

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No: **ICC-01/05-01/13**
Date: **14 January 2016**

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 the '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. Aimé Kilolo Musamba

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

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(Participation/Reparation)**

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I. INTRODUCTION

1. On 23 April 2015 the Office of the Prosecutor filed an application requesting the Trial Chamber to provide notice according to Regulation 55(2) of the Regulations of the Court.¹
2. The Trial Chamber rejected the Prosecutor's application on 15 September 2015.²
3. The Prosecution sought leave to appeal the Trial Chamber's Decision.³ The Trial Chamber rejected the application.⁴
4. The Prosecution now again seeks to re-open this issue and has filed 'Prosecution's Re-application for Notice to be Given under Regulation 55(2) with respect to the Accused's Individual Criminal Responsibility' on 8 January 2016 [the Request].⁵

II. PROSECUTION'S REQUEST

5. The Prosecution re-iterates a request that the Trial Chamber issue formal notice pursuant to Regulation 55(2) that:
 - (i) The charges against Babala and Arido for crimes under articles 70(1)(b) and 70(1)(c) be re-characterised pursuant to Article 25(3)(a); and

¹ ICC-01/05-01/13-922, 23 April 2015.

² ICC-01/05-01/13-1250, 15 September 2015.

³ ICC-01/05-01/13-1270, 18 September 2015.

⁴ See ICC-01/05-01/13-T-10-CONF-ENG ET 29-09-2015, pp.8-9.

⁵ ICC-01/05-01/13-1538, 8 January 2016.

- (ii) The charges against all five accused for all crimes under articles 70(1)(a), 70(1)(b) and 70(1)(c) be re-characterised pursuant to article 25(3)(d).⁶

III. SUBMISSIONS IN REPLY

6. In response to point (ii) of the Prosecution's Request, the Defence for Mr. Kilolo reiterates previous submissions made in reply to the Prosecution's initial application (dated 15 May 2015)⁷ and respectfully adopts the reasoning of the Trial Chamber in its' Decision of 15 September 2015.

7. In short, the following observations are made:

- (i) Regulation 55 is not applicable in the case of Article 70 offences. The text of Regulation 55(1) is explicit and refers only to crimes under articles 6, 7 and 8 of the Statute.
- (ii) As previously highlighted by the Trial Chamber on two occasions: the Prosecution has failed to present either exceptional or indeed 'any other reason' to justify granting Regulation 55(2) notice.⁸
- (iii) The Pre-Trial Chamber in its 'Decision on the Confirmation of Charges'⁹ held that the facts and circumstances of this case did not support a finding of responsibility under Article 25(3)(d). The Pre-Trial Chamber expressly considered and rejected liability pursuant to Article 25(3)(d).¹⁰

⁶ Para. 7 of the Request.

⁷ ICC-01/05-01/13-952, 18 May 2015.

⁸ See ICC-01/05-01/13-1250, para.11 and ICC-01/05-01/13-T-10-CONF-ENG ET 29-09-2015, p. 9, line 11.

⁹ ICC-01/05-01/13-749, 11 November 2014.

¹⁰ ICC-01/05-01/13-749, para. 51.

As noted previously by the Trial Chamber, the mode of liability that the Prosecution now seeks to advance was ‘rejected in the Confirmation Decision and the Prosecution did not seek leave to appeal this decision’.¹¹

- (iv) The Prosecution’s Request also seeks to go behind the Trial Chamber’s ‘Decision on the Submission of Auxiliary Documents’¹² in which the Trial Chamber held that:

‘[A]t the confirmation stage the Pre-Trial Chamber has the sole authority to define the parameters of the case for the purpose of ensuing trial proceedings; the confirmation of charges decision rendered under Article 61(7)(a) of the Statute sets out the charges, which, as such, also binds the Trial Chamber’.¹³

Again, as previously held by the Trial Chamber, the Prosecution ‘did not request to amend the charges according to Article 61(9) of the Statute. Granting the Prosecution’s request ‘would call into question the findings of the Pre-Trial Chamber’.¹⁴

- (v) Applying Regulation 55(2) at this late stage of the trial process, after the conclusion of the Prosecution’s case, would violate the accused’s fundamental rights under article 67(1)(a) of the Statute and article 6 of the European Convention on Human Rights.

¹¹ ICC-01/05-01/13-1250, para. 10.

¹² ICC-01/05-01/13-992, 10 June 2015.

¹³ ICC-01/05-01/13-992, para. 12.

¹⁴ ICC-01/05-01/13-1250, para. 10.

8. Giving formal notice of the re-characterisation of crimes at this stage of the proceedings creates even greater unfairness to the accused than re-characterisation before the start of trial.
9. The Prosecution is therefore wrong to assert that ‘notice at this stage is fully consistent with the Accused’s rights under article 67(1)(a) of the Statute ... , and with the Chamber’s article 64(2) duty to “ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused”’.¹⁵
10. The Prosecution has already presented its case and called witnesses before the Chamber. The accused each conducted their defences in accordance with the charges as they currently stand, not in accordance with what the Prosecution might like them to be.
11. Re-characterisation of the charges *after* the Prosecution has called evidence in support of its case expressly denies the accused an opportunity to ‘conduct their defences’ and take steps to ‘minimise any prejudice which might arise should there be such a recharacterisation at a later stage’.¹⁶ There is, at this late stage, simply no opportunity for the accused to conduct its defence and examination of the Prosecution’s evidence in light of any re-characterisation of the charges.

IV. RELIEF REQUESTED

12. The Trial Chamber is respectfully requested to reject the Prosecution’s Request.

¹⁵ Para. 8 of the Request.

¹⁶ Para. 5 of the Request, citing ICC-01/05/13-1250, fn 32.

Respectfully submitted,



Maître Paul Djunga Mudimbi
Lead Counsel of Mr. Aimé Kilolo Musamba



Mr. Steven Powles
Associate Counsel of Mr. Aimé Kilolo Musamba

Dated this 14 January 2016,
At The Hague, The Netherlands.