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TRIAL CHAMBER III

Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

**IN THE CASE OF
THE PROSECUTOR
*v. Jean-Pierre Bemba Gombo***

**Public Redacted version
Urgent**

**Defence Request for Leave to Appeal the Decision on the Temporary Suspension
of the Proceedings Pursuant to Regulation 55(2) of the Regulations of the Court
and Related Procedural Deadlines**

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

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A. BACKGROUND

1. On 9 May 2008, the Prosecution brought charges against Mr. Jean-Pierre Bemba.¹ On 15 June 2009, the charges were confirmed in part.² The Pre-Trial Chamber refused to confirm an allegation that Mr. Bemba “should have known” that MLC troops were committing or about to commit the crimes for which he was charged.

2. The trial commenced on 22 November 2010. The Prosecution case lasted 16 months and closed on 20 March 2012. During that time, no mention was made of an allegation that Mr. Bemba “should have known” of any fact relevant to the charges.

3. On 13 July 2012, the Defence filed its Pre-Defence Brief.³ In that document, the Defence once again noted that Mr. Bemba was not charged under the “should have known” theory of liability and that its case was based exclusively on the allegation that Mr. Bemba “knew” of the crimes charged and other relevant material facts.⁴

4. The Defence case opened on 14 August 2012.

5. On 21 September 2012, nearly two years after the start of the proceedings, Trial Chamber III (“the Chamber”) gave notice pursuant to Regulation 55(2) of the Regulations that it was considering the possibility of modifying the legal characterisation of the facts so as to consider the alternate form of knowledge contained in Article 28(a)(i) of the Statute, namely that owing to the circumstances at the time, the Accused “should have known” that MLC troops were committing or about to commit the crimes included in the charges.⁵ The Chamber further requested the parties and participants to make submissions on the procedural impact of the

¹ ICC-01/05-13-Exp, Application for Warrant of Arrest against Jean-Pierre Bemba Gombo under Article 58 with annexes, 9 May 2008. The first Document Containing the Charges against Mr. Bemba (ICC-01/05-01/08-136-AnxA) was submitted on 1 October 2008.

² ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo.

³ ICC-01/05-01/08-2243-Conf.

⁴ See *ibid.*, para. 18(e) and accompanying footnote 13.

⁵ ICC-01/05-01/08-2324.

notification.

6. On 18 October 2012, the Defence filed its "Defence Submissions on the Trial Chamber's Notification under Regulation 55(2) of the Regulations of the Court",⁶ in which it raised a number of substantive objections to the course envisaged by the Chamber. The Defence objected to the unfairness of this course and raised a number of legal and factual objections to this process. On the procedural impact, the Defence submitted that, at a minimum, the envisaged change may require (i) recalling prosecution witnesses; (ii) being provided with a detailed notice of the relevant material facts; (iii) further defence investigations; (iv) additional time to identify and interview potential witnesses; (v) further requests for assistance from various governments and/or organisations; (vi) additional disclosure requests from the prosecution; and (vii) a meaningful period of time to investigate and prepare. The Defence estimated that the minimum time necessary would be 6-9 months. The Defence further asked the Chamber to "render a reasoned decision in a timely fashion in order to minimize the impact of the issue upon the continuing process".

7. On 19 November 2012, the Chamber issued its "Decision requesting the defence to provide further information on the procedural impact of the Chamber's notification pursuant to Regulation 55(2) of the Regulations of the Court", in which it requested the Defence to provide more information and justifications in relation to (i) which Prosecution witnesses the Defence would intend to recall; and (ii) the envisaged time needed for further defence investigations and preparations. In its Decision, the Chamber effectively refused the Defence's request for a reasoned opinion and said that a change to the legal characterisation of the facts, if any, will ultimately be made by the Chamber in its decision under Article 74 of the Statute.

8. On 30 November 2012, the Defence filed its "Defence further submission on the notification under Regulation 55(2) of the Regulations of the Court and Motion for notice of material facts and circumstances underlying the proposed amended charge" in which it again objected to the course envisaged by the Trial Chamber and

⁶ ICC-01/05-01/08-2365-Conf.

underlined the unfairness of that process.⁷ In addition, the Defence requested the Chamber to provide further details of the material facts and circumstances upon which it intends to rely for the proposed re-characterisation under Regulation 55 of the Regulations. In confidential *ex parte* Annex A, the Defence provided the Chamber with more detailed and concrete information as requested, including a request for 6 to 9 additional months to re-investigate on the basis of the proposed re-characterisation of the charges.⁸

9. On 11 December 2012, an *ex parte* Status Conference was held to discuss [REDACTED].

10. On 13 December 2012, the Chamber issued its [REDACTED].

11. On 14 December 2012, more than 2 years into the trial, the Chamber rendered its “Decision on the temporary suspension of the proceedings pursuant to Regulation 55(2) of the Regulations of the Court and related procedural deadlines” (“Impugned Decision”).⁹ In the Impugned Decision, the Chamber refused to provide the Defence with notice of the material facts which would be relevant to the new allegation that Mr Bemba “should have known” of the alleged crimes (and other relevant underlying facts).¹⁰ The Chamber said that only the legal characterization of facts would be concerned by a Regulation 55 order, if made and that the factual allegations (and the evidence) relevant to the possible new charge would remain the same as were relevant to the allegation confirmed by the Pre-Trial Chamber.¹¹ The Chamber also ordered a temporary suspension of proceedings until 4 March 2013, a period of time which, according to the Chamber, would enable the Defence to investigate and prepare for the new allegation.

12. By 14 December 2012, the date of the Impugned Decision, the Defence had

⁷ CC-01/05-01/08-2451-Conf-Exp, with Public Redacted Version ICC-01/05-01/08-2451-Red.

⁸ ICC-01/05-01/08-2451-Conf-Exp-AnxA.

⁹ ICC-01/05-01/08-2480.

¹⁰ Impugned Decision, pars 9-12.

¹¹ Ibid, pars 11-12.

already presented 15 of its proposed 63 witnesses.

13. Given that the Defence refers herein to the content of, and cites to information contained in confidential, and confidential and *ex parte* filings and transcripts, the Defence files; (a) a confidential version *ex parte* Prosecution and Defence, and (b) a public redacted version.

B. REQUEST FOR LEAVE TO APPEAL

14. The Defence submits that the Trial Chamber committed a series of errors resulting in prejudice to the accused, and significantly interfering with his rights as guaranteed by the Statute.

15. All conditions for leave to appeal are satisfied. In light of the fundamental importance of the issue to the overall fairness of the proceedings, it would be unfair to deny the Defence an opportunity to appeal and to prevent the Appeals Chamber from exercising its essential remedial function.

(a) *Conditions for Leave to Appeal*

16. Leave to appeal pursuant to Article 82(1)(d) will be granted if the filing party has identified at least one issue of appeal addressed in the impugned decision that meets the following two cumulative criteria:¹²

- a. It must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and
- b. It must be an issue for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

17. The Appeals Chamber has held that “[a]n issue is an identifiable subject or

¹² ICC-01/04-01/07-108, *Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions*, 14 December 2007, p. 3; ICC-01/04-01/07-116, *Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions*, 19 December 2007, p. 4.

topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.”¹³

18. Significantly, the application of Regulation 55 was recognised by both the *Lubanga* Trial Chamber and, subsequently, the Appeals Chamber as being an appealable issue under Article 82(1)(d).¹⁴ Granting leave is also entirely consistent with the Chamber’s duty and responsibility to ensure the effective protection of the rights of the accused,¹⁵ by enabling the Defence to seek and obtain the necessary relief from a decision that affects the rights afforded to Mr Bemba under the Statute.

(b) Identification of Appealable Issues

19. The Impugned Decision gives rise to the following identifiable subjects or topics requiring resolution, which meet the criteria set out under Article 82(1)(d), and warrant consideration by the Appeals Chamber. These appealable issues constitute discrete legal questions which arise directly out of the Impugned

¹³ Situation in the Democratic Republic of the Congo, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168, para. 9.

¹⁴ Respectively, "Decision on the prosecution and the defence applications for leave to appeal the 'Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'", ICC-01/04-01/06-2107; and ICC-01/04-01/06 OA 15 OA 16, "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'", 8 December 2009.

¹⁵ Regarding this duty/responsibility, see, *inter alia*, *Prosecutor v Katanga*, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled 'Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings', 12 July 2010, pars 77. See also *Prosecutor v Tadic*, Appeal Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin, 27 February 2001, page 3-4; *Prosecutor v Kupreskic et al*, Decision on Appeal by Dragan Papic Against Ruling to Proceed by Deposition, 15 July 1999, Separate Opinion of Judge David Hunt on Appeal by Dragan Papic Against Ruling to Proceed by Deposition, par 11; *Prosecutor v Seselj*, Decision on the Financing [of] the Defence of the Accused, 30 July 2007, par 33 ; *Prosecutor v Blagojevic*, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace his Defence Team, 7 November 2003, pars 7 and 12; *Prosecutor v Blagojevic*, Decision on Independent Counsel for Vidoje Blagojevic's Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, 3 July 2003, par 112; *Prosecutor v Seselj*, Decision on the Financing [of] the Defence of the Accused, 30 July 2007, par 38; *Prosecutor v Milosevic*, Decision on the Interlocutory Appeal by the Amici Curiae Against the Trial Chamber Order concerning the Presentation and Preparation of the Defence Case, 20 January 2004, par 19; *Prosecutor v Delalic et al*, Separate Opinion of Judge David Hunt on Motion by Esad Landzo to Preserve and Provide Evidence, 22 April 1999, par 3; *Prosecutor v Bagosora et al*, Decision on Aloys Ntabakuze's Motion for Injunctions against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder, 6 October 2010, par 18.

Decision and which meet the above criteria for appeal. The undeniable significance of the Impugned Decision to the conduct of the proceedings, and the novelty both of Regulation 55 itself and the Chamber's method of application in the present case, all mitigate in favor of granting leave to appeal.

20. The appealable issues are as follows:

- i. The Chamber interpreted and applied Regulation 55 in a manner inconsistent with the text of that provision and, therefore, without a valid legal basis. Although characterised by the Chamber as a "legal recharacterisation of facts", the course envisaged by the Chamber goes well beyond that by adding a new set of facts and factual allegations to the charges. This finds no legal basis in Regulation 55. In practice, the Impugned Decision circumvents the regulatory system of the Court, displaces the role and function of the Pre-Trial Chamber as confirming Chamber in relation to factual allegations relevant to the charges and amounts to the Trial Chamber taking over from the Prosecutor the responsibility to prosecute this case.
- ii. The Chamber erred when it failed to apply Regulation 55 in a manner consistent with the Statute. As a result, the course taken by the Chamber resulted in the violation of the following rights of the accused:
 - a) **his right to have prompt and detailed notice of the charges:** The accused has received no notice of the material facts which would be relevant to the case envisaged by the Chamber pursuant to Regulation 55. The Chamber has refused (on two occasions) to provide such particulars, thereby denying the Defence a fair opportunity to identify the nature and scope of allegations that would be relevant to such a case and a fair opportunity to prepare for and confront these allegations. It is of significance in that context that the Pre-Trial Chamber had refused to confirm this part of the case, and that the Prosecution failed to appeal that decision. The Defence has neither prepared, nor responded to this allegation, which still does

not form part of the charges against Mr Bemba. The Defence still has no notice of what these allegations might consist, or what evidence could be relevant. The timing of the Impugned Decision (*two years into the case; months into the Defence case; after the end of the Prosecution*) also constitutes a violation of the right of the accused to “prompt” notice of the charges.

- b) **his right to have adequate time and resources to prepare:** The Chamber failed to verify that the course envisaged in the Impugned Decision would be consistent with the right of the accused to adequate time and resources to prepare to defend the case against him. The Chamber ignored the Defence assertion that “if [it] was required now to conduct new investigations, it would be unable to do so” and the underlying arguments.¹⁶ The Chamber knew that [REDACTED]. The Chamber also failed to account for the current security situation in the DRC, which would prevent any effective investigation, or acknowledge that [REDACTED]. All of these factors – none of which the Chamber took into account in the Impugned Decision – make it highly dangerous, if not impossible [REDACTED] to attempt to conduct the re-investigations necessitated by the proposed re-characterisation of charges. Moreover, the “time” allotted by the Chamber for a would-be investigation is manifestly inadequate. On the face of it, the Defence has been allotted 2.5 months for this task. This 2.5-month period includes a month of judicial recess, which includes important religious holidays, and which the Defence team members had intended to spend with their families. Given the terms of paragraphs 22(ii) and (iii) of the Impugned Decision, the reality is that the Defence must have finalised its witness list within **5 weeks** of the recommencement of proceedings after the winter break. The Chamber has provided no reasoned opinion supporting such a limited timeframe, particularly in light of the Defence request for a 6 to 9 month period for re-investigation. The Chamber also knew and was informed that the Defence has no more investigative resources. The Chamber failed to take

¹⁶ ICC-01/05-01/08-2451-Conf-Exp, paras. 24-27.

into account or provide any reasons for disregarding the fact that the Counsel Support Section has indicated that no more funds will be made available for Defence investigations in this case, effectively leaving the accused with no ability to investigate the new charges against him¹⁷ Finally, it should be noted in this context that Mr Bemba is being made to pay for his Defence with his own resources. Having used his own resources to disprove the case as confirmed by the Pre-Trial Chamber, Mr Bemba is now expected to contribute resources with a view to allowing the Prosecution to put forth an alternative basis for liability to convict him. The unfairness of such a course is evident.

- c) **his right to liberty:** The Chamber ordered the suspension of proceedings for approximately 2.5 months on the basis that the Defence should be re-preparing for and re-investigating the case on the basis of the new allegation. As such, under the Chamber's ruling, Mr. Bemba will be detained another 2.5 months without the Chamber having conducted any evaluation of the lawfulness, necessity and proportionality of such a course. That he should remain detained despite the fact that the Chamber's decision to suspend the proceedings was subject to no evaluation of the lawfulness of such a course or compatibility with his right to freedom as guaranteed under international law.¹⁸

- d) **his right to be presumed innocent and to have the Prosecution bear at all times the burden of proof:** The course envisaged by the Chamber effectively liberates the Prosecution from having to carry its burden of proof: absent confirmation of that allegation, the Prosecution was not permitted to prosecute Mr Bemba on the basis that he "should have known" of the alleged crimes (and other relevant factual allegations) and it did not therefore attempt to do so until the time when the Chamber

¹⁷ ICC-01/05-01/08-2451-Conf-Exp, para. 31.

¹⁸ Article 9(1) ICCPR; Article 5 ECHR, guaranteeing the fundamental right of any person to liberty and security. See also STL, Order of 15 April 2009, par 7, *in fine*; STL, Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack against Prime Minister Rafiq Hariri and Others, 29 April 2009, par 22.

decided to consider using Regulation 55. The practical effect of the Chamber's actions is to relieve the Prosecution of its burden and to consider that the Prosecution might in fact have proved this allegation *despite itself* and without putting the Prosecution to the task of doing so (and allowing the Defence to challenge it). In the Impugned Decision, the Chamber also requests the Defence to identify those passages of the Prosecution evidence that would warrant recalling of Prosecution witnesses. This effectively amounts to requiring the Defence to identify evidence that might be relevant to convicting Mr Bemba; this cannot be reconciled with either the presumption of innocence or the right not to incriminate oneself. The Defence cannot lawfully be expected to do so.

- e) **his right to be tried without undue delay:** As explained below, the course taken by the Chamber would unduly prolong the proceedings, which in turn constitutes an impermissible interference with the right of the accused to be tried expeditiously.
- f) **his right to be tried by a tribunal which does not lack the appearance of impartiality:** The course taken by the Chamber gives the appearance that the Chamber, unsatisfied with the Prosecution case as confirmed and presented, is taking over the prosecution of this case. This perception is reinforced by the Chamber's failure to consider and give weight to the rights of Mr Bemba before adopting the impugned course of action. This, in turn, has created an appearance that the Chamber is lacking the necessary impartiality to which Mr Bemba is entitled.¹⁹

(c) *Satisfaction of the Conditions for Leave to Appeal*

21. Each of these identified appealable issues significantly affects the **fair and expeditious conduct of the proceedings** and the **outcome of the trial**.

¹⁹ See, in particular, Dissenting Opinion of Judge Van den Wyngaert, ICC-01/04-01/07-3319. The Defence reserves its right to raise a number of other factors and elements which might be relevant to an evaluation of the Chamber's appearance of impartiality (or lack thereof).

22. For the reasons outlined above, the course taken by the Chamber constitutes an interference with the right of Mr Bemba to a fair trial.²⁰ The course envisaged in the Impugned Decision also constitutes an interference with his right to an expeditious trial as it will result in a further delay of *at least* 2.5 months (during which he will continue to be detained), and will have to be extended if the impugned timeframe proves predictably inadequate. Also, as acknowledged by the Chamber itself, this course might result in the recalling of Prosecution (and/or Defence witnesses) who have already testified as well as the possibility of additional Defence witnesses. This, in turn, would prolong the trial and interfere with Mr Bemba's right to an expeditious resolution of this case.

23. The Impugned Decision also involves issues that would significantly affect the outcome of the trial, as required by Article 82(a)(ii). If, as envisaged in the Impugned Decision, the Chamber were to convict Mr Bemba based on the alternative "should have known" *mens rea*, this would evidently affect the outcome of the trial. An acquittal would become a conviction. Release would be replaced by the continued detention of Mr Bemba pending an appeal.

24. **An immediate resolution by the Appeals Chamber** would also materially advance the proceedings. A prompt and immediate resolution is necessary to ensure and protect the rights of Mr. Bemba from grave violations, which could *not* be meaningfully repaired after the close of the proceedings if the Chamber were to prosecute him on an alternate *mens rea* standard and/or decide to convict him on that basis. The Impugned Decision, therefore, contains issues which can not be safely left for any potential appeal from a Judgement in first instance. The appealable issues identified will have an impact on the ongoing trial. Witnesses will have to be recalled; investigations will have to be attempted in a dangerous, un-cooperative, environment without necessary resources and putting the security of Defence personnel and witnesses at risk; the Defence will have to present a defence to a new allegation not knowing the material elements of that allegation, nor which

²⁰ See in particular, above, para. 20(ii).

material facts confirmed by the Pre-Trial Chamber or evidence already presented are believed to be relevant to such an allegation; a conviction could be entered without the Defence having had a fair and proper opportunity to confront the Prosecution case.

25. A resolution of these issues cannot be safely left for appeal. A conviction based on the belated and impermissible amendment of the case against Mr Bemba (*as could result from the proposed amendment*) would take many months or years to be remedied by the Appeals Chamber. Nor would any prejudice arise to any parties or participants as a result of appellate intervention and clarification. By contrast, all parties would greatly benefit from the intervention of the Appeals Chamber, which should be permitted to exercise its remedial function in relation to an issue of fundamental importance to the fairness of these proceedings.

C. RELIEF REQUESTED

26. In light of the above arguments, the Defence respectfully requests that the Chamber:

GRANT the urgent Defence request for leave to appeal the Impugned Decision, in terms of the issues identified herein.

SUSPEND the timeframes set in paragraph 22 of the Impugned Decision until the resolution of both the present request and any subsequent appellate litigation.

The whole respectfully submitted.



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Lead Counsel



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Co- Counsel

Done on the 18th of December 2012
At The Hague, The Netherlands