

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 1 October 2015

THE APPEALS CHAMBER

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
 Judge Kuniko Ozaki
 Judge Howard Morrison
 Judge Piotr Hofmański
 Judge Chang-ho Chung

SITUATION IN CÔTE D'IVOIRE

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

Public Document

Response to Mr Gbagbo's document in support of the appeal against the
 "Decision giving notice pursuant to Regulation 55(2) of the Regulations of the
 Court" (ICC-02/11-02/15-231)

Source: Office of Public Counsel for Victims

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Ms Helen Brady

Counsel for Mr Laurent Gbagbo

Mr Emmanuel Altit

Ms Agathe Bahi Baroan

Counsel for Mr Blé Goudé

Mr Geert-Jan Alexander Knoops

Mr Claver N'dry

Legal Representatives of the Victims

Ms Paolina Massidda

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

Mr Enrique Carnero Rojo

Ms Ludovica Vetrucchio

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. The Common Legal Representative of the victims admitted to participate in the proceedings (the “Legal Representative”)¹ submits that Mr Gbagbo’s appeal against the “Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court” (the “Impugned Decision”)² must be dismissed.

2. The appeal does not show that Trial Chamber I (the “Chamber”) committed any error when issuing the Impugned Decision.³

3. Firstly, the Legal Representative submits that the Chamber did not err in law by applying regulation 55(2) of the Regulations of the Court (the “Regulations”) before the start of the trial *stricto sensu*, namely before the start of the presentation of evidence.

4. The Chamber did not make an “extensive” interpretation of the notion of “trial”, did explain the reasons for its interpretation of this term in regulation 55(2) of the Regulations as including the time before the presentation of evidence, and rightly relied on the jurisprudence of the Appeals Chamber to support its conclusion. Moreover, the Chamber’s literal, contextual and teleological interpretation of regulation 55(2) is correct. In this regard, the Defence fails to notice the different phases in the application of regulation 55, as well as the different meaning of the term “trial” in decisions issued by the Chambers under articles 19(4), 61(9) or 64(8)(a) of the Rome Statute (the “Statute”), on the one hand, and in decisions issued pursuant to regulation 55 of the Regulations, on the other hand. The Defence also refers to inapposite provisions as relevant context in order to limit the temporal dimension of the notice under regulation 55(2), and ignores the legal aim of said regulation.

¹ See No. ICC-02/11-01/15-205, 3 September 2015, p. 24.

² See No. ICC-02/11-01/15-185, 20 August 2015 (dated 19 August 2015) (the “Impugned Decision”).

³ *Idem*.

5. Secondly, the Legal Representative submits that the Chamber did not err in finding that the provision of notice pursuant to regulation 55(2) of the Regulations before the start of the trial *stricto sensu* was justified by the “special circumstances of this case”.

6. Pre-Trial Chamber I (the “Pre-Trial Chamber”) did not intend to limit as such the use of regulation 55 of the Regulations during the trial proceedings and did not simply decline to confirm the charges based on the mode of liability foreseen in article 28 of the Statute. Moreover, the Chamber’s resort to regulation 55(2) in the Impugned Decision has not taken place in the absence of any new element or contradictory debate. On the contrary, it is justified by the conclusions on article 28 of the Statute reached by the Pre-Trial Chamber and the subsequent submissions filed by the Prosecution. The provision of the notice is not prevented by the “Pre-Trial Practice Manual” recently adopted or by the fact that the evidence has still not been discussed.

II. Background

7. On 12 June 2014, the Pre-Trial Chamber confirmed the charges against Mr Gbagbo and committed him for trial (the “Confirmation Decision”),⁴ declining, *inter alia*, to confirm the charges for Mr Gbagbo under article 28 of the Statute.⁵

8. On 24 April 2015, the Prosecution requested the Chamber to give notice to the parties and participants pursuant to regulation 55(2) of the Regulations that the legal characterisation of the facts and circumstances in the Confirmation Decision may be subject to change to include liability under article 28(a) and (b) of the Statute (the “Request”).⁶

⁴ See No. ICC-02/11-01/11-656-Red, 12 June 2014 (the “Confirmation Decision”).

⁵ *Idem*, paras. 262-265.

⁶ See No. ICC-02/11-01/15-43, 24 April 2015 (the “Request”).

9. On 16 July 2015, the Prosecution filed a pre-trial brief, acknowledging, *inter alia*, that the Pre-Trial Chamber declined to confirm charges under article 28 of the Statute, noting the pending Request and addressing, in the alternative, Mr Gbagbo's responsibility under article 28 of the Statute (the "Pre-Trial Brief").⁷

10. On 20 August 2015, the Chamber issued the Impugned Decision, *inter alia*, notifying the parties and participants that the legal characterisation of the facts and circumstances set out in the Confirmation Decision may be subject to change to include Mr Gbagbo's liability under article 28(a) or (b) of the Statute.⁸

11. On 26 August 2015, Mr Gbagbo sought leave to appeal the Impugned Decision pursuant to article 82(1)(d) of the Statute (the "Request for Leave to Appeal").⁹

12. On 10 September 2015, the Chamber granted the Request for Leave to Appeal (the "Leave to Appeal Decision")¹⁰ in respect of the following two questions: i) whether "the Chamber erred in interpreting the phrase 'any time during the trial' as covering the pre-trial period" ("Issue One"); and ii) whether "the Chamber used an irrelevant concept, namely 'special circumstances of this case'" ("Issue Two").¹¹

13. On 21 September 2015, Mr Gbagbo filed his document in support of the appeal against the Impugned Decision (the "Document in Support of the Appeal").¹²

14. Pursuant to regulation 65(5) of the Regulations,¹³ the Legal Representative files her response to the Document in Support of the Appeal.

⁷ See No. ICC-02/11-01/15-148-Anx1, 16 July 2015 (the "Pre-Trial Brief"), Section V(10).

⁸ See the Impugned Decision, *supra* note 2, p. 11.

⁹ See No. ICC-02/11-01/15-193, 26 August 2015 (the "Request for Leave to Appeal").

¹⁰ See No. ICC-02/11-01/15-212, 10 September 2015 (the "Leave to Appeal Decision").

¹¹ *Idem*, p. 9.

¹² See No. ICC-02/11-01/15-231, 21 September 2015 (the "Document in Support of the Appeal").

¹³ See No. ICC-02/11-01/15-172 OA6, 31 July 2015, paras. 16 and 19.

III. Submissions

1. The Chamber did not err in law by applying regulation 55(2) of the Regulations of the Court before the start of the trial *stricto sensu*

15. The Defence argues that the Chamber erred in law because it relied on irrelevant reasons to find that notice under regulation 55(2) of the Regulations may be given before hearing the evidence at trial, and because it construed said regulation in a manner contrary to the applicable rules of interpretation.¹⁴

16. The Legal Representative opposes this ground of appeal in whole because the challenged findings in the Impugned Decision are not misdirected on a question of law.¹⁵ The Chamber rightly found that a Trial Chamber may give notice under regulation 55(2) of the Regulations before the start of the trial *stricto sensu*, namely before the start of the presentation of evidence.

a) The Chamber considered and made explicit the relevant factors for its interpretation of regulation 55(2) of the Regulations of the Court

17. Contrary to the Defence's contention, the Legal Representative submits that the Chamber did not make an "extensive" interpretation of the notion of "trial", did explain the reasons for its interpretation of this term in regulation 55(2) of the Regulations as including the time before the presentation of evidence, and rightly relied on the jurisprudence of the Appeals Chamber to support its conclusion.¹⁶

18. Firstly, in the Impugned Decision, the Chamber relied on the findings of other Chambers that have also made use of regulation 55(2) before the start of the trial

¹⁴ See the Document in Support of the Appeal, *supra* note 12, para. 9.

¹⁵ See No. ICC-02/05-03/09-295 OA2, 17 February 2012, para. 20; and No. ICC-02/04-01/15-251 OA3, 17 June 2015, para. 30.

¹⁶ *Contra* the Document in Support of the Appeal, *supra* note 12, paras. 10-12.

stricto sensu, although it did not elaborate on said findings.¹⁷ In these circumstances, it cannot be argued that the Chamber made an extensive interpretation of this provision. Rather, it showed its agreement with the interpretation made by other Chambers in the past, such as those in the *Lubanga*, *Katanga*, and *Ruto and Sang* cases.

19. In the *Lubanga* case, Trial Chamber I found that “[n]otice shall be given to the parties of this possibility [that a decision to modify the legal characterisation of facts and circumstances may be issued under regulation 55 of the Regulations of the Court] once it emerges”.¹⁸ This Chamber did not set the commencement of the presentation of evidence as the starting moment for the provision of said notice.

20. In a more explicit manner, in the *Ruto and Sang* case, Trial Chamber V(a) concluded that “[f]or an application for the notice of a possibility of a legal recharacterisation, facts and circumstances pleaded in the charging document can also sufficiently inform the Chamber as to the apparent possibility of an eventual change in legal characterisation [...] The Chamber is thus not persuaded by the Defence submission that notice of the possibility of recharacterisation may not be given unless evidence has been heard in the case”.¹⁹

21. Subsequently, in the *Katanga* case, the Appeals Chamber impliedly agreed with the findings quoted above, by finding that “[n]otice can be given, inter alia, after the hearing of evidence has been concluded [...] while it is preferable that notice under regulation 55 (2) of the Regulations of the Court should always be given as early as possible”.²⁰

22. Secondly, the Chamber did make explicit its reasons for supporting this interpretation. As admitted by the Defence, the Chamber referred to (i) “the purpose

¹⁷ See the Impugned Decision, *supra* note 2, para. 11.

¹⁸ See No. ICC-01/04-01/06-1084, 13 December 2007, para. 48.

¹⁹ See No. ICC-01/09-01/11-1122, 12 December 2013, paras. 24-25.

²⁰ See No. ICC-01/04-01/07-3363 OA13, 27 March 2013, paras. 23-24.

of Regulation 55(2)-(3)".²¹ However, the Chamber did not provide this sole reason to give notice at this time of a possible change in the legal characterisation of the facts and circumstances of the case. In addition, the Impugned Decision refers to (ii) the procedural "context", where the Prosecution had not sought an amendment of the charges;²² (iii) the "circumstances of the case", including the fact that the Confirmation Decision acknowledges the possibility of charges under article 28 of the Statute;²³ and (iv) the "overarching obligation" of the Chamber to ensure that the trial is fair and expeditious and is conducted with full respect for the rights of the accused.²⁴

23. This need to ensure that no unfairness results from the use of regulation 55 of the Regulations was also referred to in the jurisprudence of other Chambers relied upon in the Impugned Decision.²⁵ In particular, Trial Chamber V(a) concluded that *"[a]lthough a Regulation 55(2) Assessment, for purposes of notice of a possibility of recharacterisation, may be done at any time during the trial, the Chamber considers that it is best to make this assessment and issue the notice as early as is possible [...] waiting to give such notice increases the chances of prejudice to the Defence"*.²⁶

24. Lastly, it must be noted that the need to protect at all times the rights of the accused is also behind the finding of the Appeals Chamber that notice of a possible change in the characterisation of facts should always be given "as early as possible".²⁷ As such, the reliance on this finding in the Impugned Decision is not an error.²⁸ On the contrary, it should be praised as a guarantee for the protection of the fairness of the proceedings at all times.

²¹ See the Document in Support of the Appeal, *supra* note 12, para. 11.

²² See the Impugned Decision, *supra* note 2, paras. 8 and 11.

²³ *Idem*, paras. 8 and 11-12.

²⁴ *Ibid.*, para. 11. See also the Leave to Appeal Decision, *supra* note 10, para. 13.

²⁵ See e.g. No. ICC-01/04-01/06-1084, 13 December 2007, para. 47.

²⁶ See No. ICC-01/09-01/11-1122, 12 December 2013, para. 27.

²⁷ See *supra* note 20.

²⁸ *Contra* the Document in Support of the Appeal, *supra* note 12, para. 12.

25. Said concerns in relation to the fairness of the proceedings have more recently led Trial Chamber VII in the *Bemba et al.* case to refer to the Impugned Decision, concluding that “[i]t is established jurisprudence of this Court that this notice [of a possible legal re-characterisation] can be provided before the commencement of trial [...]”.²⁹

b) The Chamber’s literal, contextual and teleological interpretation of regulation 55(2) of the Regulations of the Court is correct

26. In light of the arguments *supra*, the interpretation of regulation 55 provided by the Defence is not correct.³⁰ Although the Legal Representative agrees with the Defence that the Vienna Convention on the Law of Treaties is also applicable when interpreting the Regulations,³¹ a correct reading of regulation 55 does not exclude its application before the start of the presentation of evidence.

27. In fact, a literal and contextual interpretation of the term “trial” in regulation 55(2) refers to the trial phase (“le procès au sens large”, starting with the transmission by the Presidency to the Trial Chamber of the decision confirming the charges and of the record of the proceedings altogether). Contrary to the Defence’s contention,³² the term “trial” referred to in this regulation does not mean the trial *stricto sensu* (the proceedings after the opening statements).

28. Firstly, the Defence fails to notice the different phases in the application of regulation 55 of the Regulations, as already clarified by the Chambers in the present and previous cases.

²⁹ See No. ICC-01/05-01/13-1250, 15 September 2015, para. 9.

³⁰ *Contra* the Document in Support of the Appeal, *supra* note 12, paras. 14-36.

³¹ Cf. No. ICC-01/04-01/07-776 OA7, 26 November 2008, para. 82, with the Document in Support of the Appeal, *supra* note 12, para. 13.

³² See the Document in Support of the Appeal, *supra* note 12, paras. 14 and 24.

29. Pursuant to regulation 55, the parties and participants are first provided with the notice of a possible change in the legal characterisation of the facts and circumstances described in the charges. Thereafter, the Chamber, “having heard the evidence”, gives the parties and participants the opportunity to make oral or written submissions on the possible change to the legal characterisation. And finally, the Chamber decides in the trial judgment whether to change the legal characterisation of the facts and circumstances.³³

30. Accordingly, the Defence’s argument that notice can be provided only after the Chamber has already “examined” the evidence is not accurate.³⁴ The judges may provide said notification at any time, even without the need to “examine the evidence” (“at any time during the trial” in regulation 55(2) of the Regulations). By contrast, the judges can only “change the legal characterisation of facts” after conducting said examination of the evidence (“having heard the evidence” in regulation 55(2) of the Regulations).

31. This analysis is not contradicted by the fact that regulation 55 is included in a section of the Regulations entitled “Trial”. Contrary to the Defence’s submissions,³⁵ the particular location of regulation 55 in this legal text cannot be read as necessarily meaning that notice under regulation 55(2) can only be provided during the trial *stricto sensu* (i.e. the proceedings after the opening statements). In fact, the Chamber already applied other provisions contained in the “Trial” section of the Regulations when deciding to hold status conferences.³⁶

³³ See the Impugned Decision, *supra* note 2, paras. 16-17; and the Leave to Appeal Decision, *supra* note 10, para. 13. See also No. ICC-01/04-01/06-1084, 13 December 2007, para. 48; No. ICC-01/04-01/07-3363 OA13, 27 March 2013, paras. 45 and 105; No. ICC-01/09-01/11-1122, 12 December 2013, paras. 25-26; and No. ICC-01/05-01/13-1250, 15 September 2015, para. 8.

³⁴ See the Document in Support of the Appeal, *supra* note 12, para. 15.

³⁵ *Idem*, para. 16.

³⁶ See e.g. No. ICC-02/11-01/15-40, 17 April 2015, p. 3, expressly referring to regulation 54 of the Regulations.

32. More generally, the Legal Representative submits that the Defence's failure to notice the different procedural steps envisaged in regulation 55 can be corrected neither by referring to "*une analyse rapide*" of the provisions in the Statute and the Rules of Procedure and Evidence nor by making unfounded assumptions about the will of the drafters.³⁷

33. At most, a cursory reading of the Rules establishes that the "pre-trial phase" concludes with the Presidency's transmission to the Trial Chamber of the decision confirming the charges and the record of the proceedings. In fact, rule 130 of the Rules, the last rule within Section VI of Chapter 5 of the Rules, is titled "closure of the pre-trial phase". The Rules also suggest that the "trial phase" starts immediately thereafter because the title of Chapter 6 of the Rules, following the confirmation of charges, is "trial procedure".

34. Similarly, considering the structure and titles of the relevant rules, it can at most be concluded that the "trial phase" envisaged in Part 6 of the Statute and Chapter 6 of the Rules is comprised, in chronological order, of status conferences (rule 132 of the Rules), opening statements (rule 140(1) of the Rules), submission of evidence (rules 138, 140(2), 141(1) and 143 of the Rules), closing statements (rule 141(2) of the Rules), deliberations (rule 142 of the Rules), and the delivery of the decision (rule 144 of the Rules). The trial *stricto sensu* appears to refer only to the discussion of and conclusions on the evidence (*i.e.* the opening statements, the submission of evidence, the closing statements, the deliberations, and the decision).

35. Accordingly, the Legal Representative cannot see any merit in the Defence's conclusion that the concept of "trial" refers to the notion of trial *stricto sensu* "*chaque fois qu'il s'agit de discuter des pouvoirs et fonctions de la Chambre de première instance*".³⁸

³⁷ See the Document in Support of the Appeal, *supra* note 12, paras. 17 and 20.

³⁸ *Idem*, para. 23.

36. Secondly, the Defence fails to notice the different meaning of the term “trial” in decisions issued by the Chambers under articles 19(4), 61(9) or 64(8)(a) of the Statute, on the one hand, and in decisions issued pursuant to regulation 55 of the Regulations, on the other hand.

37. Admittedly, as argued by the Defence,³⁹ the term “trial” included in articles 19(4), 61(9), 64(6) and 64(8)(a) of the Statute was read by Trial Chamber I in the *Lubanga* and the *Gbagbo and Blé Goudé* cases, and by Trial Chamber III in the *Bemba* case as referring to the trial *stricto sensu* (i.e. the proceedings after the opening statements);⁴⁰ albeit Trial Chamber II in the *Katanga and Ngudjolo* case disagreed with this approach and referred instead to the “trial phase” when applying article 19(4) of the Statute.⁴¹

38. Regardless of the possible reasons for the different approach of Trial Chamber II in *Katanga and Ngudjolo*,⁴² all Trial Chambers except for the latter agreed, to date, that regulation 55(2) of the Regulations must be read as referring to the entire trial phase and not only to the trial *stricto sensu*.⁴³

39. The Legal Representative submits that the different meaning given by the Trial Chambers to the term “trial” when interpreting articles 19(4), 61(9) and 64(8)(a) of the Statute on the one hand, and when interpreting regulation 55(2) of the Regulations on the other hand, is consistent with the ruling of the Appeals Chamber that the former provisions address “different stages of the procedure” from the latter.⁴⁴

³⁹ *Ibid.*, para. 21.

⁴⁰ See No. ICC-01/04-01/06-1084, 13 December 2007, para 39; No. ICC-01/05-01/08-802, 24 June 2010, para 210; No. ICC-02/11-01/11-T-25-Red-ENG CT, 4 November 2014, p. 3, line 25 to p. 4, line 4; No. ICC-02/11-01/15-58, 7 May 2015, paras. 16 and 21; and No. ICC-02/11-01/15-205, 3 September 2015, paras. 12-13. See also No. ICC-01/04-01/07-1497 OA8, 25 September 2009, para. 38.

⁴¹ See No. ICC-01/04-01/07-1213-tENG, 16 June 2009, para. 40.

⁴² *Idem.* See also the Document in Support of the Appeal, *supra* note 12, para. 22.

⁴³ See No. ICC-01/04-01/06-1084, 13 December 2007, paras. 47-50; No. ICC-01/09-01/11-1122, 12 December 2013, paras. 27-28; and No. ICC-01/05-01/13-1250, 15 September 2015, para. 9.

⁴⁴ See No. ICC-01/04-01/06-2205 OA15 OA16, 8 December 2009, para. 77.

40. Whereas articles 19(4), 61(9) and 64(8)(a) of the Statute refer to the trial *stricto sensu* (i.e. the proceedings after the opening statements), the provision of the notice of a possible change in the legal characterisation of the facts pursuant to regulation 55(2) “at any time during the trial” refers to the trial phase (starting with the transmission by the Presidency to the Trial Chamber of the decision confirming the charges and the record of the proceedings).⁴⁵

41. In this regard, the Appeals Chamber found that “[f]ailing to permit a Trial Chamber to re-visit the legal characterisation that was confirmed by the Pre-Trial Chamber at the end of the confirmation procedure bears the risk of acquittals that are merely the result of legal qualifications confirmed in the pre-trial phase that turn out to be incorrect, in particular based on the evidence presented at the trial”,⁴⁶ and that “[n]otice [of a possible legal re-characterisation of the facts] can be given, inter alia, after the hearing of evidence has been concluded”.⁴⁷

42. The Legal Representative submits that this language (“in particular”, “inter alia”) shows that notice of a possible change to the legal characterisation of the facts can be provided not only after evidence has been presented at trial, but also before.

43. Thirdly, the Defence refers to inapposite provisions as relevant context in order to limit the temporal dimension of a notice of possible re-characterisation under regulation 55(2) of the Regulations.

⁴⁵ See STAHN (C.), “Modification of the Legal Characterization of Facts in the ICC System: a Portrayal of Regulation 55”, (2005) *Criminal Law Forum* 16, pp. 26 and 28 (“The regulation vests the Trial Chamber with a double form of control: control over the initiation of a legal re-classification and supervision of its procedural application. This system provides adequate safeguards against an overflow of requests for re-classification and a possible re-opening of the trial [...] the suggestion to initiate a change in legal qualification may be made ‘at any time during the trial’, even at an early stage of proceedings. If a Trial Chamber should, for example, be of the opinion that the facts and circumstances described in the charges establish a different form of perpetration or participation than that identified in the charges, it may raise this point at the beginning of the trial proceedings and notify the participants of an envisaged change in legal qualification at that early stage. This type of ‘early warning’ may foster judicial efficiency by preventing unnecessary duplications of evidence in the procedure”).

⁴⁶ See No. ICC-01/04-01/07-3363 OA13, 27 March 2013, para. 22 (emphasis added). See also No. ICC-01/04-01/06-2205 OA15 OA16, 8 December 2009, para. 77.

⁴⁷ See No. ICC-01/04-01/07-3363 OA13, 27 March 2013, para. 23 (emphasis added).

44. The Legal Representative agrees with the Defence that regulation 55(2) of the Regulations cannot be read in violation of the Statute or the Rules.⁴⁸ However, the Legal Representative submits that the interpretation of this provision must be made in the context of relevant articles and rules.

45. In this regard, as argued *supra*,⁴⁹ the Impugned Decision relied on regulation 55(2) of the Regulations to provide notice of a possible legal re-characterisation of the facts, not in order to decide on said re-characterisation. As a consequence, contrary to the Defence's submissions,⁵⁰ the Impugned Decision does not infringe articles 61(9) or (11) of the Statute by amending the charges confirmed by the Pre-Trial Chamber.

46. In fact, the Impugned Decision notes as a "preliminary matter" that an amendment pursuant to article 61(9) of the Statute was not sought by the Prosecution, and that instead the latter moved the Chamber to exercise its *proprio motu* powers pursuant to regulation 55 of the Regulations.⁵¹

47. For the same reasons, the notice provided by the Chamber under regulation 55(2) cannot be read as a disguised appeal of the Confirmation Decision.⁵² Indeed, the Chamber expressly noted that a request for leave to appeal said decision was not sought by the Prosecution, and concluded that providing notice to the Defence at this stage was possible only because of the "specific context" of the Confirmation Decision (see also *infra* section III.2).⁵³

⁴⁸ See the Document in Support of the Appeal, *supra* note 12, para. 26. See also Rome Statute, article 52(1), and Regulations of the Court, regulation 1(1).

⁴⁹ See *supra* para. 29.

⁵⁰ See the Document in Support of the Appeal, *supra* note 12, paras. 29-30.

⁵¹ See the Impugned Decision, *supra* note 2, para. 8.

⁵² *Contra* the Document in Support of the Appeal, *supra* note 12, para. 30.

⁵³ See the Impugned Decision, *supra* note 2, para. 8.

48. Lastly, this misreading of the Impugned Decision by the Defence is equally apparent in its submissions concerning the teleological interpretation of regulation 55(2) of the Regulations.

49. The Defence argues that the use of regulation 55 is only justified when the Pre-Trial Chamber does *not* confirm different modes of liability in the alternative, on the ground that the object and purpose of this provision is to avoid lengthy indictments with cumulative and alternative charges.⁵⁴

50. By contrast, the Appeals Chamber repeatedly found that the object and purpose of regulation 55 of the Regulations is to close accountability gaps which may arise from legal qualifications that may be incorrect.⁵⁵ The Legal Representative submits that this purpose cannot be dismissed as a goal of a “political order”.⁵⁶ It is a mere expression of the legal aim of “putting an end to impunity” enshrined in the fifth paragraph of the Preamble of the Statute.

51. In this regard, the Appeals Chamber relied on this goal when finding admissible legal re-characterisations under regulation 55 of the Regulations related to modes of liability, indicating that “[w]ere such a change not to be permissible, it would defeat the purpose of regulation 55 of the Regulations of the Court. The Trial Chamber would be constrained exclusively to using the precise characterisations established by the Pre-Trial Chamber at a much earlier stage of the proceedings and with a necessarily more restricted view of the case as a whole”.⁵⁷

52. Moreover, the Legal Representative submits that an interpretation of regulation 55(2) of the Regulations consistent with “internationally recognised

⁵⁴ See the Document in Support of the Appeal, *supra* note 12, paras. 35-36.

⁵⁵ See No. ICC-01/04-01/06-2205 OA15 OA16, 8 December 2009, para. 77; and No. ICC-01/04-01/07-3363 OA13, 27 March 2013, paras. 22 and 104. See also No. ICC-01/05-01/13-1250, 15 September 2015, para. 7.

⁵⁶ *Contra* the Document in Support of the Appeal, *supra* note 12, para. 34.

⁵⁷ See No. ICC-01/04-01/07-3363 OA13, 27 March 2013, para. 57.

human rights” pursuant to article 21(3) of the Statute, requires that notice of a possible legal re-characterisation of the facts be given as soon as possible and not only immediately before the presentation of evidence. The jurisprudence of international human rights courts has consistently read national provisions similar to regulation 55 in this manner.⁵⁸

2. The Chamber did not err in finding that the provision of notice pursuant to regulation 55(2) of the Regulations of the Court before the start of the trial *stricto sensu* was justified by the “special circumstances of this case”

53. The Defence argues that the Chamber erred because it provided notice pursuant to regulation 55(2) of the Regulations after the Pre-Trial Chamber had taken into account alternative modes of liability,⁵⁹ and because said notice was based on non-existing “special circumstances” that were wrongly identified by the Chamber.⁶⁰

54. In this regard, Trial Chamber VII in the *Bemba et al.* case has recently concluded that “[w]hile in exceptional circumstances it might be necessary to provide notice [of the possibility of a legal re-characterisation] at this stage of the proceedings [before the opening statements], [...] this should [not] be a mechanism whereby the Prosecution immediately seeks to start a procedure which aims at modifying the legal characterisation of the confirmed charges and reintroduces modes of liability which were just rejected by the Pre-Trial Chamber”.⁶¹

55. Against this background, the Legal Representative opposes this ground of appeal in whole because the Chamber neither misappreciated the facts founding the Impugned Decision nor abused its discretion.⁶² The Impugned Decision was not

⁵⁸ See e.g. ECHR (Grand Chamber), *Pélissier and Sassi v. France*, Application no. 25444/94, Judgment (Merits and Just Satisfaction), 25 March 1999, para. 62; and ECHR, *Mattei v. France*, Application no. 34043/02, Judgment (Merits and Just Satisfaction), 19 December 2006, paras. 36-37.

⁵⁹ See the Document in Support of the Appeal, *supra* note 12, paras. 37-44.

⁶⁰ *Idem*, paras. 45-54.

⁶¹ See No. ICC-01/05-01/13-1250, 15 September 2015, para. 11.

⁶² See No. ICC-01/04-02/12-271-Corr A, 7 April 2015, paras. 21-22.

based on irrelevant considerations, but was justified by the particular circumstances of the case (“special circumstances”).

56. Firstly, contrary to the Defence’s submissions,⁶³ the litigation on modes of liability held before the Pre-Trial Chamber was not meant to limit as such the use of regulation 55 during the trial proceedings, and the Chamber’s resort to said regulation in the Impugned Decision has not taken place in the absence of any new element or contradictory debate since the confirmation hearing.

57. The Pre-Trial Chamber intended to reduce the need to resort later to regulation 55 of the Regulations not just “*pour éviter le recours ulterieur à la Norme 55*” as such,⁶⁴ but to ensure the right of the accused to be tried without undue delay in the subsequent proceedings.⁶⁵ In fact, during the confirmation proceedings, the Pre-Trial Chamber reminded the parties and participants that the main purpose of regulation 55 was to notify the Defence of potential characterisations of the facts, and thereby to ensure the better protection of its rights.⁶⁶

58. In a similar manner, in the Impugned Decision, the Chamber relied on the Request and the Pre-Trial Brief to ensure that the Defence could benefit from an early notice of a possible change in the characterisation of the facts. The Chamber reiterated that it could not rely on facts and circumstances not described in the charges confirmed by the Pre-Trial Chamber,⁶⁷ but rightly concluded that the Prosecution’s narrative in the Pre-Trial Brief and the Defence’s response provided sufficient grounds to resort to regulation 55(2) before the start of the trial *stricto*

⁶³ See the Document in Support of the Appeal, *supra* note 12, paras. 37 and 31.

⁶⁴ *Idem*, para. 39. See also *ibid.*, para. 48 *in fine*.

⁶⁵ See the Confirmation Decision, *supra* note 4, para. 228.

⁶⁶ See No. ICC-02/11-01/11-619, 14 February 2014, paras. 21-22.

⁶⁷ See the Impugned Decision, *supra* note 2, para. 17. See also No. ICC-01/04-01/07-3363 OA13, 27 March 2013, para. 49; and No. ICC-01/05-01/13-1250, 15 September 2015, para. 7.

sensu.⁶⁸ Accordingly, the Defence's arguments on the absence of new submissions, and that it could not contest them, are misplaced.

59. It must be noted that the Pre-Trial Brief, a document not expressly envisaged by the legal instruments of the Court, was ordered by the Chamber as “[a] *document explaining the Prosecution’s case theory with reference to the witnesses the Prosecution intends to call and the evidence it intends to rely on at trial*”.⁶⁹ This document therefore provides additional elements for consideration during the trial. In this regard, although the confirmation decision and not the Pre-Trial Brief defines the parameters of the trial,⁷⁰ the Appeals Chamber stated that “[t]his does not necessarily exclude that further details about the charges, as confirmed by the Pre-Trial Chamber, may, depending on the circumstances, also be contained in other auxiliary documents”.⁷¹

60. Secondly, the “Pre-Trial Practice Manual” recently adopted cannot be construed as an obstacle to the correctness of the Impugned Decision.⁷² Said manual provides that the use of regulation 55 “*even before the opening of the evidentiary debate at trial*” should be limited only when said use is “*improper*” and takes place “*immediately after the issuance of the confirmation decision*”.⁷³

61. By contrast, as argued *supra*,⁷⁴ the Chamber did not make an “improper” use of regulation 55(2) of the Regulations in the Impugned Decision, but a perfectly reasonable one. Said use was also justified by the fact that the Confirmation Decision was issued over a year ago.⁷⁵

⁶⁸ See the Impugned Decision, *supra* note 2, para. 13.

⁶⁹ See No. ICC-02/11-01/15-58, 7 May 2015, para. 19.

⁷⁰ *Idem*, para. 18.

⁷¹ See No. ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 124.

⁷² *Contra* the Document in Support of the Appeal, *supra* note 12, para. 44.

⁷³ See the “Pre-Trial Practice Manual”, September 2015, available at <[http://www.icc-cpi.int/iccdocs/other/Pre-Trial_practice_manual_\(September_2015\).pdf](http://www.icc-cpi.int/iccdocs/other/Pre-Trial_practice_manual_(September_2015).pdf)>, p. 18.

⁷⁴ See *supra* paras. 56-58.

⁷⁵ See *supra* note 4.

62. Thirdly, as argued by the Defence, the Confirmation Decision failed to include charges under article 28 of the Statute, but did not “simply” decline to confirm the charges based on this mode of liability.⁷⁶ The Pre-Trial Chamber expressly noted “[t]he available evidence that indicates a failure on the part of Laurent Gbagbo to prevent violence or to take adequate steps to investigate and punish the authors of the crimes,”⁷⁷ and concluded that it “[c]annot rule out the possibility that the discussion of evidence at trial may lead to a different legal characterisation of the facts, following the appropriate procedure to that effect”.⁷⁸

63. The Legal Representative submits that these findings in the Confirmation Decision amount to a “special”, “unique” or “exceptional” circumstance⁷⁹ justifying the provision of notice under regulation 55(2) of the Regulations at this point in time in this case. As noted in the Impugned Decision, “[t]he Pre-Trial Chamber expressly acknowledged, on different occasions, the possibility of Mr Gbagbo’s liability under Article 28 of the Statute”.⁸⁰

64. Moreover, as evidenced by the Request and the Pre-Trial Brief, article 28 of the Statute provides for a mode of liability with notably different requirements than those in article 25(3) of the Statute.⁸¹ In this regard, the Legal Representative contends that the Prosecution’s submission of the Request and the Pre-Trial Brief provided a clearer “narrative of the facts”⁸² or “case theory”,⁸³ reasonably leading the Chamber to conclude that Mr Gbagbo’s alleged failure to prevent, investigate or punish the crimes *may* also be considered on its own under article 28 of the Statute.

⁷⁶ See the Document in Support of the Appeal, *supra* note 12, paras. 48 and 52.

⁷⁷ See the Confirmation Decision, *supra* note 4, para. 264.

⁷⁸ *Idem*, para. 263.

⁷⁹ See the Impugned Decision, *supra* note 2, paras. 8 and 11-12.

⁸⁰ *Ibid.*, para. 12.

⁸¹ *Idem*.

⁸² See the Confirmation Decision, *supra* note 4, para. 263.

⁸³ See No. ICC-02/11-01/15-58, 7 May 2015, para. 19.

65. Lastly, contrary to the Defence's contention,⁸⁴ the existence of circumstances justifying the provision of notice under regulation 55(2) of the Regulations cannot be affected by the fact that the evidence has still not been discussed. The Legal Representative notes that a discussion of the evidence is required only to issue the judgment at the end of the trial.⁸⁵

66. Moreover, the Appeals Chamber has not ruled out that it may be possible for a Trial Chamber to re-visit the legal characterisation of the facts *before* the presentation of evidence.⁸⁶

IV. Conclusion

67. For the foregoing reasons, the Common Legal Representative respectfully requests the Appeals Chamber to dismiss the appeal.

It is hereby certified that this document contains a total of 5,934 words and complies in all respects with the requirements of Regulation 36 of the Regulations of the Court.⁸⁷



Paolina Massidda
Principal Counsel

Dated this 1st day of October of 2015

At The Hague, The Netherlands

⁸⁴ See the Document in Support of the Appeal, *supra* note 12, para. 49.

⁸⁵ See Rome Statute, article 74(2).

⁸⁶ See *supra* paras. 41-42.

⁸⁷ This statement (30 words), not itself included in the word count, follows the Appeals Chamber's direction. See No. ICC-01/11-01/11-565 OA6, 24 July 2014, para. 32.