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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 Redacted Document

**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)**

Source: Defence for Jean-Jacques Kabongo Mangenda

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

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I. INTRODUCTION

1. Jean-Jacques Mangenda opposes the Prosecution's "Re-application"¹ to the Trial Chamber to give notice pursuant to Regulation 55(2) of the Regulations of the Court to include Article 25 (3)(d) of the Rome Statute ("Statute") as one of the modes of liability by which he is allegedly responsible for the crimes charged.
2. The Prosecution's Re-application, as with the previous Application, fails to adequately define the material facts and circumstances upon which notice could be given. Permitting charges to be based on such vague allegations would violate Mr. Mangenda's right to a fair trial, and would fail to ensure that "the facts and circumstances that could potentially be recharacterised were confirmed by the Pre-Trial Chamber."²
3. The three facts invoked by the Prosecution have, furthermore, all been disproven during the course of trial. Mr. Mangenda: (i) never "coordinate[ed] with [Mr. Bemba and Mr. Kilolo] about the money transfers made or to be made to the Witnesses"; (ii) was not "present" when Mr. Kilolo allegedly "explicitly instructed [REDACTED], [REDACTED], D-4 and D-6" on the "content of their testimony"; and (iii) has not been shown to have handed over mobile telephones to witnesses, let alone handed them over on the basis of any understanding that they would be "used [to remain in contact with the Defence] once their own phones would be collected by the VWU." The alleged "facts" adduced at trial provide no justification for charging Mr. Mangenda with 25(3)(d) liability by resort to the remedial mechanism of Regulation 55(2).

¹ *Bemba et al.*, 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, 8 January 2016 ("Re-application"); *Bemba et al.*, 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, 23 April 2015 ("Application"). This is a public redacted version of a previous confidential submission filed by the Defence for Mr. Mangenda (ICC-01/05-01/13-1549) and is filed pursuant to an order by the Chamber.

² *Gbagbo*, Judgment on the appeal of M Laurent Gbagbo against the decision of Trial Chamber I entitled "Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court", ICC-02/11-01/15-369, 18 December 2015, para. 2.

II. PROCEDURAL HISTORY

4. The arrest warrant was filed on 20 November 2013,³ and the Document Containing the Charges (“DCC”) on 30 June 2014.⁴ After written submissions by the Prosecution on 30 July 2014⁵ and on 21 August 2014,⁶ the Trial Chamber rendered its decision confirming certain charges against the defendants on 11 November 2014.⁷ That decision expressly declined to confirm the mode of liability under Article 25(3)(d) of the Statute against Mr. Mangenda or any other defendant.⁸
5. Some five months after the Confirmation Decision, the Prosecution asked this Trial Chamber to issue a notice pursuant to Regulation 55(2) that the accused should be deemed charged with liability pursuant to Article 25(3)(d).⁹ The Application was rejected in its entirety on 15 September 2015.¹⁰
6. The Prosecution case was heard from 29 September 2015¹¹ through 13 November 2015.¹²
7. The present submissions are without prejudice to any subsequent legal submissions as may be appropriate concerning the sufficiency of notice or the applicability of the mode of individual criminal responsibility alleged.¹³

³ *Bemba et al.*, Warrant of arrest for Jean-Pierre BEMBA GOMBO, Aimé KILOLO MUSAMBA, Jean-Jacques MANGENDA KABONGO, Fidèle BABALA WANDU and Narcisse ARIDO, ICC-01/05-01/13-1-Red2-tENG, 20 November 2013.

⁴ *Bemba et al.*, Prosecution’s Notification of Filing of the Document Containing the Charges and List of Evidence, ICC-01/05-01/13-526, 30 June 2014.

⁵ *Bemba et al.*, Prosecution’s Notification of Filing of Submission on the Confirmation of Charges, ICC-01/05-01/13-597, 30 July 2014.

⁶ *Bemba et al.*, Prosecution’s Response to Defence Confirmation Submissions, ICC-01/05-01/13-646-Conf, 21 August 2014.

⁷ *Bemba et al.*, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/05-01/13-749, 11 November 2014 (“Confirmation Decision”).

⁸ Confirmation Decision, para. 51.

⁹ *Bemba et al.*, 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, 23 April 2015 (“First R55 Application”).

¹⁰ *Bemba et al.*, Decision on Prosecution Application to Provide Notice pursuant to Regulation 55, ICC-01/05-01/13-1250, 15 September 2015 (“First Decision”).

¹¹ *Bemba et al.*, Transcript, ICC-01/05-01/13-T-10-CONF-ENG, 29 September 2015.

¹² *Bemba et al.*, Transcript, ICC-01/05-01/13-T-37-CONF-ENG, 13 November 2015.

¹³ See e.g., *Ruto and Sang*, Decision on Applications for Notice of Possibility of Variation of Legal Characterisation, ICC-01/09-01/11-1122, 12 December 2013 (“*Ruto* Decision”), para. 16 (“The Chamber’s decision solely relates to the Regulation 55(2) portions of these submissions. No decision is made at this time as regards the interpretation of Article 25(3) of the Statute. Any decision in that regard will be considered as part of the final judgment in the case.”)

III. SUBMISSIONS

(i) **The Prosecution Has Not Provided Adequate Notice of the Material Facts That Would Supposedly Be the Basis For Liability Pursuant to Article 25(3)(d)**

(a) *Introduction*

8. The Prosecution has failed to give adequate notice of the material facts upon which the Regulation 55(2) notice of Mr. Mangenda's 25(3)(d) liability is to be given. The failure is impermissible for two reasons. First, it breaches the fundamental right of a defendant to have adequate notice of the charges; second, it creates a risk that the "facts and circumstances" upon which recharacterisation is sought exceeds those confirmed by the Pre-Trial Chamber.

(b) *The Material Facts Upon Which the Regulation 55(2) Is to Be Given Are Not Defined With Adequate Specificity to Ensure Trial Fairness*

9. The process of judicial confirmation of charges is designed to ensure that clear notice is given of the material facts upon which each charge is based.¹⁴ Resort to Regulation 55(2), especially if done in an informal or vague manner, risks providing insufficient detail about the material facts upon which a defendant is to be judged guilty or innocent. The material facts upon which the Prosecution is seeking to add Article 25(3)(d) liability against Mr. Mangenda are set out, after a fashion, in paragraph 41 of the original Application. The Prosecution's Re-application has offered no additional material facts nor any further details about these alleged material facts.
10. Paragraph 41 of the Application sets out three quotations from the Confirmation Decision itself, but otherwise makes no reference to any specific events or activities of Mr. Mangenda; gives no specific dates or locations as to when or where conduct occurred substantiating this mode of criminal responsibility; and makes no allegation for inferring Mr. Mangenda's specific state of mind or knowledge on any such unspecified occasion. Paragraphs 47 and 48 of the Application provide some additional information about the conduct alleged against Mr. Mangenda, but with no specificity or precision about the content of the material facts being alleged. The three

¹⁴ V. Nerlich, "The Confirmation of Charges Procedure at the International Criminal Court", JICJ 10 (2012) 1339, 1348-1351.

footnotes to paragraph 41 even resort to the “*see also*” signal, which implies indirect – but not direct – support for a particular proposition.

11. The “facts” upon which this allegation is to be based are not articulated with sufficient clarity and certainty to ensure a fair trial.¹⁵ As stated in the *Ruto* case:

The Chamber considers that the Prosecution and LRV need to exhaustively indicate the facts and circumstances described in the charges that would support the proposed recharacterisations. Such a showing allows for the Defence to be able to make full submissions on whether the facts and circumstances described in the charges are exceeded and, if notice under Regulation 55(2) of the Regulations is given, to be informed in detail of the factual allegations to which any potential change in the legal characterisation of the facts relate. Although the Appeals Chamber has considered it permissible to give additional details subsequent to giving notice under Regulation 55(2) of the Regulations in order to clarify the facts and circumstances being relied upon, the Chamber considers it best for the Defence to be able to defend against giving notice of proposed legal recharacterisations *with full clarity as to what factual allegations could be relied upon*. The Chamber recalls that, for purposes of this trial, the charging document is the Prosecution's Updated Document Containing the Charges (‘Updated DCC’). Accordingly, the Chamber directs the Prosecution and LRV to provide all the facts and circumstances described in the Updated DCC which would support the proposed recharacterisations in their respective applications.¹⁶

12. The lack of specificity in the *Ruto* Application¹⁷ was compounded by the Prosecution's subsequent refusal to confirm that the paragraph constituted an “exhaustive” statement of the material facts upon which the Regulation 55(2) notice was sought.¹⁸ The Prosecution has likewise given no indication here that the facts as

¹⁵ *Kvočka*, IT-98-30/1-A, Judgement, 28 February 2005 (“*Kvočka* Appeal Judgement”), paras. 28-29 (“the material facts relevant to each [...] mode [of responsibility] must be pleaded in the indictment. Otherwise, the indictment will be defective either because it pleads modes of responsibility which do not form part of the Prosecution's case, or because the Prosecution has failed to plead material facts for the modes of responsibility it is alleging.”)

¹⁶ *Ruto and Sang*, Order Regarding Applications for Notice of Possibility of Variation of Legal Characterisation, ICC-01/09-01/11-907, 5 September 2013 (“*Ruto* Order”), paras. 10-11 (italics added).

¹⁷ *Ruto and Sang*, Prosecution's Submissions on the law of indirect co-perpetration under Article 25(3)(a) of the Statute and application for notice to be given under Regulation 55(2) with respect to William Samoei Ruto's individual criminal responsibility, ICC-01/09-01/11-433, 3 July 2012 (“*Ruto* Application”), para. 32.

¹⁸ *Ruto* Order, para. 8 (“In paragraphs 30-32 of the Prosecution Application, the Prosecution details facts and circumstances described in the confirmation decision which could correspond to liability under Article 25(3)(b)-(d) of the Statute. When asked at the 19 August 2013 status conference whether these passages exhaustively set out the facts and circumstances intended to be relied upon, the Prosecution replied that ‘they were intended to be indicative and examples rather than an exhaustive list’. The Prosecution argued that its submissions were sufficient to warrant Regulation 55(2) Notice being given at this stage.”)

set out in the Application are exhaustive; on the contrary, footnote 2 of the Application expressly states the opposite.¹⁹

13. The requirements of “notice” under Regulation 55(2) should be no less stringent than the requirements of “notice” for the DCC. As set out in the *Ruto* Decision:

when making a Regulation 55(2) Assessment, the Chamber must remain mindful of the rights of the accused. In particular, the Chamber must ensure that the accused: (i) receives the specific facts within the ‘facts and circumstances described in the charges’ which may be relied upon and (ii) the accused is given adequate time and facilities for the effective preparation of his or her defence.²⁰

14. This principle is mirrored by fundamental human rights principles, which govern the interpretation and application of Regulation 55(2). As stated by the European Court of Human Rights:

[I]n order that the right to defence be exercised in an effective manner, the defence must have at its disposal *full, detailed information concerning the charges made, including the legal characterisation that the court might adopt in the matter*. This information must either be given before the trial in the bill of indictment *or at least in the course of the trial by other means such as formal or implicit extension of the charges*. Mere reference to the abstract possibility that a court might arrive at a different conclusion than the prosecution as regards the qualification of an offence is clearly not sufficient.²¹

15. The ICTY and ICTR have likewise insisted that the material facts underpinning each mode of individual criminal responsibility must be pleaded with specificity to ensure trial fairness.²² The Prosecution must make all reasonable efforts to state such material facts to the best of its knowledge,²³ including dates and locations if known,²⁴ and the

¹⁹ Application, fn. 2 (“The Prosecution reserves its right to rely on factual allegations contained in the Document Containing the Charges (‘DCC’) that were not rejected in the Confirmation Decision, should it consider it necessary.”)

²⁰ *Ruto* Decision, para. 20.

²¹ ECtHR, *I.H. v. Austria*, 42780/98, Judgement of 20 April 2006, para. 34. See ECtHR, *Pellisier and Sassi v. France* (Merits and Just Satisfaction) 25444/94 Grand Chamber (25 March 1999) para. 52 (notice requires “*full, detailed information concerning the charges*”).

²² *Ndindabahizi*, ICTR-01-71-A, Appeal Judgement, 16 January 2007, para. 16; *Kupreškic et al.*, IT-95-16-A, Appeal Judgement, 23 October 2001, paras. 89 and 114; ICTR, *Kamuhanda*, ICTR-99-54A-A, Appeal Judgement, 19 September 2005, para. 17; *Kvočka* Appeal Judgement, para. 28.

²³ *Kvočka* Appeal Judgement, para. 30 (“[h]owever, even where it is impracticable or impossible to provide full details of a material fact, the Prosecution must indicate its best understanding of the case against the accused and the trial should only proceed where the right of the accused to know the case against him and to prepare his defence has been assured. The Prosecution is expected to know its case before proceeding to trial and may not rely on the weaknesses of its own investigation in order to mould the case against the accused as the trial progresses.”)

conduct and state of mind of the defendant in relation to the criminal acts if known.²⁵

The Application falls short of those requirements and, accordingly, invites the Trial Chamber to give a Regulation 55(2) notice that would also be deficient.

16. The remedy ordered by the *Ruto* Trial Chamber was to require a more detailed statement of the nature of the new charges of which notice was to be given under Regulation 55(2), as well as the material facts on which those charges were to be based. The Victims' failure, unlike the Prosecution in that case,²⁶ to provide any such formal statement and details led to dismissal of its request.²⁷
17. The Prosecution, despite being given a second chance by the Trial Chamber to formulate its Regulation 55(2) application, has given no additional reasons to substantiate adding a charge against Mr. Mangenda pursuant to Article 25(3)(d). The "Re-application" should, accordingly, be dismissed with prejudice.

(c) The Prosecution Has Failed to Show that the Re-Characterisation is Confined to Facts and Circumstances Confirmed By the Pre-Trial Chamber

18. Article 74(2) of the Statute provides that no final judgement is permitted to "exceed the facts and circumstances described in the charges and any amendments to the charges." The Appeals Chamber has held that Regulation 55(2), to be consistent with Article 74(2), must be interpreted as requiring that "the modification of the legal characterisation is limited by the facts and circumstances described in the charges or any amendment thereto."²⁸ The Appeals Chamber criticised and reversed one such purported notice on the basis that the

²⁴ *Id.* para. 31.

²⁵ *Id.* para. 28 ("The Prosecution's characterization of the alleged criminal conduct and the proximity of the accused to the underlying crime are decisive factors in determining the degree of specificity with which the Prosecution must plead the material facts of its case in the indictment in order to provide the accused with adequate notice.")

²⁶ *Ruto and Sang*, Annex A to Prosecution Filing in Compliance with the Trial Chamber's Order Regarding Applications for Notice of Possibility of Variation of Legal Characterisation, ICC-01/09-01/11-907-Anx A, 17 September 2013.

²⁷ *Ruto* Decision, para. 49 ("As the Chamber was never given the information which it considered necessary for evaluating the LRV's relief sought, the Chamber rejects the relief sought in the LRV Application as being insufficiently substantiated.")

²⁸ *Lubanga*, 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", ICC-01/04-01/06-2205, 8 December 2009 ("*Lubanga* Appeals Judgement"), para. 93 ("Thus, the

Trial Chamber's explanations in the Impugned Decision and the Clarification regarding the facts and circumstances that it would take into account for the change in the legal characterization are extremely thin. The Trial Chamber neither provided any details as to the elements of the offences the inclusion of which it contemplated, *nor did it consider how these elements were covered the facts and circumstances described in the charges.*²⁹

19. The prohibition on basing a Regulation 55(2) notice on anything beyond the facts and circumstances was recently re-affirmed by the Appeals Chamber in *Gbagbo*:

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.*³⁰

20. This contrasts with the latitude in some civil law systems which permit re-characterisation even when “special circumstances appear only at the hearing.”³¹ This is not permitted under Article 74(2), which requires that any re-characterisations be strictly legal in nature.
21. Neither the Application nor the Re-application defines the “facts and circumstances” upon which the Regulation 55(2) notice is to be given with adequate specificity to ensure that it does not enlarge or expand upon those confirmed in the Confirmation Decision. The three “facts and circumstances” identified in paragraph 41 of the Application are not related with specificity to the elements of Article 25(3)(d); they were not recognised by the Pre-Trial Chamber as being referable to Article 25(3)(d) liability; and the Prosecution has not affirmed that these are an exhaustive statement of the facts and circumstances upon which notice of Article 25(3)(d) liability should be based. Indeed, far from confirming that this is the exhaustive basis for seeking a Regulation 55(2) recharacterisation, the Prosecution goes beyond the four corners of the Confirmation Decision by arguing that “not only are the additional modes of liability made out by the facts confirmed by the Pre-Trial Chamber [...] but the

Appeals Chamber is of the view that article 74(2) of the Statute confines the scope of Regulation 55 to the facts and circumstances described in the charges and any amendment thereto. If applied with such limitation, Regulation 55 is consistent with article 74(2) of the Statute.”)

²⁹ *Lubanga* Appeals Judgement, para. 109 (italics added).

³⁰ *Gbagbo*, Judgment on the appeal of M Laurent Gbagbo against the decision of Trial Chamber I entitled “Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court”, ICC-02/11-01/15-369, 18 December 2015, para. 2 (italics added).

³¹ German Code of Criminal Procedure, s. 265(2); C. Stahn, “Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55”, *Criminal Law Forum* (2005) 16: 1, 5-6.

Chamber has received a large part of the evidence, both testimonial and through items deemed ‘formally submitted’ establishing those facts.’³² The implication is that the Trial Chamber should examine facts and circumstances beyond those set out in the Confirmation Decision to substantiate issuing a Regulation 55(2) notice. This is impermissible.

(ii) The Prosecution Has Failed to Show That the Evidence Heard at Trial Justifies a Regulation 55(2) Notice

22. The evidence heard by the Trial Chamber so far directly contradicts the three specific “facts and circumstances” relied on by the Prosecution to impute Article 25(3)(d) liability to Mr. Mangenda.
23. First, no evidence shows that Mr. Mangenda “coordinated with [Mr. Bemba and Mr. Kilolo] about the money transfers made or to be made to the Witnesses.”³³ In fact, the Prosecution has conceded that, subsequent to its request for sweeping telephonic surveillance of Mr. Mangenda, it “[REDACTED].”³⁴ This was apparently not an acknowledgement that the Prosecution deemed necessary to make before the Pre-Trial Chamber which, in fact, found that Mr Mangenda had “coordinated with [Mr. Bemba and Mr. Kilolo] about the money transfers.”³⁵ The Prosecution is wrong to assert that the evidence heard at trial “establishes”³⁶ this “fact” upon which the Prosecution seeks a Regulation 55(2) notice.
24. Second, the evidence has shown that it is not true, as found in the Confirmation Decision, that “Mr. Mangenda was present [...] specifically when Mr Kilolo explicitly instructed D-3, D-2, D-4 and D-6 on the content of their testimony.”³⁷ [REDACTED] and [REDACTED], the only witnesses to give testimony on the issue, stated the following:

Q. So am I correct in understanding that this was a one-on-one meeting off to the side with Maître Kilolo? A. No. It was like us in this room here. There

³² Re-application, para. 6.

³³ Application, para. 41.

³⁴ *Bemba et al.*, Prosecution’s Response to the Mangenda Defence Motion to Declare Inadmissible Telephone Intercepts of Mr Mangenda, ICC-01/05-01-13-1180-Conf, 24 August 2015, para. 10.

³⁵ Confirmation Decision, para. 75.

³⁶ Re-application, para. 6.

³⁷ Application, para. 41; Confirmation Decision, para. 74.

was a certain distance, about a distance of 10 metres, we were slightly off to the side, but we were in the same space. Q. And what were the others doing during this moment when you were off to the side having this meeting with Maître Kilolo, if you know? A. The other members of the group were together with Jean-Jacques. Myself, I was somewhat off to the side with Mr Kilolo, but all of that within the same space, within the same room. When the documents were handed out, he asked that the other members of the group be with Jean-Jacques, and I was to be with Mr Kilolo. Q. I understand. So Maître Jean-Jacques was not participating in your conversation with Maître Kilolo, right? A. No. He did not take part in the discussion.³⁸

[...]

Q. Now, we've heard what you said just now about your one-on-one conversation with Maître Kilolo or your separate conversation, and I just simply want to ask you a question of language in respect of this passage, and that is what do you understand when you use the expression "*en présence de*"? A. The question that you have just asked is different -- or earlier, rather, is different from this question. Now, when I say in the presence of him, it means that I made that analogy. So, you see, in the presence of means you're present in the room, even if there are different parts, but you are indeed within the room. All this to say that he was there. He was present. In any event, the -- in the place where we were, he was present. There was a distance, at least 5 metres, but he was present. When I was asked whether Jean-Jacques was with us, I said no because he was somewhat off to the side. We had withdrawn. We had moved away from the rest of the group.³⁹

[...]

The only thing that Mr. Jean-Jacques spoke about related to my protection. We had a conversation about my protection. But apart from that we did not discuss anything else.⁴⁰

[...]

[REDACTED].⁴¹

25. The evidence shows that Mr. Mangenda was not present during any alleged discussions about prospective evidence with witnesses. The Pre-Trial Chamber's finding to the contrary⁴² rests on the Prosecution investigators' failure to clarify, in particular with [REDACTED], his understanding of the word "present." This "fact and circumstance", which is expressly relied upon by the Prosecution in the Application, provides no basis for re-characterising the charges.

³⁸ Bemba et al., Transcript, ICC-01/05-01/13-T-27-CONF-ENG, 23 October 2015, p. 73, l. 24 - p. 74, l. 18.

³⁹ Bemba et al., Transcript, ICC-01/05-01/13-T-27-CONF-ENG, 23 October 2015, p. 75, ll. 9-20.

⁴⁰ Bemba et al., Transcript, ICC-01/05-01/13-T-27-CONF-ENG, 23 October, p. 83, ll. 12-14.

⁴¹ Bemba et al., Transcript, ICC-01/05-01/13-T-19-CONF-ENG, 13 October 2015, p. 32, ll. 10-14.

⁴² Confirmation Decision, para. 74.

26. Third, the Prosecution has adduced no evidence showing that Mr. Mangenda was aware that the alleged purpose of giving mobile phones to witnesses was to “[remain in contact with the Defence] once their own phones would be collected by VWU.”⁴³ [REDACTED] clarified that he did “not remember” whether Mr. Mangenda was present at the specific moment when any alleged instructions were given to him about the purpose of the phone,⁴⁴ and [REDACTED],⁴⁵ or [REDACTED].⁴⁶ The Prosecution’s own analysis of the telecommunications data fails to show any improper contact between the Yaoundé witnesses and anyone on the Bemba Defence.⁴⁷ The Pre-Trial Chamber’s assessment that Mr. Mangenda “handed over to all of the witnesses who were present cell phones to be used once their own phones would be collected by the VWU” has turned out to be unsubstantiated by the evidence heard during this trial. The Prosecution is wrong to assert that the evidence heard at trial “establish[es] those facts”, or otherwise provides any basis for a Regulation 55(2) notice.⁴⁸
27. A fourth fact relied on by the Prosecution for its request for a Regulation 55(2) notice in respect of Mr. Mangenda is the finding in the DCC that Mr. Mangenda “discussed with Mr. Bemba and Mr. Kilolo the instructions to be given to the Witnesses in advance of their testimony.”⁴⁹ This finding fails to distinguish between legitimate discussions concerning the potential content of prospective witnesses’ testimony and the notion of participating in wrongful “instructions” to prospective witnesses. In any event, the content of these supposed “instructions” has not yet been addressed at trial in a manner that could justify any re-characterisation of the charges pursuant to Regulation 55(2). The Prosecution is therefore, again, incorrect in asserting⁵⁰ that any “facts” have been established at trial that justify issuing a Regulation 55(2) notice.

IV. CONCLUSION

28. A Regulation 55(2) notice adding Article 25(3)(d) liability would be neither fair nor appropriate in the circumstances of this case. No evidence heard during trial provides

⁴³ Application, para. 41.

⁴⁴ *Bemba et al.*, Transcript, ICC-01/05-01/13-T-27-CONF-ENG, 23 October 2015, p. 83, l. 21.

⁴⁵ *Bemba et al.*, Transcript, ICC-01/05-01/13-T-19-CONF-ENG, 13 October 2015, p. 32, l. 5 - p. 33, l. 1.

⁴⁶ *Bemba et al.*, Transcript, ICC-01/05-01/13-T-19-CONF-ENG, 13 October 2015, p. 32, l. 25 - p. 33, l. 1 (“[REDACTED]”).

⁴⁷ Annex A to CAR-OTP-0090-0630, “Contacts between suspects and contacts between suspects and witnesses”, 26 June 2015, pp. 19, 26, 31, 38 [REDACTED].

⁴⁸ Re-application, para. 6.

⁴⁹ Confirmation Decision, para. 75; Application, para. 41.

⁵⁰ Re-application, para. 6.

any justification for doing so. The formulation of the proposed notice is inherently deficient. The Prosecution has not provided any additional details or justification as to the basis or scope of the proposed Regulation 55(2) notice. The Re-application should, accordingly, be denied with prejudice.



Christopher Gosnell
Counsel for Mr. Jean-Jacques Kabongo Mangenda

Dated this 15 January 2016
At The Hague, The Netherlands