statute.³⁵ The Chamber has indicated that it will take all necessary and appropriate measures in discharging its overarching obligation to ensure that the proceedings are fair and expeditious.³⁶

14. Accordingly, without prejudice to whether or not the Category Two Issues constitute appealable issues, the Chamber is not satisfied that they meet the other

³² Impugned Decision, ICC-02/11-01/15-185, para 13.

³³ *Situation in the Democratic Republic of the Congo*, Appeals Chamber, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 15 (‘Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of the proceedings’).

³⁴ Impugned Decision, ICC-02/11-01/15-185, paras 16-17.

³⁵ Impugned Decision, ICC-02/11-01/15-185, para. 14.

³⁶ Articles 64(2) and 67(1) of the Statute. After giving notice pursuant to Regulation 55(2) of the Regulations, it is the trial chamber that is best placed to determine what measures are necessary to ensure that the trial as a whole is fair. *See Katanga Appeal Decision*, ICC-01/04-01/07-3363, paras 95, 98-99 and 102.

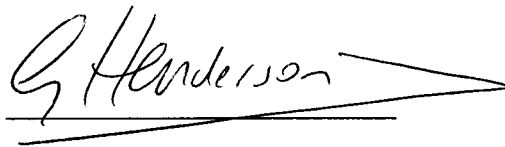
cumulative criteria set out in Article 82(1)(d) of the Statute. Their impact on the proceedings is unduly speculative. They cannot have any significant impact on the fair and expeditious conduct of the proceedings or outcome of the trial, and appellate resolution could not materially advance the proceedings.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Gbagbo Defence leave to appeal Issues One and Two as set out in paragraph 12 above; and

REJECTS the remainder of the Request.

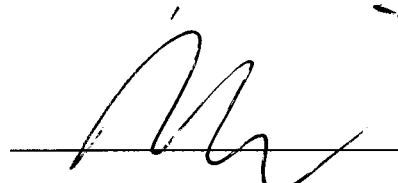
Done in both English and French, the English version being authoritative.

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Judge Geoffrey Henderson, Presiding Judge

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Judge Olga Herrera Carbuccion

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Judge Bertram Schmitt

Dated 10 September 2015

At The Hague, The Netherlands