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TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

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 Document

**Defence Response to the 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)**

Source: Defence for Jean-Jacques Kabongo Mangenda

Document 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-Jacques Kabongo Mangenda

Mr Christopher Gosnell

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for the Victims The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section Other

I. INTRODUCTION

1. Jean-Jacques Mangenda opposes the Prosecution's Application¹ for the Trial Chamber to give notice of a potential enlargement of the modes of individual criminal responsibility alleged against him to encompass Article 25 (3)(d) of the Rome Statute ("Statute").
2. The Application fails to adequately "set[] out the facts and circumstances [...] which can be relied upon in support of its proposed recharacterisations."² The material facts that supposedly substantiate the addition of Article 25(3)(d) liability as against Mr. Mangenda are vague, unspecific and informal. No details are provided that would permit the Trial Chamber to give adequate notice pursuant to Regulation 55(2) of the Regulations of the Court ("Regulations") of either (i) the material facts underpinning Article 25(3)(d) liability; or (ii) the precise scope of liability alleged. This would impair the Trial Chamber's ability to ensure that the trial is streamlined, efficient and kept within discernible and relevant boundaries, as well as infringing Mr. Mangenda's rights under Article 67(1)(a) of the Statute.
3. The Application also constitutes an unprecedented usurpation of Article 61 of the Statute. Although Regulation 55(2) has been interpreted very flexibly in the past, the Application goes much further in seeking to add a mode of liability that: (i) was expressly proposed, considered and rejected at the confirmation stage (ii) on the basis of no information additional to what was available to the Pre-Trial Chamber, and (iii) at a time when the Prosecution has ample opportunity to seek amendment of the charges pursuant to Article

¹ *Prosecutor v. Jean- Pierre Bemba Gombo 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").

² *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Applications for Notice of Possibility of Variation of Legal Characterisation, ICC-01/09-01/11-1122, 12 December 2013 ("Ruto Decision").

61(9). The proposed manner of proceeding, especially given its lack of specificity and informality, would undermine the orderly and fixed procedures of the Court prescribed by Article 61 that are designed precisely to ensure both the efficiency and the fairness of proceedings.

4. The present submissions are addressed only to the appropriateness of the Regulation 55(2) notice, and are without prejudice to any subsequent legal submissions as may be appropriate concerning the sufficiency of notice and on the substance or applicability of the modes of individual criminal responsibility alleged.³

II. SUBMISSIONS

A. THE APPLICATION PROVIDES INADEQUATE NOTICE OF THE SCOPE OF THE NEW FORM OF RESPONSIBILITY IN RELATION TO THE EXISTING CHARGES AND THE MATERIAL FACTS ON WHICH IT IS SUPPOSEDLY BASED

5. The Prosecution has requested the Trial Chamber to give notice pursuant to Regulation 55(2) that Mr. Mangenda may be liable not only on the basis of the modes of individual criminal responsibility confirmed by the Pre-Trial Chamber,⁴ but also under Article 25(3)(d) in respect of each and every charge confirmed. The Prosecution sets out the factual basis for this principally in paragraph 41 of the Application, which includes 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

³ See e.g., *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.")

⁴ *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision pursuant to Article 61(7)(a) ad (b) of the Rome Statute, ICC-01/05-01/13-749, 11 November 2014 ("Confirmation Decision").

state of mind or knowledge on any such unspecified occasions. Paragraphs 47 and 48 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. None of this information is presented as part of proposed amendments to any charging document, such as an updated Document Containing the Charges (“DCC”), let alone formalised in any other manner. The three footnotes to paragraph 41 even resort to the “*see also*” signal, which implies indirect – but not direct – support for a particular proposition.

6. The information provided does not allow the Trial Chamber to give appropriate notice of the specific charges or counts to which 25(3)(d) liability is supposed to extend, or the material facts on which they are based.⁵ The Prosecution previously attempted to amend charges in the *Ruto* case based on a paragraph virtually identical to paragraph 41 of the Application. That attempt was rejected as having failed to provide the minimum level of specificity, clarity, or exhaustiveness:

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

⁵ ICTY, *Prosecutor v. Kvočka*, Judgement, IT-98-30/1-A, A Ch, 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.”)

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.⁶

7. The lack of specificity and informality in the *Ruto* Application⁷ was compounded by the Prosecution's subsequent refusal to formally confirm that the paragraph constituted an "exhaustive" statement of the material facts upon which the Regulation 55(2) notice was sought.⁸ The Prosecution has likewise given no indication here that the facts as set out in the Application are exhaustive; on the contrary, footnote 2 of the Application expressly states the opposite.⁹
8. The need for such specificity, clarity and comprehensiveness is inherent in the word "notice" under Regulation 55(2), which should not be any less stringent than the requirements of "notice" that must be provided through the DCC. As set out in the *Ruto* Decision:

⁶ *Prosecutor v. William Samoei Ruto and Joshua Arap 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.

⁷ *Prosecutor v. William Samoei Ruto and Joshua Arap 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.

⁸ *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.")

⁹ 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.")

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.¹⁰

9. This understanding of “notice” as equally applicable to the DCC and in the Regulation 55(2) context is mirrored in the jurisprudence of 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.¹¹

10. The formulaic recitation that a mode of individual criminal responsibility applies across-the-board in respect of any and all crimes, as the Prosecution invites the Trial Chamber to do here, is inimical to trial fairness and efficiency because “of the ambiguity that this causes.”¹² The Prosecution, on the contrary, is expected to “indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged.”¹³ Specificity is especially important where the mode of responsibility has various or

¹⁰ *Ruto Decision*, para. 20.

¹¹ ECtHR, *I.H. v. Austria*, App no. 42780/98, Judgement of 20 April 2006, para. 34. See ECtHR, *Pellissier and Sassi v. France* (Merits and Just Satisfaction) App no. 25444/94 Grand Chamber (25 March 1999) para. 52 (notice requires “full, detailed information concerning the charges”).

¹² ICTR, *Rukundo v. Prosecutor*, Appeal Judgement, ICTR-2001-70-A, A Ch, 20 October 2010, para. 30.

¹³ ICTY, *Prosecutor v. Aleksovski*, Appeal Judgement, IT-95-14/1-A, A Ch, 24 March 2000, para. 171, n. 319; ICTY, *Prosecutor v. Krnojelac*, Appeal Judgement, IT-97-25-A, A Ch, 17 September 2003, para. 134; ICTY, *Prosecutor v. Blaškić*, Appeal Judgement, IT-95-14-A, A Ch, 29 July 2004, para. 215.

alternative sub-forms,¹⁴ as appears to be the Prosecution's position in respect of Article 25(3)(d).¹⁵ The Prosecution has neither justified its across-the-board charging technique nor reduced its ambiguity to a minimum by either articulating precisely what sub-form of 25(3)(d) liability is alleged or by communicating the material facts on which this mode of liability is based in respect of which charge or count.

11. The material facts underpinning each mode of individual criminal responsibility, even when the mode is properly limited, must also be pleaded with adequate specificity to ensure trial fairness.¹⁶ The Prosecution must make all reasonable efforts to state such material facts to the best of its knowledge,¹⁷ including dates and locations if known,¹⁸ and the conduct and state of mind of the defendant in relation to the criminal acts if known.¹⁹ The Application falls

¹⁴ ICTR, *Gacumbitsi v. Prosecutor*, Appeal Judgement, ICTR-2001-64-A, A Ch, 7 July 2006, para. 172 ("Paragraph 25 of the Indictment comes closer to providing the necessary notice, as it clearly refers to concerted action among a plurality of persons in support of "a common scheme, strategy or plan to exterminate the Tutsi" (*"d'un plan, d'une stratégie ou d'un dessein communs visant à exterminer les Tutsis"*). This language is similar to that employed in *Tadić* and seems to encompass the critical elements of a JCE charge. However, in then proceeding to state that the accused participated in the common scheme 'by his own affirmative acts or through persons he assisted or by his subordinates with his knowledge and consent', the Indictment could be read to invoke three established modes of liability other than JCE: "committing" through direct, personal perpetration, aiding and abetting, and Article 6(3) superior responsibility. The Appellant could have interpreted the paragraph, taken as a whole, to refer only to those modes of liability and not to JCE, and he cannot therefore be said to have received clear notice of the JCE theory. This is especially so because, at the time of the Indictment, JCE was still an unfamiliar mode of liability in this Tribunal, although it had been employed at the ICTY.")

¹⁵ Application, para. 30.

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

¹⁷ *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.")

¹⁸ *Id.*, para. 31.

¹⁹ *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.")

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

12. The remedy ordered by the *Ruto* Trial Chamber, when facing an equally deficient request by the Prosecution and the Victims, was to require that they provide a 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,²⁰ to provide any such formal statement and details led to dismissal of its request.²¹ Given that the Prosecution proceeded with the present Application in full knowledge of the requirements laid down in the *Ruto* Decision, and therefore should have been aware that its Application was materially deficient, the Application should be dismissed with prejudice. The Defence requests, in the alternative, that the Application at a minimum be dismissed without prejudice.

B. GRANTING THE APPLICATION WOULD UNDERMINE THE BASIC PROCEDURAL STRUCTURE OF THE COURT

13. Three unprecedented circumstances converge in respect of the present Application that distinguish it from all previous applications under Regulation 55(2): the proposed object of the notice (i) was expressly proposed, considered and rejected at confirmation;²² (ii) is not based on any information not already known to the Pre-Trial Chamber at the time of its confirmation

²⁰ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, 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, 17 September 2013, Annex A.

²¹ *Ruto* Decision, para. 49 ("As the Trial 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.")

²² Confirmation Decision, para. 51; Application, para. 25.

decision;²³ and (iii) could, without any undue delay, be the object of an amendment pursuant to Article 61(9).²⁴

14. Although Trial Chambers have in the past demonstrated a high degree of flexibility in applying Regulation 55(2), the present Application is an undisguised and blatant end-run around the plain scope of Article 61(9):

*After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held.*²⁵

15. The requirement that a hearing “must be held” to amend the charges during the interregnum between the confirmation of charges and the start of trial suggests that it would be improper to permit a *de facto* amendment by resort to some other, less formal mechanism that dispenses with such a hearing.²⁶

16. The Appeals Chamber’s jurisprudence has underscored that the scope of Regulation 55(2) is distinct from Article 61(9) both temporally and substantively.²⁷ The distinct temporal scope is evident from the plain language

²³ Application, para. 2.

²⁴ *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Transcript of the First Status Conference, ICC-01/05-01/13-T-8-CONF-ENG, 24 April 2015, p. 74, l. 22 – 24, p. 75, l. 1 – 3 (“We believe that it would be difficult to venture a date, but as far as we are concerned, as soon as we would have received all the materials from the Prosecutor...I think six months would seem to be reasonable to us. But as long as we don’t have all the materials, we cannot really be specific, but as soon as we have those things, I think four to six months would be reasonable.”)

²⁵ Article 61(9) of the Rome Statute (emphasis added).

²⁶ *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decision of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, ICC-01/04-01/06-1084, 13 December 2007, para. 47 (“[I]f use of Regulation 55 conflicted with any statutory provision or one contained in the Rules of Procedure and Evidence, then the latter take precedence.”)

²⁷ *Prosecutor v. Thomas Lubanga Dyilo*, 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

of both provisions. The substantive distinction is reflected in Appeals Chamber jurisprudence that Regulation 55(2) is a remedial mechanism²⁸ to ensure that a previously unforeseen legal characterisation is not omitted from consideration because it is too late or too disruptive to rewind to an earlier procedural stage:

The Appeals Chamber observes that changing the legal characterisation of the facts may become necessary not only in the course of the hearing of evidence as, for example, an immediate reaction thereto, but also thereafter. At that latter stage, the Trial Chamber may realise, upon carefully analysing the material and evidence that was presented in its totality, that the legal characterisation on the basis of which the charges were confirmed may be subject to change. That this may be necessary at the deliberations stage is particular the case in light of the length, complexity and evidentially voluminous nature of the proceedings that come before this Court.²⁹

17. In the present situation, on the contrary, the procedure prescribed by Article 61(9) presents no impediment whatsoever for the inclusion of the proposed mode of criminal responsibility. The Prosecution is aware of the mode that it wishes it add and asserts that this is a very simple case in which volume and complexity is not an issue.³⁰ The Prosecution can – indeed, according to the Statute’s plain language, “must” – avail itself of Article 61(9). Resorting to

2009 (“*Lubanga* Appeal Judgment”), para. 77 (“[t]he Appeals Chamber recalls that article 61 (9) addresses primarily the powers of the Prosecutor to seek an amendment, addition or substitution of the charges, at his or her own initiative and prior to the commencement of the trial” and emphasising that the two provisions “address different powers of different entities at different stages of procedure”).

²⁸ *Lubanga* Appeal Judgment, para. 77 (“The Appeals Chamber is of the view that a principal purpose of Regulation 55 is to close accountability gaps, a purpose that is fully consistent with the Statute.”)

²⁹ *Prosecutor v. Germain Katanga*, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled “Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons”, ICC-01/04-01/07-3363, 27 March 2013, para. 21. See also *Lubanga* Appeal Judgment, para. 77 (“risk of acquittals that are merely the result of legal qualifications confirmed in the pre-trial phase that turn out to be incorrect, *in particular based on the evidence presented at trial.*”)

³⁰ ICC-01/05-01/13-T-8-CONF-ENG, p. 63, l. 18 – 22 (“It’s not an Article 5 case. The issues don’t require substantive or lengthy or complex background issues. They are very insular, they are very direct. The DCC reflects it, the submissions of the Prosecution during the confirmation process reflect it, the submissions of the Defence reflect a clear understanding of the charges that were alleged.”)

Regulation 55(2) under these circumstances would not reflect a “complement[ary]” relationship with Article 61(9),³¹ but would, in fact, reduce it to a dead letter. This cannot have been the intention of the States Parties in formulating Article 61(9), nor does it accord with a coherent and holistic interpretation of the Court’s statutory instruments.

III. CONCLUSION

18. The Prosecution claims that its invitation for a Regulation 55(2) notice is motivated by solicitude for the fairness of trial proceedings.³² The contrary is apparent, however, from the substance of the Application. The absence of specific and exhaustive notice of either the exact nature and scope of the additional charges, or the material facts on which they are based, is likely to render the proceedings less fair and less efficient. Further, responsibility for this defective notice is being shifted from the Prosecution to the Trial Chamber by resort to Regulation 55(2) rather than the deliberate and normal procedure prescribed by Article 61(9).

19. The Application should, accordingly, be rejected in its totality with prejudice. In the alternative, the Defence requests that the Application be dismissed without prejudice.



Christopher Gosnell
Counsel for Mr. Jean-Jacques Kabongo Mangenda

Dated this 15 May 2015
 At The Hague, The Netherlands

³¹ *Lubanga* Appeal Judgment, para. 88.

³² Application, para. 3.