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**International
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Court**



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TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

THE PROSECUTOR

***v. JEAN-PIERRE BEMBA GOMBO, AIME KILOLO MUSAMBA, JEAN-JACQUES
MANGENDA KABONGO, FIDELE BABALA WANDU AND NARCISSE ARIDO***

Public Document

**Prosecution Application for Leave to Appeal the “Decision on Prosecution
Application to Provide Notice pursuant to Regulation 55”**

Source: Office of the Prosecutor

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

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I. Introduction

1. On 15 September 2015, the Trial Chamber VII (“Chamber”) rejected the Office of the Prosecutor (“Prosecution”)’s application¹ to provide notice pursuant to regulation 55 of the Regulations of the Court (“Decision”).² The Prosecution seeks leave to appeal the Decision on the following issue:

Whether the Trial Chamber erred by taking into consideration an irrelevant factor, namely that the Prosecution did not seek leave to appeal the Confirmation Decision or request to amend the charges according to article 61(9) of the Rome Statute (“Issue”).

2. The Issue arises from the Decision and meets the criteria for leave to appeal under article 82(1)(d) of the Rome Statute. Immediate appellate intervention would not require postponement of the commencement of the evidentiary phase of the trial. Rather, it would materially advance the proceedings by providing legal certainty as to the correctness of the Decision and give concrete guidance for any future application of regulation 55(2) in this case.

3. Trial Chamber I, in the *Gbagbo and Blé Goudé* case, has also recently granted leave to appeal a regulation 55 decision (including certifying as an issue whether a particular factor was irrelevant to a regulation 55(2) notice).³ While that decision is indicative that the Issue in this case likewise meets the criteria for leave to appeal, the Appeals Chamber’s judgement in that case will not provide the specific guidance required for these proceedings.

¹ ICC-01/05-01/13-922 (“Regulation 55 Application”).

² ICC-01/05-01/13-1250.

³ ICC-02/11-1/15-212, para.2(ii) – Issue Two.

II. Submissions

A. The Issue arises from the Decision and qualifies as an “appealable issue”

4. The Issue arises from the Decision. As a principal reason to reject the Regulation 55 Application, the Decision expressly refers to the fact that the Prosecution did not seek leave to appeal the Confirmation Decision or request to amend the charges.⁴ Because the Prosecution had not undertaken these procedural steps, the Trial Chamber considered that granting the Regulation 55 Application now would amount to questioning the findings of the Pre-Trial Chamber and would provide the Prosecution, impermissibly, with an opportunity *de facto* to appeal the Confirmation Decision.⁵

5. In this context, the Issue is plainly a discrete and identifiable subject whose resolution was essential for the Decision, leading to the rejection of the Regulation 55 Application.⁶ Previous Chambers have certified decisions for appeal based on issues concerning the alleged consideration of irrelevant factors, including in the context of regulation 55(2).⁷

B. The Issue meets the criteria for leave to appeal under article 82(1)(d)

6. The Issue significantly affects the fair and expeditious conduct of the proceedings and the outcome of the trial. In addition, immediate resolution of the Issue by the Appeals Chamber would materially advance the proceedings.

⁴ Decision, para.10.

⁵ Decision, para.10.

⁶ ICC-01/04-168 OA3, para.9.

⁷ ICC-02/11-1/15-212, para.2(ii) – Issue Two; *see also* ICC-01/09-02/11-1004, p.14, paras.25, 29.

i. The Issue significantly affects the fair and expeditious conduct of the proceedings

7. The Issue significantly affects the fair conduct of the proceedings. The Decision—which limits the timely application of the Trial Chamber’s power under regulation 55(2) on the basis of the non-exhaustion of a procedure designed for a different purpose⁸—at the very least delays the issue of a regulation 55 notice until the later stages of the proceedings. Such delay affects the rights of both the Prosecution and the Accused, as it diminishes the Parties’ certainty as to the legal scope of the trial. This may impact the Parties’ strategy and the manner in which they may wish to address evidence in this case.⁹ Precisely to avoid such an outcome, the Appeals Chamber has held it is “preferable that notice under regulation 55 (2) of the Regulations of the Court should always be given as early as possible”.¹⁰

8. Moreover, the Trial Chamber appears to have already acknowledged that the uncertainty left by the Decision may affect the fairness of the proceedings. Thus it cautioned the Defence to take steps to “minimise any prejudice” which might arise in the event of a future recharacterisation.¹¹ In the circumstances, immediate appellate intervention would be a better and swifter way to avoid any potential prejudice.

9. Likewise, the Issue significantly affects the expeditious conduct of the proceedings. Delayed notice in this case may necessitate additional procedures under regulation 55(3). For instance, it may require the Trial Chamber to give the Accused

⁸ Specifically, regulation 55 protects a different interest, and takes account of different factors, than any application to the Pre-Trial Chamber under article 82(1)(d). Not all circumstances which justify a request under regulation 55 justify an application under article 82(1)(d). In addition, the procedure under article 61(9) is designed as a tool for the Prosecution to convince a Pre-Trial Chamber that new charges should be added, based on additional evidence. If the Prosecution did not present new evidence, the procedure under article 61(9) would amount to a mere request for reconsideration.

⁹ ICC-01/09-01/11-1122, para.27.

¹⁰ ICC-01/04-01/07-3363 OA13, para.24.

¹¹ Decision, fnt.32.

additional time to prepare their defence,¹² or it may require the case to be re-opened and certain witnesses who have already testified to be recalled.¹³

ii. The Issue affects the outcome of the trial

10. The Issue also significantly affects the outcome of the trial due to its importance to the Trial Chamber's reasoning, and the clear procedural consequence of the Decision. Specifically, the five Accused in this case cannot *presently* be convicted of the crimes charged on the basis of certain modes of liability (for which the Decision declined to give notice under regulation 55).¹⁴

11. This situation may be remedied if and when the Trial Chamber gives regulation 55 notice in the future, which the Decision foreshadows in appropriate circumstances.¹⁵ However, given the Trial Chamber's approach in this Decision, the Trial Chamber could well continue to factor in the Prosecution's failure to have taken certain procedural steps¹⁶ in any future determination as to whether a regulation 55 notice is appropriate. The Issue may therefore also affect the ultimate outcome of the trial.

¹² Regulation 55(3)(a).

¹³ Regulation 55(3)(b); see also ICC-01/09-01/11-1122, para.27.

¹⁴ ICC-01/05-01/13-922, para.1.

¹⁵ Decision, para.12. The Trial Chamber also noted that "counsel should be [...] aware of the possibility of recharacterisation and to conduct their defences accordingly, taking steps to minimise any prejudice which might arise should there be such a recharacterisation at a later stage" (Decision, fnt.32).

¹⁶ This includes the consequences of the Prosecution's omissions as held by the Trial Chamber, namely that notice at that later stage would call into question the findings of the Pre-Trial Chamber and provide the Prosecution with an opportunity to de facto appeal the Confirmation Decision (Decision, para.10).

iii. *Immediate resolution of the Issue by the Appeals Chamber would materially advance the proceedings*

12. Prompt certification of the Issue for the “authoritative determination” of the Appeals Chamber will clarify the procedural consequences of the Decision, such as the need for additional investigations, a prolonged evidentiary phase of the trial, or changes in Parties’ strategy.¹⁷ In addition, it will provide concrete guidance to the Trial Chamber and the Parties for any future regulation 55 notice in this case,¹⁸ and ensure that the Trial Chamber applies regulation 55 correctly to fulfil its purpose of closing “accountability gaps” and managing the “risk[s] of acquittals that are merely the result of legal qualifications confirmed in the pre-trial phase that turn out to be incorrect”.¹⁹

13. Immediate appellate intervention is also necessary because the Chambers of this Court disagree on whether the Prosecution must seek leave to appeal a confirmation decision or amend the charges before it may request a regulation 55 notice.²⁰ Such a condition has been introduced only in two recent decisions, including the present one,²¹ yet has been absent from previous regulation 55 decisions,²² even when the regulation 55 notice was asked for and issued before the commencement of the trial.²³ In one case, the Pre-Trial Chamber even rejected the Prosecution’s application for leave to appeal the confirmation decision on the basis that the Prosecution is not prevented from subsequently requesting the Trial Chamber to reconsider the legal characterisation of the confirmed facts pursuant to regulation 55.²⁴ These inconsistent findings and contradicting legal reasonings underscore the

¹⁷ ICC-01/04-168, paras.14-15, 18.

¹⁸ ICC-02/11-01/15-212, para.12.

¹⁹ Decision, para.7, relying on ICC-01/04-01/06-2205 OA15 OA16, para.77.

²⁰ In other cases, leave to appeal has been granted on issues which are marked by diverging practice between different chambers: see ICC-02/11-01/11-212, para.12.

²¹ See also ICC-02/11-01/15-185, para.8.

²² See for instance, ICC-01/09-01/11-1122, paras.27-28.

²³ See for instance, ICC-01/04-01/06-1084, paras.48-50.

²⁴ ICC-01/04-01/06-915, paras.44-45.

need for the Appeals Chamber's intervention in order to unify conflicting jurisprudence.

14. Finally, prompt resolution of this Issue by the Appeals Chamber would also assist the advancement of other proceedings before the Court.²⁵ It would clarify the applicable law and would mean that the Prosecution would not have to seek leave to appeal each confirmation decision or to amend the charges, simply to preserve the possibility of prompt action under regulation 55 at trial. Clarity on the Issue would further avoid burdening Chambers with litigation pursued solely for the purpose of exhausting alternate remedies as a predicate condition for requesting regulation 55 notice.

III. Relief Requested

15. For the reasons above, the Prosecution requests the Trial Chamber to grant leave to appeal the Decision on the above Issue.



Fatou Bensouda, Prosecutor

Dated this 18th day of September 2015
At The Hague, The Netherlands

²⁵ While the impact of immediate resolution of the issue on other proceedings may not itself be sufficient to sustain a grant of leave under article 82(1)(d), it is a factor to be weighed in deciding whether to grant leave. Pre-Trial Chamber II has previously recognised that in certain circumstances, the potential impact on other proceedings may be “invoked as an additional argument in support of the alleged significant impact on the current proceedings” See ICC-01/05-20-US-Exp, para. 54 (unsealed pursuant to ICC-02/04-01/05-52). See also *Prosecutor v Bizimungu et al*, ICTR-99-50-T, Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses, 28 September 2005, para.5; *Prosecutor v Mrksic*, IT-95-13/1-PT, Decision Granting Certification to Appeal, 29 May 2003.