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**No. ICC-02/11-01/15 OA 7
Date: 18 December 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 THE REPUBLIC OF CÔTE D'IVOIRE

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

Public document

Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled "Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court"

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

The Office of the Prosecutor

Ms Fatou Bensouda

Ms Helen Brady

Counsel for Mr Laurent Gbagbo

Mr Emmanuel Altit

Ms Agathe Bahi Baroan

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Ms Paolina Massidda

Counsel for Mr Charles Blé Goudé

Mr Geert-Jan Alexander Knoops

Mr Claver N'dry

REGISTRY

Registrar

Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled “Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court” of 19 August 2015 (ICC-02/11-01/15-185),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The “Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court” is confirmed. The appeal is dismissed.

REASONS

I. KEY FINDINGS

1. While the Appeals Chamber is not called upon to consider whether the term “trial” has the same interpretation when used in other contexts throughout the legal framework of the Court, the ordinary meaning of the phrase “at any time during the trial” in the context of regulation 55, does not exclude the stage after a Trial Chamber is seised of a case and before opening statements.

2. There is no legal impediment to a Trial Chamber recharacterising facts and circumstances to include a mode of liability that was considered, but not confirmed by the Pre-Trial Chamber, so long as the facts and circumstances that could potentially be recharacterised were confirmed by that Pre-Trial Chamber.

II. BACKGROUND

A. Procedural history

1. Proceedings before the Trial Chamber

3. On 13 January 2014, in the case of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, the Prosecutor filed an amended document containing the charges, alleging that Mr Laurent Gbagbo (hereinafter: “Mr Gbagbo”) was criminally

responsible under articles 25 (3) (a), (b) and (d), and 28 (a) and (b) of the Statute for crimes against humanity under article 7 (1) of the Statute.¹

4. On 12 June 2014, Pre-Trial Chamber I (hereinafter: “Pre-Trial Chamber”), by majority, confirmed the charges against Mr Gbagbo for crimes against humanity under article 25 (3) (a), (b), and (d) of the Statute, but declined to confirm the charges under article 28 (a) and (b) of the Statute² (hereinafter: “Confirmation Decision”). Judge Van den Wyngaert rendered a dissenting opinion³ (hereinafter: “Dissenting Opinion”).

5. On 24 April 2015, the Prosecutor requested that Trial Chamber I (hereinafter: “Trial Chamber”) give notice pursuant to regulation 55 (2) of the Regulations of the Court that the legal characterisation of the facts in the Confirmation Decision may be subject to change to include Mr Gbagbo’s liability under article 28 (a) and (b) of the Statute⁴ (hereinafter: “Request for Notice”).

6. On 7 May 2015, the Trial Chamber set the commencement date for the trial to 10 November 2015.⁵

7. On 16 July 2015, the Prosecutor filed a pre-trial brief addressing, *inter alia*, Mr Gbagbo’s responsibility under article 28 (a) and (b) of the Statute⁶ (hereinafter: “Pre-Trial Brief”).

8. On 20 August 2015, the Trial Chamber rendered the “Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court”⁷ (hereinafter: “Impugned Decision”) giving notice of the possibility that the legal

¹ “Document amendé de notification des charges”, [ICC-02/11-01/11-592-Anx1](#), paras 232-235. The Appeals Chamber notes that this document was filed in the case of *The Prosecutor v. Lauren Gbagbo* prior to the case of *The Prosecutor v. Charles Blè Goudè* being joined to it, see Trial Chamber I, “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](#), p. 33.

² “Decision on the confirmation of charges against Laurent Gbagbo”, [ICC-02/11-01/11-656-Red](#), paras 265-266.

³ “Dissenting Opinion of Judge Christine Van den Wyngaert”, 12 June 2014, [ICC-02/11-01/11-656-Anx.](#)

⁴ “Prosecution request for notice to be given of a possible recharacterisation pursuant to regulation 55(2)”, [ICC-02/11-01/15-43](#), paras 1, 38.

⁵ “Order setting the commencement date for trial”, [ICC-02/11-01/15-58](#).

⁶ “Annex 1 to Prosecution Pre-Trial Brief”, [ICC-02/11-01/15-148-Anx1](#), Section V (10); a corrigendum was registered on 28 July 2015, [ICC-02/11-01/15-148-Anx1-Corr.](#)

⁷ Dated 19 August 2015 and registered on 20 August 2015, [ICC-02/11-01/15-185](#).

characterisation of the facts set out in the Confirmation Decision may be subject to change to include Mr Gbagbo's liability under article 28 (a) and (b) of the Statute.⁸

9. On 26 August 2015, Mr Gbagbo sought leave to appeal the Impugned Decision.⁹

10. On 28 October 2015, the Trial Chamber rescheduled the date for the start of the trial to Thursday, 28 January 2016.¹⁰

11. On 10 September 2015, the Trial Chamber granted, in part, Mr Gbagbo's request for leave to appeal the Impugned Decision¹¹ (hereinafter: "Decision Granting Leave to Appeal").

2. *Proceedings before the Appeals Chamber*

12. On 21 September 2015, Mr Gbagbo filed his document in support of his appeal against the Impugned Decision,¹² as well as an annex, containing an explanatory table of the use of the terms "trial" and "proceedings" in the Statute and Rules of Procedure and Evidence.¹³

13. On 1 October 2015, the Office of Public Counsel for victims, acting as the common legal representative for victims in the case (hereinafter: "Victims") filed its response.¹⁴

14. On 2 October 2015, the Prosecutor filed her response,¹⁵ requesting, *inter alia*, that the appeal be dismissed *in limine*.¹⁶

⁸ [Impugned Decision](#), p. 11.

⁹ "Demande d'autorisation d'interjeter appel de la 'Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court' (ICC-02/11-01/15-185)", [ICC-02/11-01/15-193](#).

¹⁰ "Decision granting the request of the Gbagbo Defence and re-scheduling opening statements", [ICC-02/11-01/15-322](#).

¹¹ "Decision on request for leave to appeal the 'Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court'", [ICC-02/11-01/15-212](#).

¹² "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)", dated 21 September 2015 and registered on 7 October 2015, [ICC-02/11-01/15-231-tENG](#) (OA 7) (hereinafter: "Document in Support of the Appeal"); original French version, 21 September 2015 ([ICC-02/11-01/15-231](#) (OA 7)).

¹³ "Explanatory table – Use of terms 'trial' and 'proceedings' in the Statute and Rules of Procedure and Evidence", dated 21 September 2015 and filed on 9 October 2015, [ICC-02/11-01/15-231-Anx-tENG](#) (OA 7); original French version, 21 September 2015 ([ICC-02/11-01/15-231-Anx](#) (OA 7)).

¹⁴ "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)", [ICC-02/11-01/15-261](#) (OA 7) (hereinafter: "Victims' Response to the Document in Support of the Appeal").

15. On 14 October 2015, after having been granted leave by the Appeals Chamber,¹⁷ Mr Gbagbo filed a reply in relation to the Prosecutor's request to dismiss the appeal *in limine*.¹⁸

I. MERITS

A. Preliminary Issues

1. *The Prosecutor's request to dismiss the appeal in limine*

16. The Prosecutor requests the dismissal *in limine* of Mr Gbagbo's appeal,¹⁹ submitting that both grounds of appeal are "irrelevant to the conduct of the proceedings in this case or the outcome of the trial".²⁰ In a footnote, she argues that the Appeals Chamber "should make its own assessment" of the criteria under article 82 (1) (d) of the Statute and that the Appeals Chamber "is not bound by the Trial Chamber's findings" in the Decision Granting Leave to Appeal in this regard.²¹ She submits that even if the Trial Chamber erred, such error neither materially affected the proceedings nor unfairly prejudiced Mr Gbagbo.²² She argues further that a reversal of the Impugned Decision would "cease to have any impact on the proceedings" because the Trial Chamber would "simply re-issue [notice] after the charges have been read [to the accused]" and the Prosecutor delivers her opening statement.²³

17. Mr Gbagbo submits that the Prosecutor fails to advance a legal basis for her argument that the Appeals Chamber should make its own assessment of whether the issues in the present appeal meet the criteria for granting leave to appeal under article 82 (1) (d) of the Statute.²⁴ He argues that the Prosecutor is attempting to appeal the

¹⁵ "Response to Laurent Gbagbo's appeal against the 'Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court'", [ICC-02/11-01/15-265](#) (OA 7) (hereinafter: "Prosecutor's Response to the Document in Support of the Appeal").

¹⁶ [Prosecutor's Response to the Document in Support of the Appeal](#), paras 1, 3-6.

¹⁷ "Decision on Mr Laurent Gbagbo's request for leave to reply", 9 October 2015, [ICC-02/11-01/15-284](#) (OA 7).

¹⁸ "Reply to the 'Response to Laurent Gbagbo's appeal against the 'Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court'" (ICC-02/11-01/15-265)", dated 14 October 2015 and registered on 20 October 2015, [ICC-02/11-01/15-289-tENG](#) (OA7) (hereinafter: "Mr Gbagbo's Reply"); original French version, 14 October 2015 ([ICC-02/11-01/15-289](#) (OA 7)).

¹⁹ [Prosecutor's Response to the Document in Support of the Appeal](#), paras 1, 3-6.

²⁰ [Prosecutor's Response to the Document in Support of the Appeal](#), para. 4.

²¹ [Prosecutor's Response to the Document in Support of the Appeal](#), footnote 10.

²² [Prosecutor's Response to the Document in Support of the Appeal](#), para. 4.

²³ [Prosecutor's Response to the Document in Support of the Appeal](#), para. 5.

²⁴ [Mr Gbagbo's Reply](#), para. 4.

Decision Granting Leave to Appeal, which he submits is contrary to the wording of the Statute and the jurisprudence of the Appeals Chamber.²⁵

18. The Appeals Chamber observes that article 82 (1) (d) of the Statute clearly vests power solely in the Pre-Trial and Trial Chambers to certify appealable issues and to determine whether appellate resolution will materially advance the proceedings.²⁶ The Appeals Chamber concurs with Mr Gbagbo that the Prosecutor has not identified any legal basis for the Appeals Chamber to conduct its own assessment of the criteria of article 82 (1) (d) of the Statute. The Appeals Chamber also considers that, in making this submission, the Prosecutor appears to be attempting to directly appeal the Decision Granting Leave to Appeal, which is not permissible under the Statute.

19. Furthermore, the Appeals Chamber considers the Prosecutor's arguments²⁷ as to the "irrelevance" of the remedy sought by Mr Gbagbo, namely, the reversal of the Impugned Decision, to be misplaced. The relief sought undoubtedly remains available.²⁸ The Appeals Chamber finds no merit in the argument that Mr Gbagbo's appeal is somehow rendered inadmissible by the fact that the Trial Chamber may subsequently correct any erroneous determination in the Impugned Decision. Finally, the Appeals Chamber reiterates its disapproval of the Prosecutor raising substantive parts of her argument in a footnote, contrary to the Appeals Chamber's prior instructions to the Prosecutor that substantive arguments may only appear in the main text of filings.²⁹

²⁵ [Mr Gbagbo's Reply](#), paras 3, 5-7, 18.

²⁶ *See Situation in the Democratic Republic of the Congo*, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, [ICC-01/04-168](#) (OA 3), para. 20, wherein the Appeals Chamber stated that "the Pre-Trial or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue. By the plain terms of article 82 (1) (d) of the Statute, a Pre-Trial or Trial Chamber may certify such a decision on its own accord"; *The Prosecutor v. Laurent Gbagbo*, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute'", 16 December 2013, [ICC-02/11-01/11-572](#) (OA 5), para. 63, wherein the Appeals Chamber 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".

²⁷ [Prosecutor's Response to the Document in Support of the Appeal](#), para. 5.

²⁸ *See contra The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, "Decision on the Prosecutor's appeal against the 'Decision on the Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute'", 13 December 2013, [ICC-01/09-01/11-1123](#) (OA 6), para. 32.

²⁹ *The Prosecutor v. Mathieu Ngudjolo Chui*, "Decision on the Prosecutor's request to establish parameters for Mr Ngudjolo's personal address at the appeal hearing", 17 October 2014, [ICC-01/04-](#)

20. In light of the above, the Appeals Chamber rejects the Prosecutor's request to dismiss the appeal *in limine*.

2. *The issues certified for appeal in the Decision Granting Leave to Appeal*

21. The Prosecutor submits that several of Mr Gbagbo's arguments exceed the issues certified by the Trial Chamber and should therefore be disregarded.³⁰

22. In the Decision Granting Leave to Appeal, the Trial Chamber addressed two categories of issues that Mr Gbagbo sought leave to appeal, namely "whether the Chamber erred in law by issuing the Impugned Decision at this stage of the proceedings ('Category One Issues') and whether the Chamber erred in implementing Regulation 55 of the Regulations ('Category Two Issues')".³¹ The Trial Chamber certified two issues falling within the Category One Issues, namely: i) whether it erred in interpreting the phrase "at any time during the trial" to cover the period after the Trial Chamber is seized of a case and before opening statements and ii) whether it erred in relying on the concept of "special circumstances of this case".³² In certifying these issues, the Trial Chamber explained that

the Chamber notes that there is some disagreement among trial chambers as to the meaning of the phrase 'at any time during the trial' in Regulation 55(2) of the Regulations. In addition, if the phrase 'at any time during trial' means that a Chamber may only give notice of the possibility that the legal characterisation is subject to change after commencement [of the opening statements and presentation of evidence], then there are no 'exceptional circumstances' warranting giving notice now. Thus, if the timing of the Impugned Decision was in error, the related proceedings may continue on an unsound legal basis. [Footnotes omitted.]³³

23. On the contrary, the Trial Chamber declined to certify any of the Category Two Issues, stating that

[02/12-217](#) (A), para.10, wherein the Appeals Chamber stated that it "notes that the Prosecutor has put several of her substantive arguments in a footnote. The Appeals Chamber reminds the Prosecutor that it disapproves of this practice; a party's substantive submissions should be contained in the main text of the filing", referring to *The Prosecutor v Thomas Lubanga Dyilo*, "Decision on the re-filing of the document in support of the appeal", 22 July 2008, [ICC-01/04-01/06-1445](#) (OA 13), para. 6.

³⁰ [Prosecutor's Response to the Document in Support of the Appeal](#), para. 8.

³¹ [Decision Granting Leave to Appeal](#), para. 2.

³² See [Decision Granting Leave to Appeal](#), paras 2, 12. See also *ibid.*, p. 9 ("GRANTS the Gbagbo Defence leave to appeal Issues One and Two as set out in paragraph 12").

³³ [Decision Granting Leave to Appeal](#), para. 12.

[a]t this stage, the parties and participants were only notified of a *possibility* that the legal characterisation of the facts and circumstances described in the charges may be subject to change. As stressed in the Impugned Decision, this is without prejudice to any future decision under Regulation 55(1) of the Regulations and Article 74 of the Statute. [Footnotes omitted.]³⁴

24. The Appeals Chamber concurs with the Prosecutor that several of Mr Gbagbo’s arguments fall outside the scope of the issues that were certified by the Trial Chamber for appeal. Mr Gbagbo raises arguments that challenge the validity of recharacterising the facts and circumstances under regulation 55 (1) of the Regulations of the Court in the present case, as opposed to only challenging the actual timing of the notice of such a recharacterisation provided for in regulation 55 (2) of the Regulations. In this respect, the Appeals Chamber observes that the core of Mr Gbagbo’s appeal appears to be premised on the argument that it is legally impermissible for a Trial Chamber to recharacterise the facts and circumstances of a case to include modes of liability that were charged, but not confirmed, by the Pre-Trial Chamber.

25. The Appeals Chamber recalls that it may consider arguments “intrinsically linked to the issue on appeal as certified by the [relevant] Chamber”.³⁵ In determining whether Mr Gbagbo’s arguments are “intrinsically linked”, the Appeals Chamber recalls that, in the context of an appeal addressing a similar issue in its “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’”³⁶ (hereinafter: “*Katanga* OA 13 Judgment”), it held that

[b]y issuing the [i]mpugned [d]ecision, the Trial Chamber has merely given notice pursuant to regulation 55 (2) of the Regulations of the Court. The Appeals Chamber therefore has to review whether the Trial Chamber erred in relation to whether “it appears [...] that the legal characterisation of facts may be subject to change”, pursuant to regulation 55 (2) of the Regulations of the Court.

³⁴ [Decision Granting Leave to Appeal](#), para. 13.

³⁵ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Judgment on the appeal of Mr Mathieu Ngudjolo against the decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9’”, 27 May 2008, [ICC-01/04-01/07-521](#) (OA 5), para. 37. See also *The Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled ‘Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54 (3) (e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008’”, 21 October 2008, [ICC-01/04-01/06-1486](#) (OA 13), paras 14, 17.

³⁶ 27 March 2013, [ICC-01/04-01/07-3363](#) (OA 13).

Hence, the review that the Appeals Chamber can undertake at this stage of the proceedings is a limited one, in that the [i]mpugned [d]ecision would be erroneous only if it were immediately apparent to the Appeals Chamber, at this stage, that the change in the legal characterisation contemplated by the Trial Chamber would exceed the facts and circumstances described in the charges.³⁷

26. The Appeals Chamber considers that the issue raised by Mr Gbagbo is intrinsically linked to the issues certified on appeal in the sense that, if the legal recharacterisation of the facts and circumstances cannot as a matter of law be based on modes of liability rejected in a decision confirming the charges, this would directly impact the reasonableness (or lack thereof) of the Trial Chamber's conclusion that "it appears [...] that the legal characterisation of facts may be subject to change".³⁸ Accordingly, the Appeals Chamber rejects the Prosecutor's request that Mr Gbagbo's arguments be disregarded.

27. In line with its finding in the *Katanga* OA 13 Judgment, the review that the Appeals Chamber can undertake in these circumstances is a limited one, in that the Impugned Decision would be erroneous only if it were immediately apparent to the Appeals Chamber, at this stage, that the change in the legal characterisation contemplated by the Trial Chamber is not legally permissible. Accordingly, prior to addressing the two grounds of appeal, the Appeals Chamber will first consider Mr Gbagbo's arguments related to whether modes of liability that are not confirmed by a Pre-Trial Chamber may be the object of a legal recharacterisation of the facts and circumstances pursuant to regulation 55 of the Regulations of the Court.

28. Mr Gbagbo argues that recourse to regulation 55 of the Regulations of the Court should be ruled out because the contemplated alternative modes of liability under article 28 of the Statute were considered and rejected by the Pre-Trial Chamber.³⁹ He submits that the Trial Chamber's use of the regulation would call into question the findings and coherence of the Confirmation Decision.⁴⁰ In this respect, he submits that the Trial Chamber's invocation of regulation 55 of the Regulations of the Court

³⁷ [Katanga OA 13 Judgment](#), para. 46.

³⁸ [Impugned Decision](#), p. 11.

³⁹ [Document in Support of the Appeal](#), paras 37-39.

⁴⁰ [Document in Support of the Appeal](#), paras 40-41.

impermissibly allows it to circumvent the Pre-Trial Chamber's findings in the Confirmation Decision.⁴¹ In sum, Mr Gbagbo argues that

[t]he 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. This calls into question the rationale of the Statute, the Pre-Trial Bench's authority and the importance of the Confirmation Decision. [Footnotes omitted.]⁴²

29. The Appeals Chamber recalls that, in its "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 characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'"⁴³ (hereinafter: "*Lubanga OA 15 OA 16 Judgment*" and "Mr Lubanga", respectively), Mr Lubanga argued that regulation 55 of the Regulations of the Court did not permit recharacterisation of facts to add new offences or more serious offences than those listed in the charges, even if they are based on the facts and circumstances described in the charges.⁴⁴ While declining to rule on the substance of Mr Lubanga's arguments, the Appeals Chamber nonetheless noted that, if it were to so decide, "the particular circumstances of the case w[ould] have to be taken into account".⁴⁵

30. In resolving the issue raised by Mr Gbagbo, the Appeals Chamber accordingly limits itself only to the specific circumstances of this case, which are that the Pre-Trial Chamber declined to confirm modes of liability pursuant to article 28 of the Statute, but did confirm the alleged facts upon which the Trial Chamber now bases its notice pursuant to regulation 55 of the Regulations of the Court.

31. In this regard, the Appeals Chamber recalls that, in the *Lubanga OA 15 OA 16 Judgment*, it held that failing to permit a trial chamber to re-visit the legal characterisation of facts that were confirmed by the Pre-Trial Chamber at the end of

⁴¹ [Document in Support of the Appeal](#), para. 53.

⁴² [Document in Support of the Appeal](#), para. 54.

⁴³ 8 December 2009, [ICC-01/04-01/06-2205](#) (OA 15 OA 16).

⁴⁴ [Lubanga OA 15 OA 16 Judgment](#), para. 99, referring to "Defence Appeal against the Decision of 14 July 2009 entitled *Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court*", dated 10 September 2009 and registered on 29 September 2009, [ICC-01/04-01/06-2112-tENG](#) (OA 15); original French version, 10 September 2009 ([ICC-01/04-01/06-2112](#) (OA 15)).

⁴⁵ [Lubanga OA 15 OA 16 Judgment](#), para. 100.

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 [...]. This would be contrary to the aim of the Statute to ‘put an end to impunity’ (fifth paragraph of the Preamble)”.⁴⁶ Additionally, the Appeals Chamber held that article 74 (2) of the Statute “confines the scope of [r]egulation 55 to the facts and circumstances described in the charges and any amendment thereto. If applied with such limitation, [r]egulation 55 is consistent with article 74 (2) of the Statute”.⁴⁷ With respect to article 61 (9) of the Statute, the Appeals Chamber noted that “the text of [r]egulation 55 does not stipulate, beyond what is contained in sub-regulation 1, what changes in the legal characterisation may be permissible”.⁴⁸

32. In the circumstances of this case, the Appeals Chamber finds that there is no legal impediment to a Trial Chamber recharacterising facts and circumstances to include a mode of liability that was considered, but not confirmed by the Pre-Trial Chamber, so long as the facts and circumstances that could potentially be recharacterised were confirmed by that Pre-Trial Chamber. Therefore, the Appeals Chamber rejects Mr Gbagbo’s argument in this regard.

B. First ground of appeal

33. Under the first ground of appeal, Mr Gbagbo alleges a legal error in the Trial Chamber’s finding that the phrase “any time during the trial” in regulation 55 (2) of the Regulations of the Court means that the notice contemplated therein may be issued at “any time after the constitution of the Trial Chamber, i.e. even before the start of the trial proper”.⁴⁹

1. Relevant part of the Impugned Decision

34. In interpreting the phrase “any time during the trial”, the Trial Chamber held as follows:

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

⁴⁶ [Lubanga OA 15 OA 16 Judgment](#), para. 77. See also [Katanga OA 13 Judgment](#), para. 22.

⁴⁷ [Lubanga OA 15 OA 16 Judgment](#), para. 93.

⁴⁸ [Lubanga OA 15 OA 16 Judgment](#), para. 100.

⁴⁹ [Document in Support of the Appeal](#), para. 7.

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’. [Footnotes omitted.]⁵⁰

35. In support of its above finding that “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”,⁵¹ the Trial Chamber noted that one trial chamber of the Court had provided notice before the hearing of evidence had begun,⁵² as well as that another had “acknowledged that it could have given notice earlier, indicating that it could have done so before opening statements”.⁵³ The Trial Chamber also reasoned that in light of certain “exceptional circumstances surrounding the proposed recharacterisation” it appeared 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.⁵⁴

2. *Mr Gbagbo’s submissions*

36. First, Mr Gbagbo argues that the Trial Chamber used irrelevant criteria, namely, “the context and the special circumstances of this case” in its interpretation of a legal text, which he submits is contrary to the interpretation of treaties under the Vienna Convention on the Law of Treaties.⁵⁵ He argues that the reference by the Trial Chamber to the Appeals Chamber’s jurisprudence that notice under regulation 55 (2) of the Regulations of the Court must “always be given as early as possible” is irrelevant because it is unrelated to the question of whether the regulation can be used before the start of the trial.⁵⁶ Mr Gbagbo also submits that the Impugned Decision is inconsistent with the recommendations of the Pre-Trial Practice Manual.⁵⁷

⁵⁰ [Impugned Decision](#), para. 11.

⁵¹ [Impugned Decision](#), para. 11.

⁵² [Impugned Decision](#), footnote 27, referring to Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial 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](#).

⁵³ [Impugned Decision](#), footnote 27, referring to Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, “Decision on Applications for Notice of Possibility of Variation of Legal Characterisation”, 12 December 2013, [ICC-01/09-01/11-1122](#), para. 28.

⁵⁴ [Impugned Decision](#), paras 12-13.

⁵⁵ [Document in Support of the Appeal](#), paras 10, 13.

⁵⁶ [Document in Support of the Appeal](#), para. 12.

⁵⁷ [Document in Support of the Appeal](#), paras 42-44.

37. Mr Gbagbo submits that the term “trial” in regulation 55 of the Regulations of the Court can be interpreted as commencing upon constitution of the Trial Chamber (broad interpretation) or at the time that the opening statements are heard (narrow interpretation).⁵⁸ In his view, the ordinary meaning and contextual reading of the provision, as well as its object and purpose,⁵⁹ support a narrow interpretation of the term “trial”.

38. In relation to the ordinary meaning of the provision, Mr Gbagbo submits that the term “trial” under regulation 55 of the Regulations of the Court must be understood narrowly as it is located in the section of the Regulations of the Court entitled “Trial”.⁶⁰ Mr Gbagbo argues that all of the regulations in this section relate to the concept of a “trial in the narrow sense”.⁶¹ Regarding the provisions in the Statute and the Rules of Procedure and Evidence that include the term “trial”, Mr Gbagbo argues that “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”.⁶² Similarly, Mr Gbagbo argues that the jurisprudence of the Trial Chambers relating to the provisions containing the term “trial” demonstrates that it has “almost always interpreted this term as covering the trial in the narrow sense”.⁶³

39. Regarding the contextual interpretation of regulation 55 of the Regulations of the Court, Mr Gbagbo contends that it must be understood in the light of the coherent procedure laid out in the Statute for the adjudication of the charges brought against the accused.⁶⁴ In his view, the charges confirmed after the confirmation hearing “circumscribes the trial and determines its content”.⁶⁵ With reference to article 61 (9) and (11) of the Statute, Mr Gbagbo argues that the Prosecutor may only add to the charges, once they are confirmed, with the permission of the Pre-Trial Chamber and,

⁵⁸ [Document in Support of the Appeal](#), para. 14.

⁵⁹ The Appeals Chamber notes that the arguments related to the object and purpose of the provision relate solely to whether regulation 55 of the Regulations of the Court may be invoked with respect to modes of liability expressly not confirmed by the Pre-Trial Chamber. As this is addressed above, the Appeals Chamber will not address them again under this ground of appeal.

⁶⁰ [Document in Support of the Appeal](#), para. 16.

⁶¹ [Document in Support of the Appeal](#), para. 16.

⁶² [Document in Support of the Appeal](#), para. 19.

⁶³ [Document in Support of the Appeal](#), paras 21-22.

⁶⁴ [Document in Support of the Appeal](#), para. 27.

⁶⁵ [Document in Support of the Appeal](#), para. 28.

after the trial has begun, the Prosecutor may only withdraw the charges, not add any.⁶⁶ In Mr Gbagbo's view, the overall statutory framework applicable at the Court supports the interpretation that "there may be no recourse to regulation 55 before the start of the trial in the narrow sense".⁶⁷

3. *The Prosecutor's submissions*

40. The Prosecutor submits that the Trial Chamber did not err in its interpretation of the term "trial",⁶⁸ and argues that Mr Gbagbo has not demonstrated that this term should be interpreted to exclude the period prior to the opening statements or before the commencement of the evidentiary phase of the trial.⁶⁹

41. The Prosecutor submits that the ordinary meaning of regulation 55 of the Regulations of the Court does not preclude the Trial Chamber from issuing notice as soon as it is seised of the case.⁷⁰ She argues that early notice enhances the fairness of proceedings and an accused's right under article 67 (1) (a) of the Statute to be informed promptly of the charges.⁷¹ Thus, in her view, interpreting regulation 55 of the Regulations of the Court narrowly to exclude its application during the earliest stages of the proceedings before the Trial Chamber would be inconsistent with the Statute and the Rules of Procedure and Evidence.⁷² The Prosecutor also emphasises that a narrow interpretation would be inconsistent with the Trial Chamber's duty under article 64 (2) to ensure the fair and expeditious conduct of proceedings which extends to all phases of the proceedings before a Trial Chamber.⁷³

42. The Prosecutor submits that Mr Gbagbo's "analogy to procedures under article 61(9) for the modification of charges is inapposite" (footnotes omitted).⁷⁴ She submits that Mr Gbagbo's arguments in this regard appear to rely on the Trial Chamber's statement that the Prosecutor should have sought leave to appeal the Confirmation Decision or requested an amendment of the charges before moving the Trial Chamber

⁶⁶ [Document in Support of the Appeal](#), paras 28-29.

⁶⁷ [Document in Support of the Appeal](#), para. 31.

⁶⁸ [Prosecutor's Response to the Document in Support of the Appeal](#), para. 9.

⁶⁹ [Prosecutor's Response to the Document in Support of the Appeal](#), para. 10.

⁷⁰ [Prosecutor's Response to the Document in Support of the Appeal](#), para. 11.

⁷¹ [Prosecutor's Response to the Document in Support of the Appeal](#), para. 11.

⁷² [Prosecutor's Response to the Document in Support of the Appeal](#), para. 11.

⁷³ [Prosecutor's Response to the Document in Support of the Appeal](#), paras 11-12.

⁷⁴ [Prosecutor's Response to the Document in Support of the Appeal](#), para. 13.

to issue a regulation 55 notice.⁷⁵ In the Prosecutor’s view, “both amendment of the charges and applications for leave to appeal are procedural devices designed for a different purpose” and “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”.⁷⁶ The Prosecutor argues that introducing these procedural devices as prerequisites to the issuance of notice under regulation 55 of the Regulations of the Court would adversely impact the efficiency of the proceedings.⁷⁷

43. Finally, the Prosecutor submits that the Trial Chamber correctly considered that regulation 55 of the Regulations of the Court enables it to “close accountability gaps”.⁷⁸

4. *The Victims’ submissions*

44. The Victims submit that the Trial Chamber did not err in law by applying regulation 55 (2) of the Regulations before the start of the trial *stricto sensu*, namely before the start of the presentation of evidence.⁷⁹

45. In their view, “a literal and contextual interpretation of the term ‘trial’ in regulation 55(2) refers to the trial phase”, which the Victims submit starts with the transmission by the Presidency to the Trial Chamber of the record of the proceedings altogether.⁸⁰ The Victims argue that the “trial phase” envisaged in the Statute and the Rules of Procedure and Evidence also comprises status conferences, which does not fall within the meaning of a “trial” *stricto sensu*.⁸¹

46. Lastly, the Victims observe that notice of legal recharacterisation of the facts being given as early as possible is consistent with the jurisprudence of international

⁷⁵ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 13.

⁷⁶ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 13.

⁷⁷ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 13.

⁷⁸ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 14.

⁷⁹ [Victims’ Response to the Document in Support of the Appeal](#), paras 1, 3, 16.

⁸⁰ [Victims’ Response to the Document in Support of the Appeal](#), para. 27.

⁸¹ [Victims’ Response to the Document in Support of the Appeal](#), paras 33-34.

human rights courts,⁸² and more recently Trial Chamber VII's decision in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*⁸³

5. *Determination of the Appeals Chamber*

47. At issue under this ground of appeal is whether it was in principle lawful, pursuant to the terms of regulation 55 of the Regulations of the Court, for the Trial Chamber to give notice to the participants that the legal characterisation of facts may be subject to change at a stage prior to the hearing of opening statements.

48. Regulation 55 of the Regulations of the Court provides, in relevant part, as follows:

1. In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.

2. If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change.

49. In accordance with regulation 55 (2) of the Regulations of the Court, notice of a possible re-characterisation of the facts may be given "at any time during the trial". The Appeals Chamber has had occasion in the past to pronounce on the meaning of this phrase, albeit in the context where notice was issued at the deliberations stage of the trial but before a decision under article 74 of the Statute was rendered.⁸⁴ In this case, the Appeals Chamber held that while the timing of the issuance of notice was

⁸² [Victims' Response to the Document in Support of the Appeal](#), para. 52.

⁸³ [Victims' Response to the Document in Support of the Appeal](#), para 25, referring to *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, "Decision on Prosecution Application to Provide Notice pursuant to Regulation 55", 15 September 2015, [ICC-01/05-01/13-1250](#), para. 9, where Trial Chamber VII stated 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".

⁸⁴ [Katanga OA 13 Judgment](#), paras 11, 24.

not “incompatible” with regulation 55 of the Regulations of the Court, it was however preferable that such notice be given “as early as possible”.⁸⁵

50. In the case at hand, the Appeals Chamber concurs with the views expressed by the Prosecutor in so far as she argues that early notice of a possible re-characterisation of the facts is consistent with the accused person’s right under article 67 (1) (a) of the Statute “[t]o be informed promptly and in detail of the nature, cause and content of the charge” and with the duty of the Trial Chamber under article 64 (2) of the Statute to “ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused”.

51. The question arising, however, is whether by the terms of regulation 55 of the Regulations of the Court, the Trial Chamber is precluded from issuing notice of a possible recharacterisation of the facts at an early stage of the proceedings, namely, when it is seised of a case and before opening statements are heard. In this respect, the Appeals Chamber disagrees with Mr Gbagbo’s restrictive interpretation of the phrase “at any time during the trial” in regulation 55 (2) of the Regulations of the Court, as being limited to the stage where the hearing of evidence has begun. While the Appeals Chamber is not called upon to consider whether the term “trial” has the same interpretation when used in other contexts throughout the legal framework of the Court, in its view, the ordinary meaning of the phrase “at any time during the trial” in the context of regulation 55 does not exclude the stage after a Trial Chamber is seised of a case and before opening statements. This is because regulation 55 (2) of the Regulations of the Court requires notice to be issued when it “appears” to the Trial Chamber that the legal characterisation of facts may be subject to change. This may become apparent to the Trial Chamber at any time before a decision under article 74 of the Statute is rendered. In these circumstances, to restrict the issuance of such a notice to a stage at which opening statements have been heard would be inconsistent with the requirement that notice be issued as “early as possible” and prejudicial to the accused person.

52. In the present case, the Appeals Chamber observes that prior to the hearing of opening statements the Trial Chamber concluded that the legal characterisation of the

⁸⁵ [Katanga OA 13 Judgment](#), para. 24.

facts and circumstances described in the charges may be subject to change based on its review of the Confirmation Decision, the Request for Notice and the Pre-Trial Brief. The Trial Chamber was therefore required, pursuant to regulation 55 (2) of the Regulations of the Court, to place the participants on notice as early as possible. Accordingly, the Appeals Chamber finds no error in the Trial Chamber's interpretation of regulation 55 of the Regulations of the Court, in particular with the timing of the issuance of the notice, as it is compatible with the terms of regulation 55 (2) of the Regulations of the Court and consistent with the previous jurisprudence of the Appeals Chamber.

53. With respect to Mr Gbagbo's argument that by resorting to regulation 55 at this stage of the proceedings, the Trial Chamber is effectively subverting the coherent procedure set out in the Statute and allowing an amendment of the charges without the authorisation of the Pre-Trial Chamber, the Appeals Chamber finds this argument to be misdirected. Notwithstanding the fact that regulation 55 of the Regulations of the Court is part of the "coherent procedure" available to the Trial Chamber, the Appeals Chamber finds that the mere issuance of notice of a possible recharacterisation does not amount to an amendment of the charges. As previously stated by the Appeals Chamber, "article 61 (9) of the Statute and Regulation 55 address different powers of different entities at different stages of the procedure, and the two provisions are therefore not inherently incompatible".⁸⁶ Furthermore, as indicated by the Prosecutor, resort to regulation 55 by the Trial Chamber is not contingent on whether the procedure under article 61 (9) of the Statute for the amendment of charges was applied. On the contrary, regulation 55 is only triggered where it appears to the Trial Chamber that the legal characterisation of the facts and circumstances may be subject to change. Mr Gbagbo's argument is therefore rejected.

54. With respect to Mr Gbagbo's argument that the Impugned Decision is inconsistent with the recommendations of the Pre-Trial Practice Manual that recourse to regulation 55 of the Regulations of the Court should be limited, the Appeals Chamber considers this argument to also be misguided. The Pre-Trial Practice Manual is an explanatory document that contains general recommendations and guidelines regarding best practices at the Court, based on the experience and expertise of the Pre-

⁸⁶ *Lubanga* OA 15 OA 16 Judgment, para. 77.

Trial judges. However, it is not a binding instrument designed to have the same force and effect as the Statute, Rules of Procedure and Evidence or the Regulations of the Court. As such, the Trial Chamber cannot be constrained in its application of regulation 55 by a recommendation contained in the Pre-Trial Practice Manual. Given that all of Mr Gbagbo's arguments in relation to the Statute, Rules of Procedure and Evidence and the Regulations of the Court have been addressed above, the Appeals Chamber sees no need to further consider this argument and accordingly dismisses it.

55. Lastly, the Appeals Chamber notes Mr Gbagbo's submissions on the use of irrelevant criteria, namely, the "context and special circumstances of the case" in its interpretation of a legal text. The Appeals Chamber recalls in this regard that the Trial Chamber stated as follows:

[t]he 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.⁸⁷

56. The Appeals Chamber notes that the interpretation of any legal text is independent of the particular circumstances of a case. The "context and special circumstances" of a case become relevant only when a particular interpretation of the law is being applied. In the circumstances, the Appeals Chamber concurs with Mr Gbagbo's argument and finds that the Trial Chamber relied on irrelevant criteria in its interpretation of regulation 55 of the Regulations of the Court. However, the Appeals Chamber finds that this did not have any material effect on the Trial Chamber's interpretation as confirmed above.⁸⁸ Accordingly, the argument is rejected.

57. In sum, the Appeals Chamber finds that the Trial Chamber correctly interpreted the phrase "at any time during the trial" in regulation 55 (2) of the Regulations of the Court, to extend to the phase after the Trial Chamber is seised of a case and before opening statements. As such it was not *per se* unlawful for the Trial Chamber to give notice to the participants that the legal characterisation of facts may be subject to change at a stage prior to the hearing of opening statements. The first ground of appeal is therefore rejected.

⁸⁷ [Impugned Decision](#), para. 11.

⁸⁸ *Supra* para. 52.

C. Second Ground of Appeal

1. *Mr Gbagbo's submissions*

58. Under the second ground of appeal, Mr Gbagbo alleges that the Trial Chamber erred in relying on the “special circumstances of this case” to justify issuing notice under regulation 55 (2) of the Regulations of the Court.⁸⁹ Mr Gbagbo argues that “nothing has fundamentally changed since the [Confirmation Decision]. Otherwise put, the Trial [Chamber] has nothing more than what was in the possession of the Pre-Trial [Chamber] and has no specific material warranting modification of the [C]onfirmation [D]ecision”.⁹⁰

59. With regard to the Trial Chamber’s reliance on statements made in the Confirmation Decision, Mr Gbagbo argues that the Trial Chamber “presents only one aspect of the Pre-Trial Chamber’s approach” and misrepresents the overall position of the Pre-Trial Chamber.⁹¹ Specifically, Mr Gbagbo argues that the Pre-Trial Chamber’s statement that “the discussion of evidence at trial may lead to a different legal characterisation of the facts” does not support the use of regulation 55 before the evidentiary phase of the trial.⁹² Mr Gbagbo also submits that the Trial Chamber’s reference to Judge Van den Wyngaert’s Dissenting Opinion was taken “out of context” and “constitutes a distortion of her statements”.⁹³

2. *The Prosecutor's Submissions*

60. The Prosecutor submits that the Trial Chamber properly exercised its discretion when determining that “special circumstances” made it appropriate to issue notice at an early stage of the proceedings.⁹⁴ She submits that the Appeals Chamber can only overturn a discretionary decision “when [it] is so unfair or unreasonable as to ‘force the conclusion that the chamber failed to exercise its discretion judiciously’”, and argues that the Impugned Decision had no such error.⁹⁵

⁸⁹ [Impugned Decision](#), para. 11.

⁹⁰ [Mr Gbagbo's Reply](#), para. 19.

⁹¹ [Document in Support of the Appeal](#), paras 47, 52.

⁹² [Document in Support of the Appeal](#), para. 49.

⁹³ [Document in Support of the Appeal](#), para. 50.

⁹⁴ [Prosecutor's Response to the Document in Support of the Appeal](#), para. 16.

⁹⁵ [Prosecutor's Response to the Document in Support of the Appeal](#), para. 16.

61. Further, the Prosecutor emphasises that the Pre-Trial Chamber did not reject the Prosecutor’s evidence or the underlying facts, but rather rejected the narrative of facts supporting charges under article 28 of the Statute.⁹⁶ Therefore, she argues, the Pre-Trial Chamber’s manner of declining to confirm the charges was a relevant factor for the Trial Chamber’s determination.⁹⁷ The Prosecutor finally submits that the Pre-Trial Chamber’s statement that the possibility of re-characterisation may arise after the “discussion of evidence” is irrelevant to the timing of issuing notice, except as evidence that the possibility of re-characterisation had already been signalled.⁹⁸

3. *The Victims’ Submissions*

62. The Victims submit that the Trial Chamber did not abuse its discretion by misappreciating the facts or basing its decision on irrelevant considerations.⁹⁹ They note that more than one year separates the Confirmation Decision and Impugned Decision, and argue that the Confirmation Decision is an “exceptional” circumstance because of its statements about the dismissal of charges under article 28 and the possible need for regulation 55.¹⁰⁰ The Victims also submit that the Prosecutor’s request for the Trial Chamber to issue notice, as well as the Prosecutor’s Pre-Trial Brief, provided a “clearer ‘narrative of the facts’ or ‘case theory’” to reasonably justify issuing notice.¹⁰¹ Finally, the Victims argue that evidence must be heard before the final decision on re-characterisation is made in the judgment, but that it is not required before issuing notice.¹⁰²

4. *Determination of the Appeals Chamber*

63. As a preliminary matter, the Appeals Chamber notes that Mr Gbagbo does not clearly set out the type of error he alleges under this ground of appeal. The Appeals Chamber understands Mr Gbagbo to argue that the Trial Chamber abused its discretion by deciding that the “special circumstances” of the case justified giving notice under regulation 55 (2) of the Regulations of the Court.

⁹⁶ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 17.

⁹⁷ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 17.

⁹⁸ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 18.

⁹⁹ [Victims’ Response to the Document in Support of the Appeal](#), para. 55.

¹⁰⁰ [Victims’ Response to the Document in Support of the Appeal](#), paras 61-63.

¹⁰¹ [Victims’ Response to the Document in Support of the Appeal](#), para. 64.

¹⁰² [Victims’ Response to the Document in Support of the Appeal](#), para. 65.

64. The Appeals Chamber “will correct an exercise of discretion [...] where: (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion”.¹⁰³ Additionally, when such an exercise of discretion has been established, the Appeals Chamber must be satisfied that the “improper exercise of discretion materially affected the impugned decision”.¹⁰⁴ An abuse of discretion occurs when the impugned decision is “so unfair or unreasonable as to ‘force the conclusion that the Chamber failed to exercise its discretion judiciously’”.¹⁰⁵ The Appeals Chamber will also consider whether the first instance Chamber gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion.¹⁰⁶

65. For the reasons that follow, the Appeals Chamber is of the view that the Trial Chamber’s use of “special circumstances” to justify issuing notice of possible recharacterisation under regulation 55 was not “so unfair and unreasonable” as to constitute an improper exercise of the Trial Chamber’s discretion.

66. The Appeals Chamber understands the Trial Chamber’s assessment of “special circumstances” to include consideration of: (i) the Pre-Trial Chamber’s express acknowledgement of the possibility of Mr Gbagbo’s liability under article 28 of the Statute even before the Prosecutor included this mode of liability in its document containing the charges, as well as alleged similar statements made in the Dissenting Opinion;¹⁰⁷ (ii) the manner in which the Pre-Trial Chamber decided to decline to confirm charges under article 28 of the Statute, including its statement that it “cannot rule out the possibility that the discussion of evidence at trial may lead to a different legal characterisation of the facts”;¹⁰⁸ (iii) the Prosecutor’s indication in her Pre-Trial Brief that “the evidence supporting liability under Article 28 of the Statute is

¹⁰³ *The Prosecutor v Uhuru Muigai Kenyatta*, “Judgment on the Prosecutor’s appeal against Trial Chamber V(B)’s ‘Decision on the Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute’”, 19 August 2015, [ICC-011/09-02/11- 1032](#) (OA5) (hereinafter: “*Kenyatta* OA 5 Judgment”), para. 22.

¹⁰⁴ [Kenyatta OA 5 Judgment](#), para. 22.

¹⁰⁵ [Kenyatta OA 5 Judgment](#), para. 25.

¹⁰⁶ [Kenyatta OA 5 Judgment](#), para. 25.

¹⁰⁷ [Impugned Decision](#), para. 12.

¹⁰⁸ [Impugned Decision](#), paras 1, 12.

encompassed by that supporting other charged modes of liability”;¹⁰⁹ and (iv) the Prosecutor’s demonstration in her Request for Notice 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”.¹¹⁰

67. As a preliminary matter, the Appeals Chamber notes that the Trial Chamber’s use of the terms “special” and “extraordinary circumstances” in relation to its decision to issue notice may give the impression that there are differing standards applicable to regulation 55 (2) of the Regulations of the Court, depending on the timing of when such notice is given. Under the first ground of appeal, the Appeals Chamber has determined that the phrase “at any time during the trial” is to be interpreted broadly for purposes of regulation 55 (2) of the Regulations of the Court. Accordingly, there is no additional requirement for a Trial Chamber to establish that the circumstances of the case are “special” or “extraordinary” in order to issue notice under that provision prior to the start of the presentation of evidence in the case, nor will the Appeals Chamber’s review include any heightened level of scrutiny on this basis. Rather, the question is whether, based on the factors identified by the Trial Chamber, it was reasonable for it to hold that it “appears [to it] that the legal characterisation of facts may be subject to change”.

68. The Appeals Chamber notes that Mr Gbagbo’s arguments all relate to the manner in which the Trial Chamber took into account certain statements in the Confirmation Decision and Dissenting Opinion. However, the Trial Chamber did not rely solely on these statements or even these documents. Rather, the Trial Chamber expressly stated that it also took into account the Pre-Trial Brief and the Prosecutor’s Request for Notice. In the Impugned Decision, the Trial Chamber held that these documents demonstrated that liability under article 28 (a) and (b) of the Statute could “be derived from the facts and circumstances confirmed by the Pre-Trial Chamber”.¹¹¹ The Appeals Chamber considers that Mr Gbagbo has failed to identify any error in the Trial Chamber considering these two documents to be relevant to its decision to issue notice pursuant to regulation 55 (2) of the Regulations. Furthermore, the Appeals

¹⁰⁹ [Impugned Decision](#), para. 13.

¹¹⁰ [Impugned Decision](#), para. 13.

¹¹¹ See [Impugned Decision](#), para. 13.

Chamber emphasises that notice of a possibility of re-characterisation pursuant to regulation 55 (2) of the Regulations of the Court need not be based on evidence heard at trial, but may, as in the present case, be based on documents such as those discussed above.

69. Furthermore, the Appeals Chamber considers that Mr Gbagbo misrepresents to some extent how the Trial Chamber took the Confirmation Decision into account. The Appeals Chamber notes in this respect that, in the Impugned Decision, the Trial Chamber reproduced in full paragraphs 263 to 265 of the Confirmation Decision.¹¹² These paragraphs indicate that the Pre-Trial Chamber declined to confirm liability under article 28 (a) or (b) on the basis that it was “not persuaded that the *narrative of the facts* [...] 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” (emphasis added), finding instead that these facts led it to consider 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”.¹¹³

70. The Appeals Chamber has previously held that

[it] does not accept that a change in the narrative exceeds *per se* the facts and circumstances described in the charges. [...] [F]ocusing on certain facts to the exclusion of others will necessarily alter the narrative: indeed, it would appear inevitable that a change in characterisation would result in a change of narrative to a certain extent.¹¹⁴

71. The Appeals Chamber concurs with the Prosecutor that the manner in which the Pre-Trial Chamber declined to confirm liability under article 28 of the Statute, that is due to a different understanding of the narrative of the facts and not due to a rejection of the facts themselves, was a relevant factor to the Trial Chamber’s decision to issue notice. The Appeals Chamber considers that Mr Gbagbo has not demonstrated that it was unreasonable for the Trial Chamber to consider this factor.

¹¹² [Impugned Decision](#), para. 1.

¹¹³ See [Confirmation Decision](#), paras 263-265.

¹¹⁴ [Katanga OA 13 Judgment](#), para. 58.

72. With respect to the Trial Chamber taking into account: (i) the specific statement of the Pre-Trial Chamber that it could “not rule out the possibility that the discussion of evidence at trial may lead to a different legal characterisation of the facts”; (ii) the fact that the Pre-Trial Chamber had, throughout those proceedings, acknowledged the potential of Mr Gbagbo’s liability under article 28 of the Statute; and (iii) the statements contained in the Dissenting Opinion, the Appeals Chamber concurs with Mr Gbagbo that these are not relevant factors for purposes of deciding whether it appears to the *Trial Chamber* that the legal characterisation of the facts may be subject to change. In this respect, these statements by the Pre-Trial Chamber are not legal findings and are at most *obiter dicta*. The Appeals Chamber considers that they are irrelevant to the Trial Chamber’s determination to issue notice pursuant to regulation 55 (2) of the Regulations of the Court. However, given that the Appeals Chamber has found above that the Trial Chamber properly exercised its discretion by considering the manner in which the Pre-Trial Chamber declined to confirm liability under article 28 of the Statute in the Confirmation Decision, the Pre-Trial Brief and the Prosecutor’s Request for Notice in order to issue notice under regulation 55 (2) of the Regulations of the Court, the Appeals Chamber finds that the Trial Chamber’s consideration of these other factors did not materially affect its determination to issue notice pursuant to regulation 55 (2) of the Regulations of the Court.

73. Accordingly, the Appeals Chamber rejects Mr Gbagbo’s second ground of appeal.

II. APPROPRIATE RELIEF

74. On an appeal pursuant to article 82 (1) (d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the present case, having rejected both grounds of Mr Gbagbo’s appeal, it is appropriate to confirm the Impugned Decision.

75. In issuing this judgment, the Appeals Chamber notes that rule 158 of the Rules of Procedure and Evidence read with article 83 (4) of the Statute provides that judgments of the Appeals Chamber “shall be delivered in open court”. The Appeals Chamber notes further that regulation 19 *bis* (1) of the Regulations of the Court provides that “[u]nless otherwise determined by a Chamber, during the judicial recess hearings shall be limited to urgent issues and time limits shall not be suspended”.

Noting that the Court is in judicial recess, the Appeals Chamber considers that it is appropriate in the circumstances of this case to forego convening a hearing for the delivery of its judgment. The Appeals Chamber considers that the publication of its judgment on the Court's website, coupled with the required notice to the participants in accordance with regulations 31 and 32 of the Regulations of the Court, adequately fulfils its obligation to publicise the delivery of its judgments.

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



Judge Sanji Mmasenono Monageng
Presiding Judge

Dated this 18th day of December 2015

At The Hague, The Netherlands