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No.: ICC-01/05-01/13
Date: **15 January 2016**

TRIAL CHAMBER VII

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

Decision on Prosecution's Re-application for Regulation 55(2) Notice

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 Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Gosnell

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

Legal Representatives of Victims

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 VII ('Chamber') of the International Criminal Court, in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, having regard to Article 67 of the Rome Statute and Regulation 55 of the Regulations of the Court ('Regulations'), issues the following 'Decision on Prosecution's Re-application for Regulation 55(2) Notice'.

1. On 15 September 2015, the Chamber rejected an Office of the Prosecutor ('Prosecution') request to provide notice under Regulation 55(2) of the Regulations of the possibility that the facts described in the charges may be subject to re-characterisation to accord with the participation of Mr Babala and Mr Arido under Article 25(3)(a) of the Statute, and of all five accused under Article 25(3)(d) of the Statute ('Regulation 55 Decision').¹
2. On 8 January 2016, the Prosecution filed a 're-application' for Regulation 55(2) notice for the same proposed legal re-characterisations ('Request').² In addition to repeating arguments addressed by the Chamber in the Regulation 55 Decision, the Prosecution emphasises: (i) certain legal findings it sees as relevant in the recent Appeals Chamber judgment on Regulation 55(2) notice in the *Gbagbo and Blé Goudé* case ('*Gbagbo* OA7 Judgment') and (ii) the fact that the Chamber has now received a large part of the evidence in the case.³
3. On 14 January 2016,⁴ the defence teams for Mr Babala,⁵ Mr Bemba,⁶ Mr Mangenda⁷ and Mr Kilolo⁸ responded to the Request, all submitting that the relief should be

¹ [Decision on Prosecution Application to Provide Notice pursuant to Regulation 55](#), ICC-01/05-01/13-1250. The Prosecution sought leave to appeal this decision, which was rejected orally on 29 September 2015, [Transcript of Hearing](#), ICC-01/05-01/13-T-10-Red-ENG, p. 8, line 20 to p. 9, line 15.

² [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.

³ [Request](#), ICC-01/05-01/13-1538, paras 3-6, relying on Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, 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"*, 18 December 2015, ICC-02/11-01/15-369 (OA7).

⁴ The response deadline was shortened to this date at 16:00. Email from a Legal Officer of the Chamber to the parties, 8 January 2016 at 14:01.

rejected. A response from the defence team for Mr Arido was filed after the deadline and will not be considered.⁹

4. The Chamber recalls the applicable law for the Regulation 55 procedure.¹⁰ In the Regulation 55 Decision, the Chamber rejected the Prosecution's proposed recharacterisations on the following reasoning:

In this case, the Prosecution has requested that notice under Regulation 55(2) of the Regulations be given for modes of liability previously included in its document containing the charges. These specific modes were rejected in the Confirmation Decision and the Prosecution did not seek leave to appeal this decision. The Prosecution also did not request to amend the charges according to Article 61(9) of the Statute, a procedure available before the commencement of the trial. Granting the Request – at this point in time, before the commencement of the trial and in the absence of any specific justification – would call into question the findings of the Pre-Trial Chamber. It would furthermore provide the Prosecution with an opportunity to *de facto* appeal of the decision on the confirmation of the charges.

While in exceptional circumstances it might be necessary to provide notice at this stage of the proceedings, the Chamber does not consider that this should be a mechanism whereby the Prosecution immediately seeks to start a procedure which aims at modifying the legal characterisation of the confirmed charges and reintroduces modes of liability which were just rejected by the Pre-Trial Chamber. In the present case, 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.¹¹

5. The Prosecution presents no substantiated argument requiring revision of these findings, whether based on the evidence led at trial or otherwise. If possible recharacterisation did not appear to the Chamber prior to the commencement of trial, then the Chamber fails to see why bare, unspecific assertions that evidence has now been received should alter this assessment.

⁵ [Réponse de l'équipe de Défense de M. Fidèle BABALA WANDU à la « Prosecution's Re-application for Notice to be Given under Regulation 55\(2\) with respect to the Accused's Individual Criminal Responsibility» \(ICC-01/05-01/13-1538\)](#), ICC-01/05-01/13-1547.

⁶ [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 \(ICC-01/05-01/13-1538\)'](#), ICC-01/05-01/13-1548.

⁷ Jean-Jacques Mangenda's Response to the Prosecution's Re-Application for Notice to be given under Regulation 55(2) on the Accused's Individual Criminal Responsibility (ICC-01/05-01/13-1538), ICC-01/05-01/13-1549.

⁸ [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, ICC-01/05-01/13-1550.

⁹ [Narcisse Arido's Response to the Prosecution's Second Application for Notice to be given under Regulation 55\(2\) \(ICC-01/05-01/13-1538\)](#), 15 January 2016, ICC-01/05-01/13-1551.

¹⁰ [Regulation 55 Decision](#), ICC-01/05-01/13-1250, paras 7-9.

¹¹ [Regulation 55 Decision](#), ICC-01/05-01/13-1250, paras 10-11 (citations removed).

6. As to the arguments centred on the *Gbagbo* OA7 Judgment, the Chamber does not consider that this judgment necessitates revisiting the Regulation 55 Decision, either. The Appeals Chamber, *inter alia*, held that: (i) Regulation 55 notice can be given prior to the opening statements;¹² (ii) a Trial Chamber can re-characterise the facts and circumstances for 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 Chamber¹³ and (iii) 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 Regulation 55 notice prior to the presentation of evidence.¹⁴
7. The Regulation 55 Decision is consistent with the Appeals Chamber’s ruling. The Chamber did not state that it was procedurally barred from giving notice for rejected modes of liability prior to the commencement of trial – it rather held that the proposed recharacterisations did not ‘appear[] to the Chamber’ at that time.¹⁵ The Chamber concluded that the Prosecution had not established any exceptional circumstances, but it never made ‘exceptional circumstances’ a pre-requisite to granting Regulation 55 notice. The Prosecution’s original request was rejected because it was not deemed to be substantiated **at all** (as is the case with the current Request) – the Chamber particularly noted the ‘absence of any specific justification’ for the relief sought and the ‘exceptional circumstances or any other reasons’ which were missing.¹⁶ It is self-evident that the Chamber is not obliged to grant unsubstantiated Regulation 55 notice requests, and the Appeals Chamber specifically held that the *Gbagbo and Blé Goudé* Trial Chamber did not err in

¹² [Gbagbo OA7 Judgment](#), ICC-02/11-01/15-369, para. 57.

¹³ [Gbagbo OA7 Judgment](#), ICC-02/11-01/15-369, para. 32.

¹⁴ [Gbagbo OA7 Judgment](#), ICC-02/11-01/15-369, para. 67.

¹⁵ See Regulation 55(2) of the Regulations; [Regulation 55 Decision](#), ICC-01/05-01/13-1250, paras 8-9, 11.

¹⁶ [Regulation 55 Decision](#), ICC-01/05-01/13-1250, para. 11.

considering the Prosecution's Regulation 55 notice request in that case as relevant to its decision.¹⁷

8. The Chamber emphasises that it is ultimately its prerogative to decide if and when to give Regulation 55 notice. The Chamber is not required to accept every Prosecution submission that a recharacterisation can be derived from the facts and circumstances described in the charges – the Chamber has discretion in deciding whether a possible re-characterisation 'appears to [it]'.¹⁸ The Chamber remains unconvinced that revisiting the Regulation 55 Decision is warranted in this case.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request.

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



Judge Bertram Schmitt, Presiding Judge



Judge Marc Perrin de Brichambaut



Judge Raul C. Pangalangan

Dated 15 January 2016

At The Hague, The Netherlands

¹⁷ [Gbagbo OA7 Judgment](#), ICC-02/11-01/15-369, para. 68.

¹⁸ 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. 24 (with annex).