



Original: **English**

No.: ICC-01/05-01/13
Date: **15 September 2015**

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

Decision on Prosecution Application to Provide Notice pursuant to Regulation 55

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 (the ‘Chamber’) of the International Criminal Court (‘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 Regulation 55 of the Regulations of the Court (‘Regulations’), issues the following ‘Decision on Prosecution Application to Provide Notice pursuant to Regulation 55’.

I. Procedural history and submissions

1. On 23 April 2015, the Office of the Prosecutor (‘Prosecution’) filed an application requesting the Chamber to provide notice according to Regulation 55(2) of the Regulations of the Court (‘Request’).¹ The Prosecution requests that the Chamber give notice that the legal characterisation of the individual criminal responsibility of all five accused may be subject to change. In particular, the Prosecution requests that (i) the charges against Mr Babala and Mr Arido for the crimes under Articles 70(1)(b) and (c) of the Rome Statute (‘Statute’) may be re-characterised as direct co-perpetration under Article 25(3)(a) of the Statute and (ii) the charges against all five accused for all crimes under Articles 70(1)(a), (b) and (c) may be re-characterised pursuant to Article 25(3)(d) of the Statute.²
2. On 15 May 2015, the defence for Mr Babala (‘Babala Defence’),³ the defence for Mr Bemba (‘Bemba Defence’),⁴ the defence for Mr Mangenda (‘Mangenda Defence’),⁵ the defence for Mr Arido (‘Arido Defence’)⁶ and the defence for

¹ [Prosecution’s Application for Notice to be given under Regulations 55\(2\) on the Accused’s Individual Criminal Responsibility](#), ICC-1/09-01/11-922, with [Public Annex A](#).

² [Request](#), ICC-1/09-01/11-922, paras 1 and 51.

³ [Observations de la Défense de M. Fidèle Babala à « Prosecution’s Application for notice to be given under Regulation 55\(2\) on the Accused’s Individual Criminality responsibility »](#), ICC-1/09-01/11-948 (‘Babala Response’).

⁴ [Defence Response to Prosecution’s Application for Notice to be given under Regulation 55\(2\) on the Accused’s Individual Criminal Responsibility \(ICC-01/05-01/13-922\)](#), ICC-01/05-01/13-949, with [Public Annex A](#) (‘Bemba Response’).

⁵ [Defence Response to the Prosecution’s Application for Notice to be given under Regulation 55\(2\) on the Accused’s Individual Criminal Responsibility \(ICC-01/05-01/13-922\)](#), ICC-01/05-01/13-950 (‘Mangenda Response’).

⁶ [Narcisse Arido’s Response to the “Prosecution’s Application for Notice to be Given under Regulation 55 \(2\) on the Accused’s Individual Criminal Responsibility” \(ICC-01/05-01/13-922\)](#), ICC-01/05-01/13-951 with [Public Annex A](#) (‘Arido Response’).

Mr Kilolo ('Kilolo Defence')⁷ filed their responses, all submitting that the Request should be dismissed.

3. The Prosecution submits that the decision on the confirmation of the charges ('Confirmation Decision')⁸ alone provides sufficient basis for the Request.⁹ Further, it avers that it is preferable to provide notice as early as possible to ensure a fair trial, protect the right of the accused to be informed promptly and in detail about the charges (Article 67(1)(a) of the Statute) and to avoid delays and the risk of having to recall witnesses when notice is given at a later point in time.¹⁰ Specifically, the Prosecution argues in its Request how the individual elements of the proposed additional modes of criminal liability are fulfilled by the facts stated in the Confirmation Decision for Article 25(3)(a)¹¹ and 25(3)(d)¹² individually.
4. The Bemba and Kilolo Defence submit that Regulation 55 of the Regulations is not applicable in the case of Article 70 offences, as the text of Regulation 55(1) refers to crimes under articles 6, 7 or 8,¹³ and the principle purpose of the regulation was explained by the Appeals Chamber – according to the Bemba Defence – to be closing the accountability gap and eliminating impunity as concerns serious crimes of concern to the international community, which the Bemba Defence submits Article 70 offences are not.¹⁴ The Kilolo Defence further argues, that Regulation 55 of the Regulations only applies in cases where the legal recharacterisation of the individual criminal responsibility is changed from

⁷ [Réponse de la Défense de monsieur Aimé Kilolo à la « Prosecution's Application for Notice to be given under Regulation 55\(2\) on the Accused Criminal Responsibility »](#), ICC-01/05-01/13-952 ('Kilolo Response').

⁸ Pre-Trial Chamber II, [Decision pursuant to Article 67\(1\)\(a\) and \(b\) of the Rome Statute](#), 11 November 2014, ICC-01/05-01/13-749.

⁹ [Request](#), ICC-1/05-01/13-922, para. 2.

¹⁰ [Request](#), ICC-1/05-01/13-922, para. 3.

¹¹ [Request](#), ICC-1/05-01/13-922, paras 4-24.

¹² [Request](#), ICC-1/05-01/13-922, paras 25-50.

¹³ [Bemba Response](#), ICC-01/05-01/13-949, paras 4, 7-23, [Kilolo Response](#), ICC-01/05-01/13-952, para. 14.

¹⁴ [Bemba Response](#), ICC-01/05-01/13-949, paras 7-11; citing Appeals Chamber, *The 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 "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"](#), 8 December 2009, ICC-01/04-01/06-2205 OA15 OA 16 ('Lubanga Appeal Decision'), para. 77.

Article 25 to Article 28 and not within Article 25 itself.¹⁵ Additionally, while the Kilolo Defence recognises that notification pursuant to Regulation 55 should be provided by the Chamber as early as possible, it considers it premature at this stage of the proceedings to do so.¹⁶

5. The Bemba Defence and Mangenda Defence submit that the proposed re-characterisation would exceed the scope of the confirmed case and undermine the procedural structure of the Court, as the Pre-Trial Chamber considered, and rejected, the application of Article 25(3)(d).¹⁷ Further, the Mangenda and Kilolo Defence submit that granting the Request at this point in time would be a circumvention of Article 61(9) of the Statute, an amendment of the charges being the proper procedure before the beginning of the start of trial.¹⁸
6. Finally, the Babala Defence argues that the additional modes of liability were rejected by the Pre-Trial Chamber. Accordingly, the Prosecution should have presented additional evidence, pursuant to Article 61(8) of the Statute, which it failed to do.¹⁹ It submits that the Request tries to re-litigate the findings of the Confirmation of the Charges decision by circumventing the Article 61(8) procedure and should be rejected for this reason alone.²⁰

II. Analysis

7. The Chamber is bound by the facts and circumstances as described in the Confirmation Decision by the Pre-Trial Chamber;²¹ in this respect the decision of the Pre-Trial Chamber defines the factual and legal parameters of the trial. Regulation 55(1) of the Regulations enables a Chamber, in its decision under Article 74 of the Statute, to change the legal characterisation. The Chamber notes

¹⁵ [Kilolo Response](#), ICC-01/05-01/13-952, para. 13.

¹⁶ [Kilolo Response](#), ICC-01/05-01/13-952, paras 18-20.

¹⁷ [Bemba Response](#), ICC-01/05-01/13-949, paras 24-26, [Mangenda Response](#), ICC-01/05-01/13-950, paras 3 and 13.

¹⁸ [Mangenda Response](#), ICC-01/05-01/13-950, para. 3, 14-17; [Kilolo Response](#), ICC-01/05-01/13-952, para. 21.

¹⁹ [Babala Response](#), ICC-01/05-01/13-948, paras 13-14.

²⁰ [Babala Response](#), ICC-01/05-01/13-948, paras 15-17.

²¹ Article 74 of the Statute; Regulation 55(1) of the Regulations.

in this regard the prior jurisprudence of this Court that ‘the purpose of Regulation 55 is to close accountability gaps’.²² If the Chamber was unable to revisit the legal characterisation confirmed or rejected by the Pre-Trial Chamber, then there would be a ‘risk of acquittals that are merely the result of legal qualifications confirmed in the pre-trial phase that turn out to be incorrect’.²³

8. The system of Regulation 55 establishes a procedure in three stages to modify the legal characterisation of facts:

- (1) The Chamber decides whether it appears to it that the legal characterisation of facts may be subject to change and the Chamber gives notice to the participants of such a possibility;²⁴
- (2) Having heard the evidence in the case, the Chamber shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions as to the propriety of the actual legal recharacterisation;²⁵ and
- (3) In its decision under Article 74 of the Statute, the Chamber may decide, pursuant to Regulation 55(1) of the Regulations, whether to make the proposed recharacterisation for which notice was given at the first stage.²⁶

9. The Request relates to the first step of the procedure, providing notice to the participants of a possible legal recharacterisation. It is established jurisprudence of this Court that this notice can be provided before the commencement of trial²⁷

²² [Lubanga Appeal Decision](#), ICC-01/04-01/06-2205 OA15 OA 16 , para. 77. See also, Appeals Chamber, *The 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”](#), 27 March 2013, ICC-01/04-01/07-3363 OA 13 (‘Katanga Appeal Decision’), paras 22 and 104.

²³ [Lubanga Appeal Decision](#), ICC-01/04-01/06-2205, para. 77; see also [Katanga Appeal Decision](#), ICC-01/04-01/07-3363, para. 22.

²⁴ Regulation 55(2) of the Regulations.

²⁵ Regulation 55(2) of the Regulations.

²⁶ Regulation 55(1) of the Regulations.

²⁷ Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, [Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted](#), 13 December 2007, ICC-01/04-01/06-1084 (‘Lubanga Regulation

and in fact this has been done twice.²⁸ However, this Chamber does not consider that it is always appropriate to provide notice at this stage of the proceedings.

10. 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.²⁹ 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.³⁰ 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.

11. While in exceptional circumstances it might be necessary to provide notice at this stage of the proceedings,³¹ 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.

55 Decision'), paras 47-50; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Decision giving notice pursuant to Regulation 55\(2\) of the Regulations of the Court](#), 19 August 2015, ICC-02/11-01/15-185, para.11, ('*Gbagbo/Blé Goudé* Regulation 55 Decision'); 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, paras 27-28.

²⁸ [Lubanga Regulation 55 Decision](#), ICC-01/04-01/07-1084 and [Gbagbo/Blé Goudé Regulation 55 Decision](#), ICC-02/11-01/15-185. *See also*,

²⁹ [Prosecution's Notification of Filing of the Document Containing the Charges and List of Evidence](#), 30 June 2014, ICC-01/05-01/13-526, with confidential Annex B1, containing the document containing the charges, ICC-01/05-01/13-526-Conf-AnxB1, a confidential-redacted version of the annex was filed on 3 July, notified on 4 July 2014.

³⁰ *See also*, [Gbagbo/Blé Goudé Regulation 55 Decision](#), ICC-02/11-01/15-185, para. 8, where Trial Chamber I finds that the Prosecution pursued the same strategy in the case of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, indicating that this might be a general approach of the Prosecution.

³¹ *See*, for example, [Gbagbo/Blé Goudé Regulation 55 Decision](#), ICC-02/11-01/15-185, para. 12.

12. This is 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.³²


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 Pangalangan

Dated 15 September 2015

At The Hague, The Netherlands

³² The Chamber also notes the instructions giving by the Presiding Judge of Trial Chamber V(A) in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* during the status conference held three weeks before the start of trial with regard to the subject of recharacterisation in general, Transcript of hearing, 19 August 2013, [ICC-01/09-01/11-T-24-Red-ENG](#), page 4, lines 14-18: ‘... we [Trial Chamber V(a)] believe that in the case where accused are represented by experienced and senior counsel, these counsel should be taken to be aware of the Statute and Rules and 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.’