

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/11-01/15
Date: 19 August 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 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 Articles 25(3), 28, 61(9), 64 and 67 of the Rome Statute ('Statute'), and Regulation 55 of the Regulations of the Court ('Regulations'), issues the following 'Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court'.

I. Background

1. On 12 June 2014, Pre-Trial Chamber I ('Pre-Trial Chamber'), *inter alia*, declined to confirm charges that Mr Gbagbo was liable under Article 28 of the Statute for the following reasons ('*Gbagbo Confirmation Decision*'):¹

263. The Chamber cannot 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. However, based on the knowledge that this Chamber has at the present stage of proceedings, the Chamber is not persuaded that the narrative of the facts, as established by the evidence, points to Laurent Gbagbo's criminal responsibility based on his mere failure to prevent or repress the crimes committed by others pursuant to article 28 of the Statute.

264. The Chamber takes note of the 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, but considers that the evidence, taken as a whole, demonstrates that this failure was an inherent component of the deliberate effort to achieve the purpose of retaining power at any cost, including through the commission of crimes.

265. Therefore, 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. Accordingly, the Chamber declines to confirm the charges based on Laurent Gbagbo's alleged responsibility under article 28 of the Statute.

2. On 24 April 2015, the Office of the Prosecutor ('Prosecution') requested that the Chamber give notice to the parties and participants that the legal characterisation of the facts in the *Gbagbo Confirmation Decision* may be subject to change to

¹ Pre-Trial Chamber I, Decision on the confirmation of charges against Laurent Gbagbo, ICC-02/11-01/11-656-Conf, paras 263-265. A public redacted version was filed the same day (ICC-02/11-01/11-656-Red).

include liability under Article 28(a) and (b) of the Statute ('Request').² On 19 May 2015, the defence for Mr Gbagbo³ ('Gbagbo Defence') and defence for Mr Blé Goudé⁴ ('Blé Goudé Defence') responded to the Request ('Gbagbo Defence Response' and 'Blé Goudé Defence Response', respectively).

3. On 16 July 2015, the Prosecution filed a pre-trial brief, *inter alia*, acknowledging that the Pre-Trial Chamber had 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 ('Pre-Trial Brief').⁵

II. Submissions

Request

4. The Prosecution submits that the facts set out in Section 4 of the *Gbagbo* Confirmation Decision support each of the elements of Article 28(a) and (b) of the Statute and details those facts which support each element.⁶ It stresses that notice before trial ensures that Mr Gbagbo (i) is informed in detail of the charges; (ii) has adequate time to prepare his defence; and (iii) is tried without undue delay.⁷

Gbagbo Defence Response

5. According to the Gbagbo Defence, the Chamber cannot reintroduce charges expressly rejected by the Pre-Trial Chamber: doing so would render the confirmation phase redundant and deny the accused notice of the charges.⁸ It claims that Regulation 55 of the Regulations is intended to permit the Prosecution

² Prosecution request for notice to be given of a possible recharacterisation pursuant to regulation 55(2), ICC-02/11-01/15-43.

³ *Réponse de la Défense à la «Demande de l'Accusation aux fins de notification d'une possible requalification en vertu de la Norme 55-2»* (ICC-02/11-01/15-43-tFRA), ICC-02/11-01/15-70-tENG, with annex (ICC-02/11-01/15-70-Anx1).

⁴ Defence Observations on the "Prosecution request for notice to be given of a possible recharacterisation pursuant to regulation 55(2)" (ICC-02/11-01/15-43), ICC-02/11-01/15-71.

⁵ Prosecution's pre-trial brief, ICC-02/11-01/15-148-Anx1, Section V(10). A confidential version was also filed: Prosecution's pre-trial brief, ICC-02/11-01/15-148-Conf-Anx2, with five public annexes. Corrected versions were filed on 28 July 2015 (ICC-02/11-01/15-148-Anx1-Corr and ICC-02/11-01/15-148-Conf-Anx2-Corr).

⁶ Request, ICC-02/11-01/15-43, paras 11-32.

⁷ Request, ICC-02/11-01/15-43, paras 2 and 34-36.

⁸ Gbagbo Defence Response, ICC-02/11-01/15-70-tENG, paras 4-6, 14-15, 17-19, 22-25, 28 and 42.

to focus, at the confirmation stage, on its best case and not concern itself with modes of liability whose relevance may only emerge at the trial.⁹ The Gbagbo Defence highlights that, in all other cases, notice under Regulation 55 of the Regulations was only given at trial and addressed modes of liability not considered during the confirmation phase.¹⁰ It further submits that the Pre-Trial Chamber chose particular facts to sustain the confirmed charges and these facts only hold meaning in light of a particular charge.¹¹

6. The Gbagbo Defence submits that the facts do not support the elements of Article 28 of the Statute because the *Gbagbo* Confirmation Decision does not allege (i) the identity or intent of the perpetrators of the crimes;¹² (ii) Mr Gbagbo's effective control over the perpetrators;¹³ (iii) his knowledge of the crimes;¹⁴ (iv) a causal nexus between the exercise of control and the crimes;¹⁵ or (v) that Mr Gbagbo failed to take necessary and reasonable measures to prevent or repress the commission of the crimes or submit the matter to the competent authorities.¹⁶ If the Chamber grants the Request, the Gbagbo Defence requests that the Chamber (i) direct the Prosecution to inform Mr Gbagbo of the charges by filing an amended document containing the charges ('Amended DCC') and an elements-based chart ('EBC');¹⁷ (ii) permit the parties to make submissions;¹⁸ and (iii) recalculate the time needed for trial preparation and set a new trial commencement date, as superior responsibility is distinct from all other modes of liability and will therefore require further investigations and a new strategy.¹⁹

⁹ Gbagbo Defence Response, ICC-02/11-01/15-70-tENG, paras 16.

¹⁰ Gbagbo Defence Response, ICC-02/11-01/15-70-tENG, paras 26-27. *See also* ICC-02/11-01/15-70-Anx1.

¹¹ Gbagbo Defence Response, ICC-02/11-01/15-70-tENG, paras 30-34 and 42-45.

¹² Gbagbo Defence Response, ICC-02/11-01/15-70-tENG, paras 35-36.

¹³ Gbagbo Defence Response, ICC-02/11-01/15-70-tENG, paras 37-38.

¹⁴ Gbagbo Defence Response, ICC-02/11-01/15-70-tENG, para. 39.

¹⁵ Gbagbo Defence Response, ICC-02/11-01/15-70-tENG, para. 40.

¹⁶ Gbagbo Defence Response, ICC-02/11-01/15-70-tENG, para. 41.

¹⁷ Gbagbo Defence Response, ICC-02/11-01/15-70-tENG, paras 46-47 and page 18.

¹⁸ Gbagbo Defence Response, ICC-02/11-01/15-70-tENG, para. 48 and page 18.

¹⁹ Gbagbo Defence Response, ICC-02/11-01/15-70-tENG, paras 48-49 and page 19.

Blé Goudé Defence Response

7. The Blé Goudé Defence notes that the Request contradicts the Prosecution's arguments in support of joinder, namely the similarity between the charges and evidence against Mr Gbagbo and Mr Blé Goudé.²⁰ It claims that undue prejudice may result if the Prosecution presents evidence of Mr Gbagbo's responsibility under Article 28 of the Statute, as it may taint the evidence of Mr Blé Goudé's alleged responsibility and it would be hard to distinguish that evidence relevant to one, but not the other.²¹ Finally, the Blé Goudé Defence submits that (i) the proposed recharacterisation fundamentally alters the narrative and exceeds the confirmed facts and circumstances and (ii) as liability under Article 28 of the Statute was expressly rejected, the Request appears to be an attempt to impermissibly appeal the *Gbagbo* Confirmation Decision to this Chamber.²²

III. Preliminary matter

8. The Chamber notes that the Prosecution appears to have bypassed other statutory remedies available before making the Request. Before moving the Chamber to exercise its *proprio motu* powers under Regulation 55(2) of the Regulations, the Prosecution could have sought (i) leave to appeal the *Gbagbo* Confirmation Decision or (ii) pursuant to Article 61(9) of the Statute, an amendment thereto. Notwithstanding this failure, as set out below and in the specific context of the *Gbagbo* Confirmation Decision, it is apparent to the Chamber that the legal characterisation of the facts described in the charges may be subject to change. In these unique circumstances, the Prosecution's failure to exhaust other remedies does not impact on the Chamber's obligation to give notice under Regulation 55(2) of the Regulations.

²⁰ Blé Goudé Defence Response, ICC-02/11-01/15-71, paras 1-2 and 17-22.

²¹ Blé Goudé Defence Response, ICC-02/11-01/15-71, paras 20-21.

²² Blé Goudé Defence Response, ICC-02/11-01/15-71, paras 2 and 12-16.

IV. Analysis

9. The Chamber is bound by the facts and circumstances described in the charges confirmed by the Pre-Trial Chamber.²³ Regulation 55(1) of the Regulations enables the Chamber to, in its decision under Article 74 of the Statute, change the legal characterisation of these facts in order ‘to close accountability gaps, a purpose that is fully consistent with the Statute’.²⁴ If, as the Defence asserts,²⁵ the Chamber was unable to revisit the legal characterisation confirmed by the Pre-Trial Chamber, there would be a ‘risk of acquittals that are merely the result of legal qualifications confirmed in the pre-trial phase that turn out to be incorrect’.²⁶
10. Pursuant to Regulation 55(2) of the Regulations, if, at any time during the trial, it appears to the Chamber that the legal characterisation of the facts may be subject to change, the Chamber shall give notice to the parties and participants of such a *possibility* and ensure that they have adequate time and facilities for effective preparation.
11. Regulation 55(2) of the Regulations may be invoked ‘at any time during the trial’. 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 seised of a case and before opening statements.²⁷

²³ Article 74 of the Statute; Regulation 55(1) of the Regulations.

²⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court”, 8 December 2009, ICC-01/04-01/06-2205 OA15 OA 16 (*‘Lubanga Appeal Decision’*), para. 77; *see also The Prosecutor v. Germain Katanga*, Appeals Chamber, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled “Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons”, 27 March 2013, ICC-01/04-01/07-3363 OA 13 (*‘Katanga Appeal Decision’*), paras 22 and 104.

²⁵ Gbagbo Defence Response, ICC-02/11-01/15-70-tENG, paras 4-6, 14-15, 17-19, 22-25, 28 and 42; Blé Goudé Defence Response, ICC-02/11-01/15-71, paras 2 and 12-16.

²⁶ *Lubanga Appeal Decision*, ICC-01/04-01/06-2205, para. 77; *see also Katanga Appeal Decision*, ICC-01/04-01/07-3363, para. 22.

²⁷ The Chamber notes that Trial Chamber I, in *Lubanga*, gave notice under Regulation 55(2) of the Regulations more than a year before the hearing of evidence commenced. *See The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial

This interpretation is consistent with the purpose of Regulation 55(2)-(3) of the Regulations, and the Chamber's overarching obligation,²⁸ 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'.²⁹

12. In this case, the exceptional circumstances surrounding the proposed recharacterisation must be emphasised from the outset. 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.³⁰ 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'.³¹ It found that Mr Gbagbo's failure 'to prevent violence or to take adequate steps to investigate and punish the authors of the crimes [...] was an inherent component of the deliberate effort to achieve the purpose of retaining power at any cost'.³² Even the judge dissenting from the *Gbagbo* Confirmation Decision mentioned the possibility in

Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, ICC-01/04-01/06-1084, para. 47. In giving notice under Regulation 55(2) of the Regulations, Trial Chamber V(A) acknowledged that it could have given notice earlier, indicating that it could have done so before opening statements. However, it explained that it gave notice shortly after the commencement of the hearing because it was the first extended break and the Chamber required additional time to deliberate. See *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber V(A), Decision on Applications for Notice of Possibility of Variation of Legal Characterisation, 12 December 2013, ICC-01/09-01/11-1122, para. 28.

²⁸ Articles 64(2) and 67(1) of the Statute.

²⁹ *Katanga* Appeal Decision, ICC-01/04-01/07-3363, paras 24 and 102; see also *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, ICC-01/04-01/06-3121-Red, para. 129 ('[G]iven the strong link between the right to be informed in detail of the nature, cause and content of the charges and the right to *prepare* one's defence [...] a trial must commence based on a set of clearly defined charges') (emphasis in original).

³⁰ Transcript of hearing on 25 February 2013, ICC-02/11-01/11-T-17-Red-ENG, page 27, line 17 to page 28, line 6 (redacted version notified 3 April 2013).

³¹ *Gbagbo* Confirmation Decision, ICC-02/11-01/11-656-Red, para. 263.

³² *Gbagbo* Confirmation Decision, ICC-02/11-01/11-656-Red, para. 264.

this case of liability under Article 28 of the Statute, indicating that she 'could have, in principle, envisaged confirming the charges' on that basis.³³

13. In the Request, the Prosecution demonstrates that the elements of Article 28(a) and (b) of the Statute may be derived from the facts and circumstances confirmed by the Pre-Trial Chamber. Further, in the Pre-Trial Brief, the Prosecution indicates that the evidence supporting liability under Article 28 of the Statute is encompassed by that supporting other charged modes of liability.³⁴ In light of the *Gbagbo* Confirmation Decision, Request and Pre-Trial Brief, it appears to the Chamber that the legal characterisation of the facts and circumstances described in the charges may be subject to change to include Mr Gbagbo's liability under Article 28(a) or (b) of the Statute.

14. The Chamber has assessed whether this possible recharacterisation would exceed the confirmed facts and circumstances. In doing so, and without making any conclusion as to the legal interpretation thereof, the Chamber has had regard to the elements required on the face of Article 28(a) and (b) of the Statute and the facts and circumstances described in the charges.³⁵ For present purposes and without prejudice to any decision under Regulation 55(1) of the Regulations and Article 74 of the Statute, the Chamber is satisfied that, as the Prosecution demonstrates in the Request, the possible recharacterisation would not exceed the facts and circumstances described in the charges.

15. In order to facilitate the fair and expeditious conduct of the proceedings, the Chamber instructs the Prosecution to, within seven days of notification of this decision:

³³ Dissenting Opinion of Judge Christine Van den Wyngaert, 12 June 2014, ICC-02/11-01/11-656-Anx, para. 11.

³⁴ Pre-Trial Brief, ICC-02/11-01/15-148-Anx1-Corr, Section V(10).

³⁵ The Appeals Chamber has adopted a similar approach in considering whether a possible recharacterisation exceeds the facts and circumstances described in the charges. *Katanga* Appeal Decision, ICC-01/04-01/07-3363, paras 53 and 56.

- i) file an amended version of or addendum to the Pre-Trial Brief that
 - (a) exhaustively identifies those facts and circumstances described in the charges supporting the possible recharacterisation, and
 - (b) summarises the relevant evidence to be relied upon, explaining how it relates to Mr Gbagbo's alleged liability under Article 28(a) and (b) of the Statute; or
- ii) notify the Chamber, parties and participants that the Pre-Trial Brief already meets these requirements and any amendment or addendum is unnecessary.

16. Considering the information provided in the *Gbagbo* Confirmation Decision and Pre-Trial Brief, the Chamber finds that an Amended DCC and EBC, as requested by the Gbagbo Defence, remain unnecessary.³⁶ The Gbagbo Defence also requests the opportunity to make submissions concerning the possible recharacterisation. Regulation 55(2) of the Regulations entitles the parties and participants to make submissions after the hearing of the evidence and at an appropriate stage of the proceedings. The Chamber considers that this can be done in closing briefs and/or statements after the closure of the evidence pursuant to Rule 141 of the Rules. It is premature to set the modalities for such submissions.

17. Moreover, the Chamber considers that the Gbagbo Defence fails to justify its alternative request for recalculation of the trial commencement date: it does not provide any concrete indication as to the impact this decision would have on its trial preparations. On the information before it, stressing that the facts and circumstances described in the charges remain unchanged and noting that the Prosecution intends to rely on the same body of evidence, the Chamber considers that the current commencement date and accompanying schedule provide adequate time for trial preparation. On these bases, the Chamber also rejects the Blé Goudé Defence's submissions that the possible recharacterisation would

³⁶ Order setting the commencement date for trial, 7 May 2015, ICC-02/11-01/15-58, para. 17.

undermine the Chamber's decision to join the charges against and jointly try Mr Gbagbo and Mr Blé Goudé.³⁷

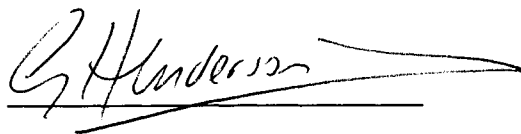
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

NOTIFIES 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;

ORDERS the Prosecution to, in accordance with the instructions given in paragraph 17 above and within seven days of notification of this decision, file an amended version of or addendum to its Pre-Trial Brief or indicate that such amendment or addendum is unnecessary; and

REJECTS all other requests.

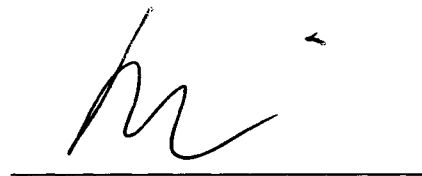
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Judge Geoffrey Henderson, Presiding Judge



Judge Olga Herrera Carbuccia



Judge Bertram Schmitt

Dated 19 August 2015

At The Hague, The Netherlands

³⁷ Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters, 11 March 2015, ICC-02/11-01/15-1.