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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 Laurent Gbagbo's appeal against the "Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court"

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Introduction

1. The appeal¹ filed by the Defence of Laurent Gbagbo (“Appellant”) against the decision giving notice pursuant to regulation 55(2)² should be dismissed *in limine*. There is no need for the Appeals Chamber’s corrective intervention, because even if, *arguendo*, the Trial Chamber erred by giving regulation 55(2) notice before the delivery of the opening statements and the evidentiary phase of the trial, such error is irrelevant for the proceedings in this case. Any such errors would not cause unfair prejudice to the Accused, but rather, early notice of charges would enhance his right under article 67(1)(a) to be informed promptly of the charges. In addition, any such alleged errors would become moot once the Prosecution delivers its opening statement on 10 November 2015, or by the very latest when the Prosecution calls its first witness in January 2016.³
2. In any event, should the Appeals Chamber entertain the merits of the Appeal, the Prosecution submits that the Trial Chamber made no error. The Trial Chamber correctly held that it had the power to give notice of a possible re-characterisation of the facts “at any time during the trial”, including once it was seised of the case and before the opening statements.⁴ The Trial Chamber also correctly found that, due to the special circumstances of this case, it was appropriate to give notice of a possible re-characterisation of the facts to include the Accused’s liability under article 28 at this early stage of the proceedings.⁵

Submissions

A. The Appeal should be dismissed *in limine*

3. Consistent with the Appellant’s request,⁶ the Trial Chamber granted leave to appeal the Decision on two issues concerning the “timing of the [...] Decision”.⁷

¹ ICC-02/11-01/15-231 OA7 (“Appeal”).

² ICC-02/11-01/15-185 (“Decision”).

³ ICC-02/11-01/15-58, para. 16.

⁴ Decision, para. 11.

⁵ Decision, paras. 11-12.

⁶ The Appellant framed both issues for which leave to appeal was granted under the heading that “*La Chambre de première instance a erré en droit en décidant de mettre en œuvre la Norme 55 à ce stade de la procédure*” (emphasis added – see ICC-02/11-01/15-193, paras. 11-28).

Accordingly, the sole questions before the Appeals Chamber are whether the Trial Chamber erred in holding that it had the power to give notice of a possible re-characterisation of the facts “at any time during the trial”, including after being seised of the case and before the opening statements (“First Ground of Appeal”);⁸ and whether the Trial Chamber erred in holding that it was appropriate to give notice at such early stage of the proceedings due to, *inter alia*, the “special circumstances” of this case (“Second Ground of Appeal”).⁹

4. Both questions are irrelevant to the conduct of the proceedings in this case or the outcome of the trial.¹⁰ In fact, even if, *arguendo*, the Trial Chamber had erred by giving a regulation 55(2) notice before the delivery of the opening statements and the evidentiary phase of the trial, such error would not require appellate intervention. The only effect of the Trial Chamber’s early notice in this case is to enhance the fairness of the proceedings and the Accused’s right under article 67(1)(a) to be informed promptly of the charges. An early regulation 55 notice cannot cause unfair prejudice to the Accused or otherwise materially affect the proceedings, and the Appellant does not argue that it did. Accordingly, if the Appeals Chamber were to entertain the Appellant’s submissions, it would need to rule on an abstract issue thereby assuming the role of an advisory body, which it has repeatedly held to be outside the scope of its authority.¹¹
5. In addition, the Appeal will become moot as soon as the charges are read to the Accused and the Prosecution delivers its opening statement on 10 November 2015, or by the very latest at the commencement of the evidentiary phase of the trial in January 2016.¹² At that stage of the proceedings, it will be irrelevant whether the Trial Chamber’s initial regulation 55 notice was issued prematurely.

⁷ ICC-02/11-01/15-212 (“Decision Granting Leave”), para. 12. The Trial Chamber’s Decision Granting Leave specifically focuses on the interpretation of the phrase “‘at any time during the trial’ in Regulation 55(2)” and whether “there could be [...] ‘exceptional circumstances’ warranting giving notice now” (para. 21).

⁸ Decision, para. 11; Appeal, paras. 7-44.

⁹ Decision, paras. 11-12; Appeal, paras. 45-54.

¹⁰ The Appeals Chamber should make its own assessment on this matter and is not bound by the Trial Chamber’s findings that the two issues for which it granted leave to appeal, have a significant impact on the fair and expeditious conduct of the proceedings or outcome of the trial (Decision Granting Leave, para. 12).

¹¹ ICC-01/04-503 OA4 OA5 OA6, para. 30; ICC-01/04-01/07-3132 OA12, para. 7; ICC-01/04-01/06-3026 A4, A5, A6, para. 4.

¹² ICC-02/11-01/15-58, para. 16.

In addition, the remedy requested by the Appellant, namely a reversal of the Decision, would then cease to have any impact on the proceedings because the Trial Chamber could simply re-issue a decision to the same effect or simply provide notice orally immediately after the charges have been read. Since all other relevant factors considered by the Trial Chamber in its Decision are likely to be unchanged, it can be assumed that the Trial Chamber would follow such course of action.

6. The Appeals Chamber should therefore dismiss the Appeal *in limine*.

B. The Trial Chamber did not err in its Decision

7. In any event, should the Appeals Chamber nevertheless decide to entertain the merits of the Appeal, the Prosecution submits that the Trial Chamber did not err by giving a regulation 55 notice before the opening statements and the start of the evidentiary phase of the trial.
8. The Prosecution notes that many of the Appellant's arguments exceed the question of the timing of a regulation 55 notice, the issue which was certified for appeal.¹³ The Appeals Chamber has held that "it is for the Pre-Trial or Trial Chamber to determine not only whether a decision may be appealed, but also to what extent".¹⁴ As a result, arguments that are not related to the issues certified for appeal are irrelevant and should be disregarded.

(i) *First Ground of Appeal: The Trial Chamber did not err in its interpretation of the term "any time during the trial"*

9. Contrary to the Appellant's contention under his First Ground of Appeal,¹⁵ the Trial Chamber correctly held that the term "any time during the trial" in regulation 55(2) is not limited to the hearing of evidence, but extends to the phase after a Trial Chamber is seised of a case and before opening statements.¹⁶

¹³ See for instance, Appeal, paras. 2-6, 33-44, 53-54.

¹⁴ ICC-02/11-01/11-572 OA5, para. 63; see also ICC-01/05-01/08-1019 OA4, para. 70.

¹⁵ Appeal, paras. 7-44.

¹⁶ Decision, para. 11.

10. The Appeals Chamber has previously found that “it is preferable that notice under regulation 55(2) of the Regulations of the Court should always be given as early as possible”.¹⁷ The Appellant does not provide any convincing argument why this finding should be read to exclude the period prior to the opening statements or before the commencement of the evidentiary phase of the trial. Any such interpretation would have the consequence of depriving accused persons of the benefit of additional time that would otherwise be available to them, if notification is given at the earliest opportunity.
11. First, the ordinary meaning of the terms of regulation 55(2) does not prevent the Trial Chamber from giving notice as soon as it is seised of a case.¹⁸ The Appellant concedes that under the Statute and the Rules the term “trial” can be interpreted broadly and is not necessarily limited to the evidentiary phase.¹⁹ In fact, Trial Chamber VII has recently held that “it is established jurisprudence of this Court that [regulation 55] notice can be provided before the commencement of the [evidentiary phase of the] trial”.²⁰ While in a different context the term “trial” may be interpreted more restrictively,²¹ there is no indication that regulation 55(2) requires such an interpretation. To the contrary, the Appeals Chamber has held that when giving a regulation 55(2) notice, a Chamber “must ensure that the trial remains fair”.²² Because early notice enhances the fairness of the proceedings and an accused’s right under article 67(1)(a) to be informed promptly of the charges, regulation 55(2) cannot be interpreted to exclude its application during the earliest stages of the proceedings before a Trial Chamber. Such approach would be inconsistent with regulation 1(1) that provides that the Regulations of the Court “shall be read subject to the Statute and the Rules”, and in particular the Trial Chamber’s duty under article 64(2) to ensure the fair and expeditious

¹⁷ ICC-01/04-01/07-3363 OA13, para. 24.

¹⁸ *Contra*, Appeal, paras. 14-24.

¹⁹ Appeal, para. 14. See also Annex to the Appeal, in which the Appellant provides numerous examples of provisions in the Statute and the Rules, which according to his assessment, do not limit the interpretation of the term “trial” to its evidentiary phase.

²⁰ ICC-01/05-01/13-1250, para. 9, relying, *inter alia*, on ICC-01/04-01/06-1084, paras. 47-50; and Decision, para. 11.

²¹ See for instance, ICC-01/05-01/08-802, para. 210; Appeal, paras. 21-22.

²² ICC-01/04-01/07-3363 OA13, para. 1.

conduct of proceedings,²³ which extends to all phases of the proceedings before a Trial Chamber.

12. Second, the Trial Chamber correctly interpreted regulation 55 in the context of the Court's legal framework.²⁴ The Prosecution agrees with the Appellant that the rights of the Accused are relevant for the interpretation and application of regulation 55.²⁵ However, as mentioned above, notice at the earliest possible stage is intended to enhance an accused's rights to a fair trial, which a Trial Chamber has a duty to protect also prior to the evidentiary phase of the trial.
13. In addition, the Appellant's analogy to procedures under article 61(9) for the modification of charges²⁶ is inapposite,²⁷ and the application of regulation 55 does not require, as a matter of law, that the Prosecution provide evidence to convince the Trial Chamber that a regulation 55 notice is appropriate.²⁸ The Appeals Chamber has repeatedly held that article 74(2) confines the scope of regulation 55 to the facts and circumstances described in the charges²⁹ and not to the evidence presented by the Parties. The Appellant's submissions in this context appear to rely on the Trial Chamber's statement that in this case the Prosecution should have sought leave to appeal the confirmation decision or requested an amendment of the charges pursuant to article 61(9) before moving the Chamber to give a regulation 55 notice.³⁰ However, this conclusion, which the Prosecution considers to be flawed, should not be used to restrict the timely application of regulation 55. Indeed, both amendment of the charges and applications for leave to appeal are procedural devices designed for a different

²³ Trial Chamber II's decision in the *Katanga* case referred to by the Appellant (ICC-01/04-01/07-1213, para. 40, Appeal, para. 22) suggesting that the term "trial" in regulation 55(2) refers to the period after the opening statement is *obiter* and was issued prior to the Appeals Chamber's judgment in the *Katanga* case, according to which notice under regulation 55 (2) should always be given as early as possible. Accordingly, it should not be followed by the Appeals Chamber. The Appeals Chamber did not "implicitly confirm" this decision, as suggested by the Appellant (Appeal, para. 22)—it simply did not rule on it (ICC-01/04-01/07-1497, para. 38).

²⁴ *Contra*, Appeal, paras. 25-32.

²⁵ Appeal, para. 28.

²⁶ Appeal, para. 29.

²⁷ ICC-01/04-01/06-2205 OA15 OA16, para. 77; ICC-01/04-01/07-3363 OA13, para. 22.

²⁸ Appeal, para. 31.

²⁹ ICC-01/04-01/06-2205 OA15 OA16, paras. 1, 88-89, 93-94; ICC-01/04-01/07-3363 OA13, para. 49.

³⁰ Decision, para. 8.

purpose.³¹ They are not prescribed as a pre-requisite for the timely application of regulation 55 either by regulation 55 itself or by the relevant jurisprudence of the Appeals Chamber and the practice of this Court.³² In addition, the introduction of these procedural devices as (extra-statutory) prerequisites for notice under regulation 55 to be given would adversely impact on the efficiency of the proceedings: both would require the Prosecution to burden Chambers with superfluous litigation, solely for the purposes of exhausting alternate remedies in order to preserve the possibility of prompt notice under regulation 55 at trial.

14. Third, the Trial Chamber correctly considered the “object and purpose” of regulation 55.³³ The Appellant merely disagrees with the Appeals Chamber’s ruling,³⁴ endorsed in the Decision,³⁵ that regulation 55 enables the Trial Chamber to “close accountability gaps”.³⁶ In addition, the Appellant’s arguments about the object and purpose of regulation 55³⁷ or on the appropriateness of a regulation 55 notice in this case,³⁸ are irrelevant to the Trial Chamber’s decision on the timing of a regulation 55 notice and to the present Appeal and must therefore be disregarded.

15. As a result of the above, the First Ground of Appeal should be rejected.

³¹ Regulation 55 protects a different interest, and takes account of different factors, than any application to the Pre-Trial Chamber under article 82(1)(d). Not all circumstances which justify a request under regulation 55 justify an application under article 82(1)(d). In addition, the procedure under article 61(9) is designed as a tool for the Prosecution to convince a Pre-Trial Chamber that new charges should be added, based primarily on additional evidence.

³² Trial Chambers have made such a statement only in two recent decisions, including the present one (*See also* ICC-01/05-01/13-1250, para. 10), yet has been absent from previous regulation 55 decisions (ICC-01/09-01/11-1122, paras. 27-28), even when the regulation 55 notice was asked for and issued before the commencement of the trial (ICC-01/04-01/06-1084, paras. 48-50). In one case, the Pre-Trial Chamber even rejected the Prosecution’s application for leave to appeal the confirmation decision on the basis that the Prosecution is not prevented from subsequently requesting the Trial Chamber to reconsider the legal characterisation of the confirmed facts pursuant to regulation 55 (ICC-01/04-01/06-915, paras. 44-45).

³³ Appeal, paras. 33-36.

³⁴ ICC-01/04-01/06-2205 OA15 OA16, para. 77; ICC-01/04-01/07-3363 OA13, paras. 22, 104.

³⁵ Decision, para. 9.

³⁶ Appeal, paras. 33-34.

³⁷ Appeal, paras. 35-36.

³⁸ Appeal, paras. 37-44.

- (ii) *Second Ground of Appeal: The Trial Chamber did not err by holding that it was appropriate to give notice at an early stage of the proceedings, due to, inter alia, the special circumstances of this case*

16. Under its Second Ground of Appeal, the Appellant raises an error in the Trial Chamber's exercise of discretion.³⁹ The Appeals Chamber has held that it would interfere with a discretionary decision amounting to an abuse of discretion only "when the decision is so unfair or unreasonable as to 'force the conclusion that the chamber failed to exercise its discretion judiciously'".⁴⁰ The Appellant does not demonstrate any such error in the Decision. Instead, the Appellant merely disagrees with the Trial Chamber's conclusion that in the context of determining the timing of a regulation 55 notice, it was appropriate to take into consideration the fact that the Pre-Trial Chamber,⁴¹ including the Dissenting Judge,⁴² has repeatedly alluded to the possibility that the Accused may face article 28 charges in this case.
17. Contrary to the Appellant's contention, the Pre-Trial Chamber's reference to possible article 28 charges is not illogical, simply because it did not confirm charges under that mode of liability.⁴³ In fact, when declining to confirm those charges, the Pre-Trial Chamber did not reject the Prosecution's evidence or the underlying alleged facts.⁴⁴ Rather, it held that the narrative of the facts in this case did not point to the Accused's "*mere* failure to prevent or repress the crimes",⁴⁵ and instead considered his omissions to be an inherent component of his "*deliberate effort* [to] retain power at any cost, including through the commission of crimes".⁴⁶ As a result, it was not unreasonable for the Trial Chamber to consider the manner in which the Pre-Trial Chamber declined to

³⁹ Appeal, paras. 45-54.

⁴⁰ ICC-01/09-02/11-1032 OA5, para. 25. The Appellant does not expressly qualify the nature of the error raised under its Second Ground of Appeal.

⁴¹ Decision, paras. 11-12; Appeal, para. 46.

⁴² Decision, para. 12; Appeal, paras. 50-51. The Appellant's submission that the Trial Chamber misconceived Judge Van den Wyngaert's dissenting opinion is unsupported. In fact, the Decision quotes from that dissenting opinion.

⁴³ Appeal, paras. 47-48.

⁴⁴ *Contra*, Appeal, para. 54.

⁴⁵ ICC-02/11-01/11-656-Red, para. 263 (emphasis added).

⁴⁶ ICC-02/11-01/11-656-Red, para. 264 (emphasis added).

confirm article 28 charges in this case as a relevant factor when providing a regulation 55 notice at an early stage of the proceedings.

18. In addition, it is irrelevant to the timing of the regulation 55 notice that the Pre-Trial Chamber had indicated that a re-characterisation of charges may be necessary as a result of the “discussion of the evidence”.⁴⁷ What matters in the context of the Decision—and this Appeal—is that the Pre-Trial Chamber had already alluded to a possible re-characterisation of the charges in this case. It was not unreasonable for the Trial Chamber to take this factor into consideration when determining that it was appropriate in this case to give an early regulation 55 notice.
19. The Second Ground of Appeal should therefore be rejected.

Conclusion

20. For the reasons set out above, the Prosecution submits that the Appeal should be rejected.



Fatou Bensouda, Prosecutor

Dated this 2nd October 2015

At The Hague, The Netherlands

⁴⁷ Appeal, para. 49; Decision, para. 12, quoting from ICC-02/11-01/11-656-Red, para. 263.