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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, AIMÉ KILOLO MUSAMBA, JEAN-JACQUES
MANGENDA KABONGO, FIDÈLE BABALA WANDU AND NARCISSE ARIDO*

Public

**Defence Response to ‘Prosecution’s Re-application for Notice to be Given under
Regulation 55(2) with respect to the Accused’s Individual Criminal Responsibility (ICC-
01/05-01/13-1538)’**

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

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1. Introduction

1. On 15 September 2015, Trial Chamber VII rejected the Prosecution's application for the Trial Chamber to provide notice under Regulation 55 of the Regulations of the Court (the Initial Regulation 55 Decision).¹

2. Almost a month after the close of the Prosecution case, the Prosecution has renewed its application for the Trial Chamber to provide such notice ("the Reapplication").²

3. The Reapplication contains no independent or new argumentation as to why it is now permissible and appropriate for the Trial Chamber to issue a Regulation 55 notice; it appears to be the expression of a mere disagreement with the outcome of the Prosecution's first Regulation 55 application for notice.

4. The Defence for Mr. Jean-Pierre Bemba respectfully submits that this constitutes grounds to reject the Reapplication.

5. In the alternative, the Defence submits that the Reapplication should be dismissed for the reasons set out in the 'Defence Response to Prosecution's Application for Notice to be given under Regulation 55(2) on the Accused's Individual Criminal Responsibility (ICC-01/05- 01/13-922)'.³

2. Submissions

6. Although the Trial Chamber left open the theoretical possibility that the Chamber *could* issue a Regulation 55 notice at a later juncture if it was appropriate

¹ ICC-01/05-01/13-1250.

² ICC-01/05-01/13-1538.

³ ICC-01/05-01/13-949.

to do so, the Reapplication fails to substantiate why it is appropriate that the Chamber do so at this juncture.

7. The paucity of argumentation is exemplified by the Prosecution's endeavour to simply "incorporate by reference the arguments set out in its Prior Application for regulation 55(2) notice".⁴

8. As a result, the Request fails to address the central questions in Regulation 55: namely first, whether there is any basis for concluding that it appears that it is possible that the legal characterisation of the facts could change, and second, whether it is appropriate to provide notice of this possibility at this stage.

9. The Reapplication includes no arguments as to what specific aspects of the case justify recourse to Regulation 55. In this regard, although Regulation 55 notice can be triggered by either the facts and circumstances set out in the charging document, or the evidence which has unfolded at trial, it cannot be triggered in a vacuum.

10. Fairness to the Defence dictates that the Prosecution should clearly set out its current position as to how the elements of the proposed recharacterisation can be derived from the facts and circumstances of this case.⁵ This is particularly warranted in light of the fact that the Prosecution's initial application relied on extracts from unsworn witness statements,⁶ which may have been contradicted at trial.

11. In the absence of any argumentation on these points, the Request can be distilled to a bald attempt to seek reconsideration of the Trial Chamber's previous

⁴ ICC-01/05-01/13-1538, para. 2.

⁵ Cf CC-02/11-01/15-185, para. 13.

⁶ See for example, ICC-01/05-01/13-922, paras. 16-18

decision based on the findings of Appeals Chamber's recent Regulation 55 judgment in the Gbagbo case ("the Gbagbo Decision").⁷

12. The Prosecution's effort to obtain *de facto* appellate relief *via* the Gbagbo Decision is, however, misguided.

13. The Gbagbo Decision is consistent with the findings and outcome of the Initial Regulation 55 Decision, and does not require its reversal. In line with the findings of the Appeals Chamber, Trial Chamber VII did not exclude the possibility that Regulation 55 could be invoked prior to the commencement of opening statements.⁸

14. Moreover, although the Trial Chamber referred to the Pre-Trial Chamber's rejection of certain modes of liability, and the Prosecution's failure to appeal the confirmation decision, the Trial Chamber's ultimate decision turned on the fact that,

the Prosecution did not provide any exceptional circumstances **or any other reasons**, nor are they apparent to the Chamber, which justify providing notice at this time. (emphasis added)⁹

15. Indeed, by noting that its decision was "without prejudice for the Chamber, *proprio motu* or at the request of the Prosecution, to provide notification at a later point in time, should it consider it to be appropriate to do so",¹⁰ the Trial Chamber implicitly acknowledged that the Pre-Trial Chamber's rejection of alternative modes of liability and the Prosecution's failure to appeal did not preclude the application of Regulation 55 to this case.

16. Contrary to the position of the Prosecution, it does not appear that the Trial Chamber rejected the first application not because of the existence of 'procedural

⁷ ICC-02/11-01/15-369.

⁸ ICC-01/05-01/13-1250, para. 9.

⁹ ICC-01/05-01/13-1250, para. 11.

¹⁰ ICC-01/05-01/13-1250, para. 12.

impediments'.¹¹ Rather, the first application was rejected because the Prosecution failed to provide cogent reasons as to why the Trial Chamber should exercise its discretion to issue a Regulation 55 notice.¹² In the absence of any intervening factors or new argumentation, there does not appear to be any basis for departing from this conclusion.

17. If anything, if it was not appropriate to issue a Regulation 55 notice in September 2015, it would be even less appropriate to do so now (i.e. after the closure of the Prosecution case, and when the time period for pre-Defence case investigations is on the cusp of expiring).

3. Relief Sought

18. The Defence for Mr. Jean-Pierre Bemba respectfully requests the Honourable Trial Chamber to dismiss the Reapplication.



Melinda Taylor
Counsel of Mr. Jean-Pierre Bemba

Dated this 14th day of January 2016

The Hague, The Netherlands

¹¹ Cf ICC-01/05-01/13-1538, para. 3.

¹² As underscored by the Trial Chamber in its oral decision on the Prosecution's request for leave to appeal, "[i]n addition to the considerations referenced by the Prosecution, the Chamber's reasoning in the impugned decision was **independently** premised on the fact that the proposed recharacterisations were rejected by the Pre-Trial Chamber and that no 11 exceptional circumstances or, quote, "any other reasons" were apparent to the Chamber which justified granting Regulation 55(2) notice." (emphasis added), Transcript 29 September 2015, ICC-01/05-01/13-T-10-Red-ENG, p. 9, lines 8-12.