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THE APPEALS CHAMBER

Before:

**Judge Kuniko Ozaki
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Piotr Hofmański
Judge Chang-ho Chung**

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE
IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO and
CHARLES BLÉ GOUDÉ***

**Public Document
One public annex**

Document in support of the appeal against the “Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court” (ICC-02/11-01/15-185)

Source: Defence team for Laurent Gbagbo

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

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I. Background.

1. On 10 September 2015, the Trial Chamber partly granted the Defence request for leave to appeal the decision 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 Statute”.¹ The Trial Chamber allowed the Defence to appeal the following two issues: “The Chamber erred in interpreting the phrase ‘any time during the trial’ as covering the pre-trial period (‘Issue One’); [t]he Chamber used an irrelevant concept, namely ‘special circumstances of this case’ (‘Issue Two’)”.²

II. Discussion

2. The Statute sets down logical and coherent procedural stages, in particular for the adjudication of charges. Firstly, provision is made for a confirmation hearing, where an adversarial debate between Prosecution and Defence allows the Pre-Trial Bench to determine whether there are reasons to proceed to trial. Upon conclusion of the hearing, the Bench hands down its decision and any charge (each consisting of the facts, the legal characterisation of the facts and the selected mode of liability) thereby confirmed circumscribes the trial and determines its content. In *Lubanga*, the Trial Chamber, in the following terms, so reminded the Prosecutor, who had argued that the Trial Bench was not bound by findings of fact and holdings of the Pre-Trial Chamber: “[t]he power to frame the charges lies at the heart of the Pre-Trial’s functions”.³ Likewise, the Trial Chamber in the present case affirmed: “the Chamber

¹ ICC-02/11-01/15-185, p. 11.

² ICC-02/11-01/15-212, para. 2.

³ ICC-01/04-01/06-1084, para. 39.

recalls that the decision on the confirmation of the charges defines the parameters at trial”.⁴

3. Regulation 55 must dovetail with this coherent structure and may not be used to bring it down. Specifically, it cannot be used to call into question the usefulness and authority of the Confirmation Decision.

4. On 12 June 2014, the Pre-Trial Chamber explicitly dismissed the Prosecution’s request for confirmation of the charges on the basis of superior responsibility (article 28), holding that “a fundamental difference exists between the forms of commission incriminated in article 25 of the Statute, which establish liability for one’s own crimes, and article 28 of the Statute, which establishes liability for violation of duties in relation to crimes committed by others”⁵ and adding that “the consideration of Laurent Gbagbo’s responsibility under article 28 of the Statute would require the Chamber to depart significantly from its understanding of how events unfolded in Cote d’Ivoire during the post-electoral crisis and Laurent Gbagbo’s involvement therein”.⁶

5. From the material submitted by the Prosecution, the Bench sifted out what appeared to it to be credible and the allegations that appeared to it to be substantiated. From that analysis, founded on an objective finding, they determined a congruent narrative consisting of charges (facts, legal characterisation of the facts and mode of liability) which have meaning within this context alone. The coherence of the decision on the confirmation of charges reflects the Bench’s understanding of

⁴ ICC-02/11-01/15-58, para. 17; ICC-02/11-01/11-810, para. 57.

⁵ ICC-02/11-01/11-656-Conf, para. 262.

⁶ *Ibid.*, para. 265.

the case founded on objective findings; the selection it made from among the possible modes of liability for each charge is part and parcel of that coherence.

6. The Impugned Decision brings down the Pre-Trial Chamber's construction and negates the rationale that holds it up. It calls into question the authority of the Confirmation Decision and undermines the fairness of the proceedings by amending, after the pre-trial phase, the charges against the Accused without affording the Accused the opportunity to defend himself. The Impugned Decision also undermines the principle of equality of arms and the Accused's right to have time and facilities to prepare for trial efficiently and effectively, by reducing the Defence's room for manoeuvre. Indeed, the Defence has to examine all of the Prosecution's evidence and allegations from a new perspective, even though the Impugned Decision does not give it time to do so.

1. First ground of appeal: the Trial Chamber erred in law by deciding to resort to regulation 55 before the start of the trial

7. The first ground of appeal concerns the timing of the possible notice under regulation 55. The Chamber considered that such notice could be given at any time after the constitution of the Trial Chamber, i.e. even before the start of the trial proper. However, pursuant to the letter of regulation 55, notice may be given "at any time during the trial". It is, therefore, a matter of determining the scope of the expression "at any time during the trial" (regulation 55(2)).

8. In the Impugned Decision, the Chamber's analysis of the regulation is confined to the following considerations:

The Chamber considers that, in this context and the special circumstances of this case, the term 'trial' is not limited to the hearing of evidence, but also extends to the phase

after a trial chamber is seized of a case and before opening statements. This interpretation is consistent with the purpose of Regulation 55(2)-(3) of the Regulations, and the Chamber's overarching obligation, to ensure that a trial is fair and expeditious. Indeed, according to the Appeals Chamber, notice under Regulation 55(2) of the Regulations 'should always be given as early as possible'.⁷

9. It seems clear, however, that the reasons given by the Chamber to interpret regulation 55 broadly (1) are irrelevant and (2) lead the Chamber to attach to the regulation a meaning that is contrary to the meaning it would have were a rigorous methodology of interpretation to be applied.

1.1 Errors of reasoning committed by the Chamber

10. Firstly, the Chamber mentions the "context and special circumstances of this case".⁸ Even if one were to consider the existence of a context that is specific to this case (which is not so, see *infra*), how would such a context constitute a relevant criterion to amend the *legal* interpretation of a text? The law is the same for all, irrespective of a case's context. The very nature of a legal norm is that it applies equally to all. This is the only way of ensuring, on the one hand, equal treatment of all who are subject to such norm and, on the other hand, the legal security of those concerned. Interpreting a norm differently depending on supposedly different contexts is tantamount to placing the judge's opinion above the text of the norm and paves the way to arbitrariness. At the ICC, judges have interpreted the concept of "trial" broadly, in direct contradiction with the text of the regulation, allowing the Prosecution to revisit the Pre-Trial Bench's holdings.

11. Secondly, as the Judges have made no effort to interpret the concept of "trial" they have consequently been unable to ground their reasoning on a sound legal

⁷ ICC-02/11-01/15-185, para. 11.

⁸ *Idem*.

foundation; in actual fact, they have provided no justification for their interpretation of regulation 55. At no time does the Chamber truly interpret the regulation itself; it merely refers to “the purpose of Regulation 55(2)-(3)”⁹ without any further explanation. Judges must demonstrate how they have interpreted a regulation so as to explain their rationale, allow parties to raise an appeal and allow judges to validate or dismiss such an approach at second instance.

12. Thirdly, the fact that the Appeals Chamber indicated that notice must “always be given as early as possible”¹⁰ cannot in itself constitute a reason to contravene the clear wording of regulation 55; it is obvious that the words “as early as possible” do not mean “at the judge’s discretion”. It is to be noted that the Appeals Chamber used the expression “as early as possible” in a specific context, as it was discussing the very late resort to regulation 55, at the deliberation stage of the proceedings.¹¹ Reference to the Appeals Judgment is thus irrelevant in this instance because it is not in any way related to the question of whether the regulation can be used before the start of the trial in the narrow sense.

1.2 The proper interpretation of regulation 55

13. Under the Vienna Convention on the Law of Treaties, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.¹² Although, technically speaking, regulation 55 is not a treaty, this rule of general interpretation of international law may serve as guidance by analogy. Accordingly,

⁹ *Idem.*

¹⁰ *Idem.*

¹¹ ICC-01/04-01/07-3363.

¹² Article 31(1) of the Convention.

an analysis of regulation 55 to determine how it applies to the case at bar requires analysis of (1) the ordinary meaning of the terms of regulation 55; (2) its context, *viz.* its status within the overarching legal framework of the Statute; and (3) its object and purpose – in other words, its spirit.

1.2.1 “Ordinary” meaning of the terms of regulation 55

14. At issue is the determination of the scope of the expression “at any time during the trial”. There are two possible meanings of “trial”. According to the first definition, the trial commences upon constitution of the Trial Chamber (trial in the broad sense). According to the second definition, the trial starts with the opening statements (trial in the narrow sense).

15. The text of the regulation mentions the judges having already examined evidence at the time of giving notice, which can only occur during the trial in the narrow sense.

16. Furthermore, in the Regulations of the Court, regulation 55 is found in the section entitled “Trial”; and yet, all the regulations in this section attach a specific meaning to the concept of “trial”, that of the trial in the narrow sense. For example, regulation 55 concerns orders that may be issued by the Trial Chamber at status conferences in relation to the “issues the participants propose to raise during the trial”. This obviously refers to the trial in the narrow sense, as the objective of these conferences is to prepare the trial in the narrow sense.¹³ Likewise, under regulation 56, the Chamber “may hear the witnesses and examine the evidence for the purposes of a decision on reparations [...] at the same time as for the purposes of

¹³ Rule 132.

trial". The wording is clear; it refers to the trial in the narrow sense because it is only during the trial in the narrow sense that witnesses are heard and evidence examined.

17. In addition, the term "trial" appears in 61 provisions of the Statute and Rules of Procedure and Evidence.¹⁴ A rapid analysis of these provisions shows that, in 43 instances, the meaning is the trial in the narrow sense; in 12 instances, the provision is ambiguous and can apply to the trial in both senses; only in 6 cases does the provision clearly refer to the trial in the broad sense. Therefore, in the vast majority of cases, the term "trial" refers to the trial in the narrow sense.

18. A closer analysis of the provisions of these texts shows that of the 18 provisions where the term "trial" does not necessarily refer to the trial in the narrow sense:

- Four concern provisions applicable at the pre-trial stage and logically refer to all proceedings after the pre-trial stage,
- Two concern provisions applicable at the appeals stage and thus logically refer to all proceedings preceding the appeals stage,
- One concerns domestic proceedings, and
- Three concern related proceedings (contempt/disciplinary).

These 10 provisions are thus irrelevant to the present discussion.

19. In particular, whenever there is mention of the Trial Chamber's functions or decisions it may or must render, the term "trial" is understood as covering only the trial in the narrow sense.¹⁵ Regulation 55 falls within this category of provisions allowing the Chamber to issue a decision. Logic would thus have it that the term "trial" is to be used with the meaning of trial in the narrow sense.

¹⁴ See Annex.

¹⁵ See Annex.

20. Furthermore, where the drafters intended to refer to the trial in the broad sense, they did so almost explicitly. This clearly transpires from a comparison of the French and English versions¹⁶ or from the terms used to spell out the concept.¹⁷

21. Lastly, it should be noted that the Trial Chambers which had the opportunity to rule on matters relating to one of these provisions containing the term “trial” have almost always interpreted this term as covering the trial in the narrow sense. In the instant case, the Trial Chamber considered that “trial commences on the first day of trial on the merits”.¹⁸ In *Lubanga*, the Trial Chamber stated that “the Bench is persuaded that this expression means the true opening of the trial when the opening statements, if any, are made prior to the calling of witnesses”.¹⁹ In *Bemba*, the Trial Chamber considered that “the trial of the accused, and an evaluation of the merits of the case against him, starts (“commences”) when the evidence in the case is called and counsel – by speeches, submissions, statements and questioning – address the merits of the respective cases”.²⁰

22. The only Chamber to have considered that the trial commences as soon as the trial bench is constituted is the Trial Chamber in *Katanga*.²¹ The implication of this decision for the purposes of the present analysis must, however, be put in perspective. Firstly, the Chamber explicitly stated that its interpretation of the term “trial” did not apply to regulation 55.²² Secondly, in the appeal against this decision,

¹⁶ For example, where the French term “*procès*” corresponds to “proceedings” in English, it obviously refers to the concept of trial in the broad sense (article 68, rule 64(2), rule 68(d)(3) and rule 39).

¹⁷ For example, the use of the expression “each stage of the trial” clearly shows the intention to refer to the trial in the broad sense (article 74(1), regulation 86(3) and rule 39).

¹⁸ ICC-02/11-01/11-T-25-CONF-ENG, p. 3, line 25, and p. 4, line 1.

¹⁹ ICC-01/04-01/06-1084, para. 39.

²⁰ ICC-01/05-01/08-802, para. 210.

²¹ ICC-01/04-01/07-1213-tENG.

²² *Ibid.*, para. 40.

although the Appeals Chamber did not rule directly on the Trial Chamber's interpretation, it did implicitly express strong disapproval.²³ Lastly, in *Bemba*, Trial Chamber III directly rejected the interpretation of the same article in *Katanga*.²⁴

23. It transpires from the above that (1) the use of the term "trial" in the legal texts refers almost systematically to the trial in the narrow sense; and (2) in the context of the powers and functions of the Trial Chamber, "trial" refers to the trial in the narrow sense (where the trial in the broad sense is concerned, this transpires clearly from the text).

24. Accordingly, the term "trial" in regulation 55 refers to the trial in the narrow sense.

1.2.2. Regulation 55 in the "context" of the overall framework of instruments applicable before the ICC

25. Regulation 55 is a provision of the Regulations of the Court, drafted by the judges, and not of the Statute or the Rules of Procedure and Evidence, which are the founding instruments of the Court and the fruit of negotiations and decision-making of the States Parties' representatives. The Statute and the Rules of Procedure and Evidence are the instruments which stand at the apex of the pyramid of norms applicable before the Court. They take precedence over other corpuses of norms, such as the Regulations of the Court, as does the application of their provisions.²⁵

26. As regulation 55 forms part of the Regulations of the Court, it must, logically and perforce, be interpreted in the light of the provisions of the Statute – not only its

²³ ICC-01/04-01/07-1497, para. 38.

²⁴ ICC-01/05-01/08-802, para. 210.

²⁵ Article 21.

letter, but also its spirit. In other words, never must implementation of regulation 55 violate the letter and spirit of the Statute, less still offend its coherence.

27. The drafters of the Statute took the utmost care to set down coherently, clearly and in detail the procedural stages culminating in trial. In particular, they crafted a procedure for the adjudication of the charges brought against the accused which is coherent and consistent with the rights of the defence.²⁶

28. First, provision is made for a confirmation hearing, where an adversarial debate between Prosecution and Defence takes place. Upon conclusion of the hearing, the bench hands down its decision and any charge thereby confirmed circumscribes the trial and determines its content.²⁷

29. Of note is that, according to the Statute, (1) the Prosecutor may add to the charges after the Confirmation Decision **only with the permission of the Pre-Trial Chamber**;²⁸ (2) the designated trial chamber may exercise all the functions of the Pre-Trial Chamber, **save authorisation of modification of the charges**;²⁹ and (3) once the trial has commenced **the Prosecutor may only withdraw the charges**, not add any.³⁰

30. Also of note is that regulation 55 serves only to complement – acting as an adjunct to a clear legal framework – in that it enables the charges to be amended, not altered. Regulation 55 may be interpreted only in respect of the other provisions of

²⁶ K.J. Heller, “‘A Stick To Hit the Accused With’: The Legal Recharacterization of Facts Under Regulation 55”, in C. Stahn *et al.* (eds.), *The Law and Practice of the International Criminal Court: A Critical Account of Challenges and Achievements* (forthcoming 2015); D. Jacobs, “A Shifting Scale of Power: Who is in Charge of the Charges at the International Criminal Court”, in W.A. Schabas, Y. McDermott and N. Hayes (eds.), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (2013), 205.

²⁷ ICC-02/11-01/15-58, para. 17; ICC-02/11-01/11-810, para. 57.

²⁸ Article 61(9).

²⁹ Article 61(11).

³⁰ Article 61(9).

the Statute which concern notice of the charges and the parameters of trial. Never must it be used to call into question, in whole or in part, the decisions of the Pre-Trial Bench. Hence, in Judge Tarfusser's words, in *Katanga*: "Regulation 55 [...] is a provision of an exceptional nature, as such subject to narrow interpretation".³¹

31. Analysis of the legal context further supports the argument that there may be no recourse to regulation 55 before the start of the trial in the narrow sense. Indeed, before the opening of the Prosecution's case, the Chamber disposes of no new material to consider whether recharacterisation is possible. In this case, the judges' position on the possible recharacterisation relies solely on the material relied upon by the Pre-Trial Bench – but Pre-Trial Chamber and Trial Chamber have reached a different conclusion. In these circumstances, giving notice before the start of the trial proper – which is what the judges are doing in the instant case – amounts to voicing disagreement with the Pre-Trial Bench. To envisage – as the Trial Bench are doing – the possible use of a mode of liability which was explicitly dismissed, without any new material to do so and on the basis of the same facts and circumstances, amounts to replacing after the event, without a single adversarial debate, the Pre-Trial Bench and depriving this phase of its usefulness.

32. Using regulation 55 as did the judges in the Impugned Decision negates the Statute and amounts to granting, over the Pre-Trial Bench, the Prosecution and the Trial Chamber the power to amend the charges.

³¹ ICC-01/04-01/07-3363, dissenting opinion of Judge Tarfusser, para. 5.

1.2.3. “Object and purpose” of regulation 55.

1.2.3.1. Irrelevance of the “fight against impunity” criterion

33. It is often contended that the concept of “fight against impunity” is relevant to the interpretation of the provisions of the Statute. This was done, for example, by the Appeals Chamber in *Lubanga* to justify a broad interpretation of regulation 55.³²

34. Although the ICC’s ultimate objective as an institution is indeed to combat impunity, the provisions of the Statute cannot be interpreted through this lens. As a stated political objective the fight against impunity is commendable but it is not a legal concept. Consequently, it makes no sense to use such a concept to analyse a normative text, which must follow a different logic. Only legal criteria deriving from the legal rationale of the Statute should be used to analyse a provision of the Statute. This is the difference between, on the one hand, an object and purpose of a legal order and, on the other, an object and purpose of a political order.

1.2.3.2. Legal object and purpose of regulation 55

35. The *raison d’être* (its “object” and “purpose”) of the regulation is to allow the Prosecution to present the strongest possible case – founded on a specific mode of liability – so it need not concern itself with “covering” all modes of liability in the event its case subsequently needs to be presented differently. As Judge Kaul opined:

such a provision was deemed essential to avoid lengthy indictments with cumulative and alternative charges. The judges want to conduct focused trials on clearly delineated charges, in the interest both of judicial economy and of the defense. [...] The regulation will enable the judges to be rigorous in confirming charges and to refer only those which

³² ICC-01/04-01/06-2205.

seem sufficiently supported by evidence to constitute grounds to believe that a crime under the Statute has been committed³³

36. Regulation 55 may be invoked when the Prosecution does not allege alternative modes of liability at the pre-trial phase, as well as when the Pre-Trial Chamber does not confirm alternative modes of liability, as stressed by Judge Van den Wyngaert:

In this respect, it has not generally been the pre-trial chambers' practice to confirm charges or issue arrest warrants on alternative modes of liability, which marks a significant difference with the *ad hoc* tribunals, where cases usually proceed on alternative charges. To some extent, Regulation 55 can serve as a tool for ICC trial chambers to recharacterise the mode of liability after the charges have been confirmed by the Pre-Trial Chamber in order to adjust the legal characterisation to better accord with the facts and circumstances described in the charges.³⁴

1.2.3.3. Application to the instant case

37. In the case at bar, the use of alternative modes of liability by both the Prosecution and the Pre-Trial Chamber should have led the Trial Bench to rule out recourse to regulation 55, all the more so because both the Prosecution and the judges had indicated that they were using such alternatives modes of liability to avoid subsequent recourse to regulation 55.

38. In filing its third DCC on 13 January 2014,³⁵ the Prosecution added two new modes of liability to those previously selected: article 25(3)(b) and article 28. It stated that the addition of new modes of liability at that stage of the proceedings would be beneficial to the Defence, as it could address them in advance of the Confirmation

³³ Hans Peter Kaul, 'Construction Site For More Justice: The International Criminal Court After Two Years' 99 *American Journal of International Law* 370 (2005), p. 377.

³⁴ ICC-01/04-01/07-3319-t-ENG/FRA, dissenting opinion of Judge van den Wyngaert, para. 5.

³⁵ ICC-02/11-01/11-592-Conf-Anx2-Corr2-tENG.

Decision, **thus avoiding recourse to regulation 55**.³⁶ Two of the three judges accepted to consider new modes of liability in the amended DCC – on the understanding that they may ultimately be rejected upon examination – so as to dispose of the matter at a swoop, **thereby avoiding recourse to regulation 55 at a later stage of proceedings**.³⁷

39. It is interesting to note, therefore, that the Pre-Trial Chamber decided to consider all of the modes of liability alleged by the Prosecution solely and specifically to avoid subsequent recourse to regulation 55. This enabled the Pre-Trial Bench to rule on the modes of liability which are consonant with the nature of the charges. It is also interesting to note that the Prosecution will have ample time and opportunities to advance other modes of liability before the Pre-Trial Chamber owing to the Pre-Trial Chamber's willingness to view the matter from the standpoint of regulation 55 and foresee the motions the Prosecution might bring under that provision at trial. The Pre-Trial Chamber's objective was to make a single determination before the start of the trial and thus allow the proceedings to run a smooth course.

40. Ultimately, the Pre-Trial Chamber decided to confirm only certain modes of liability and, what is more, in the alternative. In other words, the Chamber brought coherence to the Prosecution's allegations. It further underscored that "confirmation of alternative charges may better preserve the interests of the Defence in that it provides early notification of potential alternatives and thus reduces the need to resort to regulation 55 of the Regulations".³⁸

³⁶ ICC-02/11-01/11-612, para. 42.

³⁷ ICC-02/11-01/11-619, paras. 21-22.

³⁸ ICC-02/11-01/11-680, para. 51.

41. To invoke regulation 55 anew, whereas the Pre-Trial bench explicitly viewed the matter from the standpoint of the regulation to differentiate between alternative modes of liability and dismiss responsibility under article 28, would call into question the findings of the pre-trial phase and the coherence which informed the Confirmation Decision.

42. Lastly, the Defence notes that the Impugned Decision runs counter to the recommendations contained in the Pre-Trial Practice Manual, made public in September 2015³⁹. Its purpose is to highlight best practices from the jurisprudence of the Pre-Trial Chambers. It was drafted by Judges of the Pre-Trial Division and subsequently **approved by all the judges of the Court**.⁴⁰

43. In the Manual, the judges express their opinion that the Prosecutor may plead more than one mode of liability during the pre-trial phase and the Pre-Trial Chamber will then confirm alternative modes of liability, which should limit recourse to regulation 55:

this course of action should limit recourse to regulation 55 of the Regulations, an exceptional instrument which, as such, should be used only sparingly if absolutely warranted. In particular, **it should limit the improper use of regulation 55 immediately after the issuance of the confirmation decision even before the opening of the evidentiary debate at trial**.⁴¹

44. The Impugned Decision is all the more surprising given that the manner in which the case at bar has been conducted follows the best practices as defined in the Manual. The Chamber's conduct is thus akin to the "improper use of regulation 55 [...] even before the opening of the evidentiary debate at trial",⁴² as described by the

³⁹ Pre-Trial Practice Manual ("the Manual"), September 2015.

⁴⁰ *Ibid.*, p. 4.

⁴¹ *Ibid.*, p. 18.

⁴² *Idem.*

judges themselves in the Manual. And yet the Impugned Decision was rendered by the same judges who adopted the Manual.

2. Second ground of appeal: The Chamber erred in using the concept of “special circumstances of this case” to justify recourse to regulation 55 and call into question the findings of the pre-trial phase

45. In the Chamber’s view, in this case there are exceptional circumstances justifying recharacterisation.⁴³

46. What are these exceptional circumstances in the Chamber’s view? Essentially, the fact, in its view, that the Pre-Trial Chamber always allowed for the possibility that liability under article 28 could be considered:

In particular, the Pre-Trial Chamber expressly acknowledged, on different occasions, the possibility of Mr Gbagbo’s liability under Article 28 of the Statute, a mode of liability with notably different requirements than all those in Article 25(3) of the Statute. The Pre-Trial Chamber first mentioned criminal responsibility under Article 28 of the Statute as early as the confirmation hearing, before the Prosecution included this mode of liability in its document containing the charges. Thereafter, in declining to confirm charges under Article 28 of the Statute, the majority of the Pre-Trial Chamber ‘[could] not rule out the possibility that the discussion of evidence at trial may lead to a different legal characterisation of the facts’. [...] Even the judge dissenting from the Gbagbo Confirmation Decision mentioned the possibility in this case of liability under Article 28 of the Statute, indicating that she ‘could have, in principle, envisaged confirming the charges’ on that basis.⁴⁴

47. By expressing such a view, the Chamber presents only one aspect of the Pre-Trial Chamber’s approach and refuses to understand the logic behind it.

⁴³ ICC-02/11-01/15-185, para. 12.

⁴⁴ *Idem*.

48. Firstly, it is very clear that, despite having considered the question of liability under article 28 – as put to it by the Prosecution – the Pre-Trial Chamber explicitly dismissed it. In these circumstances, the Trial Chamber must respect the Pre-Trial Chamber’s conclusions. Otherwise, recharacterisation amounts, on the face of it, to circumventing the Pre-Trial Chamber’s decision. It is precisely because the Pre-Trial Chamber considered liability under article 28 “on different occasions” that it cannot be reinstated by the Trial Chamber. Moreover, it was to avoid recourse to regulation 55 that the Pre-Trial Chamber had authorised the Prosecution to add numerous modes of liability as the proceedings unfolded.⁴⁵

49. Secondly, the fact that “the majority of the Pre-Trial Chamber ‘[could] not rule out the possibility that **the discussion of evidence at trial** may lead to a different legal characterisation of the facts’” is a persuasive argument for the Defence’s (and not the Trial Chamber’s) interpretation of regulation 55. Indeed, there has not yet been a “discussion of evidence at trial”. The Pre-Trial Chamber’s wording cannot, therefore, be used by the Trial Chamber to support its broad interpretation of regulation 55.

50. Thirdly, as regards the statements of the dissenting judge, Judge Van den Wyngaert, it seems that the Chamber has taken them out of context and distorted their rationale. The dissenting judge considered “the evidentiary record to be rather ambiguous”⁴⁶ as far as liability under article 28 is concerned and noted “that there is some evidence showing that Laurent Gbagbo’s putative government took a number of steps to have the alleged crimes investigated and prosecuted”.⁴⁷ In relation to a hypothetical confirmation of charges under 28, she added:

⁴⁵ ICC-02/11-01/15-70-tENG, para. 21.

⁴⁶ ICC-02/11-01/11-656-Anx, para. 11.

⁴⁷ *Idem*.

With regard to crimes allegedly committed by other pro-Gbagbo armed groups, who operated outside the FDS command structure, I am not convinced by the available evidence that there are substantial grounds to believe that the members of these groups can be considered as “subordinates under [Laurent Gbagbo’s] effective authority and control” in the sense of article 28(b) of the Statute.⁴⁸

Accordingly, it is clear that to consider, out of context, as the Chamber did, that Judge Van den Wyngaert “could have, in principle, envisaged confirming the charges on that basis” constitutes a distortion of her statements, bearing in mind that she made explicit her unwillingness to confirm the charges.

51. In more general terms, the judges’ approach is questionable as, instead of discussing the scope of application of regulation 55 on the basis of objective criteria, the judges make selective use of excerpts of decisions or dissenting opinions which bear very little relation to regulation 55. Why do the judges refuse to show the overall coherence of Judge Van den Wyngaert’s position, given that she would have dismissed the charges? It should also be recalled that Judge Van den Wyngaert had considered that the inclusion of article 28 in the Prosecutor’s amended DCC in January 2014 was inconsistent with the legal regime applicable to adjournment.⁴⁹

52. By taking this approach, the judges fail to demonstrate the true position of the Pre-Trial Chamber, which simply refused to confirm the charges under article 28.

53. In short, it seems that the judges have put together the concept of “exceptional circumstances” – a concept woolly enough for them to be able to change, after the fact, the way in which decisions rendered at the pre-trial phase may be understood.

⁴⁸ *Idem.*

⁴⁹ ICC-02/11-01/11-619-Anx.

54. The fact is that, for the first time in the history of this Court, a liability mode explicitly dismissed by a Pre-Trial Chamber is being reinstated by a Trial Chamber before the trial has even started.⁵⁰ This calls into question the rationale of the Statute, the Pre-Trial Bench's authority and the importance of the Confirmation Decision.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER TO:

Having regard to article 82(1)(b) of the Statute,

Set aside the Impugned Decision in its entirety.

[signed]

Emmanuel Altit

Lead Counsel for Laurent Gbagbo

Dated this 21 September 2015,

At The Hague, the Netherlands

⁵⁰ ICC-02/11-01/15-70-Anx1.