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**International
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Court**

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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, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO***

Public Document

**Prosecution's Re-application for Notice to be Given under Regulation 55(2) with
respect to the Accused's Individual Criminal Responsibility**

Source: The Office of the Prosecutor

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

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I. Introduction

1. Pursuant to Trial Chamber VII's ("Chamber") decision of 15 September 2015,¹ the Office of the Prosecutor ("Prosecution") renews its application for the Chamber to provide notice that the facts described in the charges may be re-characterised to accord with other forms of the Accused's participation under article 25 of the Rome Statute ("Statute"), pursuant to regulation 55(2) of the Regulations of the Court.²

II. Submissions

2. The Prosecution incorporates by reference the arguments set out in its Prior Application for regulation 55(2) notice.³ Although the Prior Application was denied, the Chamber did so "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."⁴ The Chamber also noted with approval the instructions given by the Presiding Judge in the *Ruto and Sang* case that "counsel should be [...] aware of the possibility of recharacterisation and to conduct their defences accordingly, taking steps to minimise any prejudice which might arise should there be such a recharacterisation at a later stage."⁵ Providing regulation 55(2) notice now is both appropriate and warranted.

3. The Appeals Chamber's 18 December 2015 "Judgement 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'"⁶ removes any perceived procedural impediment to the Chamber providing such notice to the Accused.⁷

¹ ICC-01/05-01/13-1250, para. 12.

² ICC-01/05-01/13-922 ("Prior Application").

³ ICC-01/05-01/13-922, paras. 4-50.

⁴ ICC-01/05-01/13-1250, para. 12.

⁵ ICC-01/05-01/13-1250, fn. 32.

⁶ ICC-02/11-01/15-369.

⁷ ICC-01/05-01/13-922, para.1.

4. The Appeals Chamber held that there is no legal impediment to a Trial Chamber re-characterising facts and circumstances to include modes of liability considered, but not confirmed, by a Pre-Trial Chamber.⁸ This finding subsumes any ostensible prerequisite not provided by regulation 55(2), including that the Prosecution seek leave to appeal the Confirmation Decision.⁹ Further, the Appeals Chamber expressly held that resort to regulation 55 is not contingent on an application under article 61(9) of the Statute for the amendment of charges.¹⁰

5. Additionally, the Appeals Chamber decided that “special” or “extraordinary” circumstances are not required for a Chamber to issue regulation 55(2) notice prior to the start of the presentation of the evidence at trial.¹¹ A Chamber may further appropriately base such notice on its review of non-evidentiary documents, such as the confirmation decision, the request for regulation 55(2) notice, and the pre-trial brief.¹² This means that the Chamber may properly give notice under regulation 55 as long as the facts confirmed by the Pre-Trial Chamber make out the elements of other crimes and/or modes of liability, without making any additional value judgement at that stage. This is particularly so here, where the Chamber has already indicated that the Defence should be “aware of the possibility of recharacterisation and to conduct their defences accordingly, taking steps to minimise any prejudice which might arise should there be such a recharacterisation at a later stage.”¹³

⁸ ICC-02/11-01/15-369, paras. 2, 32.

⁹ The Appeals Chamber found that regulation 55(2) notice was appropriate in the *Gbagbo* case notwithstanding the fact that the Prosecution failed to appeal the *Gbagbo* confirmation decision (ICC-02/11-01/15-369, para. 74), a fact specifically noted by the Trial Chamber in the impugned decision (ICC-02/11-01/15-185, para. 8). In addition, the Prosecution would not have been able to seek leave to appeal the Confirmation Decision as immediate resolution by the Appeals Chamber of the issue was not necessary to materially advance the proceedings due to the availability of legal re-characterisation pursuant to regulation 55(2). *See e.g.* ICC-01/04-01/06-915, paras. 41-45.

¹⁰ ICC-02/11-01/15-369, paras. 31, 53.

¹¹ ICC-02/11-01/15-369, para. 67. *Contra* ICC-01/05-01/13-1250, para. 11 (“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.”).

¹² ICC-02/11-01/15-369, paras. 52, 68.

¹³ ICC-01/05-01/13-1250, fn. 32.

6. In this case and at this stage, not only are the additional modes of liability made out by the facts confirmed by the Pre-Trial Chamber (as argued in the Prior Application), but the Chamber has received a large part of the evidence, both testimonial and through items deemed “formally submitted” establishing those facts.¹⁴

7. Accordingly, the Chamber should issue formal notice that the charges against Babala and Arido for the crimes under articles 70(1)(b) and 70(1)(c) may be re-characterised pursuant to article 25(3)(a) (direct co-perpetration). Similarly, notice should issue that the charges against Bemba, Kilolo, Mangenda, Babala, and Arido for all crimes under articles 70(1)(a), 70(1)(b), and 70(1)(c) may be re-characterised pursuant to article 25(3)(d).

8. Even though notice of the possible re-characterisation of facts under regulation 55(2) may be given “at any time during the trial”, the Appeals Chamber has reaffirmed that it is preferable that notice be given “as early as possible”.¹⁵ Thus, it is appropriate to revisit the issue at this juncture. The Prosecution’s direct case has been presented, and the Chamber has received the evidence underpinning the confirmed charges. The Defence cases are scheduled to begin in approximately two months. Thus, notice at this stage is fully consistent with the Accused’s rights under article 67(1)(a) of the Statute “[t]o be informed promptly and in detail of the nature, cause and content of the charge”, 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”.¹⁶

9. Providing regulation 55(2) notice now will best enable the Parties to prepare for the potentially applicable modes of liability in the proceedings. Notwithstanding the Chamber’s previous caution that the Defence should conduct their defences with the

¹⁴ ICC-01/05-01/13-1285, ICC-01/05-01/13-1480 and ICC-01/05-01/13-1524.

¹⁵ ICC-02/11-01/15-369, para. 49. *See also* ICC-01/04-01/07-3363, para. 24; ICC-01/09-01/11-1122, para. 27.

¹⁶ ICC-02/11-01/15-369, para. 50. *See also* ICC-01/04-01/06-2205, para. 85.

awareness that recharacterisation is possible,¹⁷ regulation 55(2) notice will ensure that the Defence prepare and present their evidence in full cognisance of the potential scope of the Accused's exposure. It will also allow the Parties to properly address the potentially applicable modes of liability in their closing submissions, facilitating the Chamber's determination of the truth, and the appropriate level of the Accused's individual criminal responsibility for the charged crimes.

III. Relief Requested

10. For the foregoing reasons, the Prosecution requests the Chamber to provide notice of the possibility that the facts described in the charges may be subject to re-characterisation to accord with the participation of Babala and Arido under article 25(3)(a), and of all Accused persons under article 25(3)(d) of the Statute, pursuant to regulation 55(2).



Fatou Bensouda, Prosecutor

Dated this 8th Day of January 2016
At The Hague, The Netherlands

¹⁷ ICC-01/05-01/13-1250, fn. 32.